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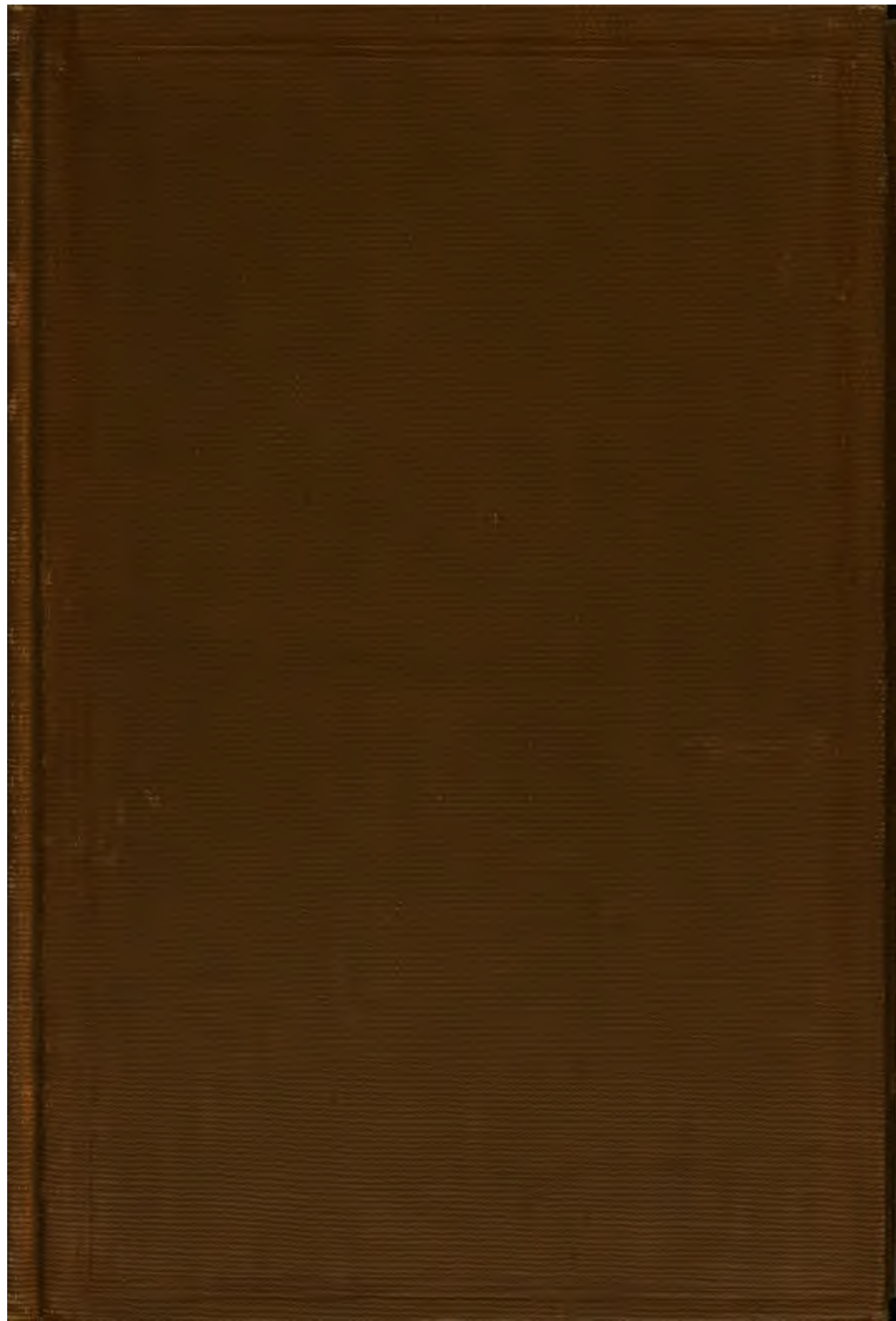
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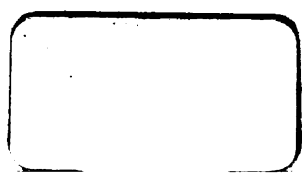
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A TREATISE
ON
FEDERAL PRACTICE
CIVIL AND CRIMINAL

INCLUDING

**PRACTICE IN BANKRUPTCY, ADMIRALTY, PATENT CASES,
FORECLOSURE OF RAILWAY MORTGAGES, SUITS
UPON CLAIMS AGAINST THE UNITED STATES,
PROCEEDINGS BEFORE THE INTERSTATE
COMMERCE COMMISSION AND THE
FEDERAL TRADE COMMISSION,**

**EQUITY PLEADING AND PRACTICE,
RECEIVERS AND INJUNCTIONS**

IN THE STATE COURTS

BY

ROGER FOSTER

OF THE NEW YORK BAR

**AUTHOR OF COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES,
TREATISES ON THE FEDERAL JUDICIARY ACTS OF 1875 AND 1887, THE
FEDERAL INCOME TAX OF 1894, THE FEDERAL INCOME TAX OF 1913
AND 1914, LIBERTY OF CONTRACT, ATTACHMENT, REMOVAL OF
CAUSES, TRIAL BY NEWSPAPER, &c., FORMERLY LEC-
TURER ON FEDERAL JURISPRUDENCE AT THE
LAW SCHOOL OF YALE UNIVERSITY.**

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PREFACE

When this work was begun, thirty-seven years ago, its design was a treatise upon Federal Equity Practice alone. The subject was chosen because this was then territory unknown to most members of the bar, including the author. During the seven years that passed before the completion of the first edition in one volume, he was convinced of the necessity of including chapters upon practice at common law and error and appeal. The kind reception given to the book by the bench and bar has induced him in the succeeding editions to include a description of the jurisdiction and practice of the courts of the United States in other branches of the law and also of the practice and jurisdiction of the United States courts of Porto Rico, Hawaii, the Philippines, of the Consular Courts, the United States Court of China, the courts of the District of Columbia, Alaska and the Canal Zone, and in the review of the decisions of the courts of the Virgin Islands.

Since the last edition the jurisdiction and practice of the Supreme Court in reviewing the decisions of the State courts have been revolutionized. The distinctions between writs of error and appeals have been to a large extent abolished. The time within which a case can be brought up for review has been shortened. The war legislation, the Federal control of railroads and telegraph lines, the questions arising upon their return to their owners, the broadened exercise of the power of Congress to regulate Interstate Commerce, the increase of Federal taxation and the Prohibition Amendment, have greatly extended the field of Federal jurisdiction, and an increase in the size of the book was thus compelled.

The book has been entirely re-written, and to some extent rearranged. A large number of sections have been added. Much new matter has been inserted; especially upon the subjects of railroad reorganizations, of accountings for profits and the as-

assessment of damages in patent, copyright, and trade-mark cases, of injunctions against strikers and upon the whole subject of injunctions. The more important cases, in which bills in equity may be filed in the Federal courts, and those in which injunctions are granted to protect rights arising under the Constitution and laws of the United States, have been classified, described and explained. The great powers vested in the Federal Trade Commission upon its creation and in the Interstate Commerce Commission from time to time since the latter came into being, especially during the year 1920, have made it seem necessary to explain for the benefit of the profession the jurisdiction of those commissions and the practice before them.

The increased demand of the bar for legal forms has caused the addition of a large number, which have been used in actual litigation in criminal as well as civil cases. All this has necessitated the enlargement of the book into four volumes.

The author has spared no pains in making the work complete. Notwithstanding the demands of an exacting profession he has worked upon the book every week that he was at his office for the last thirty years, and he believes that he has examined every reported case that has been decided by a court of the United States. He will, however, welcome any suggestions as to errors or omissions by correcting which he can make it more useful to the bar. Although he has added references to the more important of the later cases that have appeared while the book was passing through the press, he has not included all that have been reported since the two hundred and forty-fifth volume of the reports of the Supreme Court of the United States and the two hundred and fifty-fifth volume of the Federal Reporter.

The description of the practice in equity as it existed before the promulgation of the new rules has been retained, because these cannot be adequately understood without the knowledge of what preceded them and also in order to make the book useful to lawyers in the States which still retain the distinction between the practice at common law and that in equity. He believes that the book now contains everything except the local rules and statutes that is needed by a practitioner in the courts of equity in the states where the practice in equity still differs from that at common law such as Maine, Massachusetts, New Jersey, Delaware, Kentucky, Tennessee, Mississippi, and Ala-

bama, as well as in all the courts of the United States and the Supreme Court of the District of Columbia; besides the treatment of a number of topics, such as Parties, Service of Process by Publication, Multifariousness, Motions and Orders, Injunctions, Receivers, Contempts, and others equally important under Code practice and the practice in all State courts.

When he has completed his Commentaries upon the Constitution of the United States, of which one volume has been already published, the author hopes that he will have furnished the bar with a complete guide to the whole field of Federal Jurisprudence.

New York, August 14th, 1920.

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TO
The Memory of My Father,
DWIGHT FOSTER,

FORMERLY JUSTICE OF THE SUPREME JUDICIAL COURT
OF MASSACHUSETTS.

I DEDICATE THIS BOOK

BEGUN AT HIS SUGGESTION
ALTHOUGH HE DID NOT LIVE TO CORRECT ITS FAULTS.

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FEDERAL PRACTICE

VOLUME I.

CHAPTER I.

ORIGINAL JURISDICTION.

§ 1. Constitutional provisions concerning the courts of the United States. Sec. 1. The Constitution of the United States ordains: "Article III, Section 1. The judicial Power of the United States, shall be vested in one supreme court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office. Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming lands under Grants of different States, and between a State; or the Citizens thereof, and foreign States, Citizens or Subjects. In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make. The Trial

of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed. Section 3. Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court. The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted."

The jurisdiction of the courts of the United States is restricted by the Eleventh Amendment, which ordains: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

The Sixth Amendment ordains: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence." The Seventh Amendment: "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law." The Eighth Amendment: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

§ 2. Enumeration of the courts of the United States. The Courts of the United States are; the Supreme Court, the Circuit Courts of Appeals, the Court of Customs Appeals; the District

Courts, and the Court of Claims.¹ The statutes of the United States have also created certain courts which are usually considered not to be courts of the United States.² These are, the District Court of Alaska,³ the District Court of the United States for Porto Rico,⁴ the District Court of the Canal Zone,⁵ the District Court of Hawaii,⁶ the Supreme Court of the Philippines,⁷ the United States Court for China,⁸ the Consular Courts,⁹ the Supreme Court of the District of Columbia¹⁰ and the Court of Appeals of the District of Columbia.¹¹ The Board of General Appraisers¹² and the United States Commissioners¹³ have also certain judicial powers, civil and criminal which are hereinafter considered. Courts martial and military commissions are not herein discussed.

Certain civil officers and commissions or boards, for example the Interstate Commerce Commission;¹⁴ the Federal Trade Commission;¹⁵ the Railroad Board of Labor Adjustment;¹⁶ the Railroad Labor Board;¹⁷ the United States Board of Mediation and Conciliation;¹⁸ the Secretary of War, who may act with the assistance of the War Department Claims Board,¹⁹ the Commissioner of Internal Revenue,²⁰ the Secretary of the In-

§ 2. 1 The Circuit Courts of the United States have been abolished and their powers transferred to the District Courts, by the Judicial Code, enacted March 3, 1911, §§ 289, 291, 36 St. at L. 4087. *Ex parte* U. S., 226 U. S. 420. // 67

2 American Insurance Co. v. Canter, 1 Peters, 511, 7 L. ed. 242; Benner v. Porter, 9 How. 235, 13 L. ed. 119; Clinton v. Englebrecht, 13 Wall. 434, 20 L. ed. 659; McAllister v. U. S., 141 U. S. 174, 35 L. ed. 693; Romeu v. Todd, 206 U. S. 353, 368, 51 L. ed. 1093, 1097 (United States Court for Porto Rico). But it has been held that the Supreme Court of the District of Columbia is a court of the United States within the meaning of U. S. R. S. § 714. James v. U. S., 202 U. S. 401, 50 L. ed. 1079.

3 *Infra*, § 67.

4 *Infra*, § 70.

5 *Infra*, § 70a.

6 *Infra*, § 71.

7 *Infra*, § 72.

8 *Infra*, § 73.

9 *Infra*, § 74.

10 *Infra*, § 68.

11 *Infra*, § 69.

12 *Infra*, § 77h.

13 *Infra*, §§ 67, 483a, 486, 488, 489, 490, 493.

14 *Infra*, §§ 77a-77d.

15 See § 77h *infra*, and also quasi judicial powers for the taking of testimony and otherwise, some of which are hereinafter explained.

16 *Infra*, § 77e.

17 *Infra*, § 77f.

18 *Infra*, § 77g.

19 Act of March 2, 1919, 41 St. L.

20 *Infra*, § 96g, Foster on the Income Tax, §§ 89-91.

terior,²¹ Commissioner of the General Land Office,²² the Commissioner of Patents²³ have certain quasi judicial powers some of which are discussed hereafter.

§ 3. Original Jurisdiction and Terms of the Supreme Court.

The jurisdiction of the Supreme Court of the United States is original and appellate. Its appellate jurisdiction is hereinafter considered.¹

The Supreme Court has original jurisdiction both at law and equity in all cases affecting ambassadors, other public ministers and consuls, and those in which a State is a party,² except where a citizen of the same State is a party, when it has no jurisdiction.³ The jurisdiction of the Supreme Court over controversies to which a State is a party is exclusive, except as regards controversies between a State and its citizens, or between a State and citizens of other States.⁴ The Supreme Court has exclusively all such jurisdiction of suits against ambassadors or other public ministers, or their domestics or domestic servants, as a court of law can have consistently with the law of nations: and original, but not exclusive, jurisdiction of all suits brought by ambassadors, or other public ministers, or in which a consul is a party.⁵

A State can sue the United States with the consent of the defendant to establish or to protect a right of property owned by the State,⁶ but not one in which the State has no interest although a part of its citizens are interested therein.⁷ A State cannot sue the United States without the latter's consent.⁸

A State cannot sue to enforce or protect a right which is purely

²¹ *Infra*, § 131.

²² U. S. R. S., §§ 446-712, 2446, 2372, as amended; 35 St. at L. 645; 38 St. at L. 742; Comp. St., §§ 690-712, 4780, 4858, 5078c.

²³ U. S. R. S., §§ 4893, 4904, 4915; 33 St. at L. 726, 727; 34 St. at L. 1252; Comp. St. §§ 9437, 9449-9460, 9491-9494; *infra*, §§ 146-149.

§ 3. ¹ See Chapter xxxvi on "Writs of Error and Appeals."

² Constitution, art. III.

³ *California v. Southern Pac. Co.*, 157 U. S. 229, 39 L. ed. 683.

⁴ Jud. Code, § 233, 36 St. at L. 1087.

⁵ *Ibid.* 36 St. at L. 1087; *Bors v. Preston*, 111 U. S. 252, 28 L. ed. 419; *U. S. v. Ravara*, 2 Dall. 297, 1 L. ed. 388; *Gittings v. Crawford*, Taney, 1; *St. Luke's Hospital v. Barclay*, 3 Blatchf. 259; *Graham v. Stucken*, 4 Blatchf. 50.

⁶ *Minnesota v. Hitchcock*, 185 U. S. 373, 46 L. ed. 954.

⁷ *Kansas v. U. S.*, 204 U. S. 331, 51 L. ed. 510.

⁸ *Mississippi v. Johnson*, 4 Wall. 475, 478, 18 L. ed. 437; *Louisiana v. McAdoo*, 234 U. S. 627; *New*

political.⁹ A State cannot obtain an order or judgment compelling a governor of another State to return a fugitive from labor or justice.¹⁰

A State may file a bill against another State to settle and establish a disputed boundary.¹¹ In such a suit the United States has an interest in the controversy, and the attorney-general on his application may intervene, appear on behalf of the United States, adduce proofs and be heard in argument without making the United States a party in the technical sense of the term: but he has no right to interfere in the pleading or evidence or admissions of either of the States; and in such a suit the judgment cannot be either for or against the United States.¹² A State may sue another State for an injunction against the diversion of the waters of a stream flowing through both which unreasonably interferes with their use for irrigation,¹³ and at least when the stream is not navigable, the United States cannot intervene.¹⁴ A State may sue another State¹⁵ and a public¹⁶ or private¹⁷ corporation of the latter to enjoin a public nuisance affecting a large number of the complainant's citizens; such as the pollution of water¹⁸ or the discharge of noxious gases over its territory.¹⁹ Otherwise, it seems that a State cannot

Mexico v. Lane, 243 U. S. 52, *infra* § 95.

⁹ Mississippi v. Johnson, 4 Wall. 475, 18 L. ed. 437; Georgia v. Stanton, 6 Wall. 50, 18 L. ed. 721; § 283e, *infra*.

¹⁰ Kentucky v. Dennison, 24 How. 66, 16 L. ed. 717.

¹¹ New Jersey v. New York, 3 Pet. 461, 7 L. ed. 741; s. c., 5 Pet. 284, 8 L. ed. 127; s. c., 6 Pet. 323, 8 L. ed. 414; Massachusetts v. Rhode Island, 12 Pet. 755, 9 L. ed. 1272; Rhode Island v. Massachusetts, 13 Pet. 23, 10 L. ed. 41; Rhode Island v. Massachusetts, 15 Pet. 233, 10 L. ed. 721; s. c., 4 How. 591, 11 L. ed. 1116; Missouri v. Iowa, 7 How. 660, 12 L. ed. 861; Florida v. Georgia, 17 How. 478, 15 L. ed. 181; Virginia v. West Virginia, 11 Wall. 39, 20 L. ed. 67; Missouri v. Iowa, 10 How. 1, 13 L.

ed. 303; Alabama v. Georgia, 23 How. 505, 16 L. ed. 556; Missouri v. Kentucky, 11 Wall. 395, 20 L. ed. 116.

¹² Florida v. Georgia, 17 How. 478, 15 L. ed. 181.

¹³ Kansas v. Colorado, 206 U. S. 46, 51 L. ed. 956.

¹⁴ Kansas v. Colorado, 206 U. S. 46, 51 L. ed. 956.

¹⁵ Missouri v. Illinois, 180 U. S. 208; s. c., 200 U. S. 496.

¹⁶ Missouri v. Illinois, 180 U. S. 208, 45 L. ed. 497; s. c., 200 U. S. 496, 50 L. ed. 572.

¹⁷ Georgia v. Tennessee Copper Co., 206 U. S. 230, 51 L. ed. 1038.

¹⁸ Missouri v. Illinois, 180 U. S. 208, 45 L. ed. 497; s. c., 200 U. S. 496, 50 L. ed. 572.

¹⁹ Georgia v. Tennessee Copper Co., 206 U. S. 230, L. ed. 1038.

maintain a suit to redress the wrongs of a part of its own citizens,²⁰ for example, to enjoin a railway company from charging unreasonable rates within its jurisdiction;²¹ nor, to enjoin the governor and health officer of another State from enforcing unreasonable quarantine regulations, which interfere with commerce between these States,²² nor to enjoin an officer of the United States from failing to collect the proper duties upon imports which compete with the product of such state.²³

A State cannot file a bill in the Supreme Court of the United States to enforce a penal statute, such as a bill to prevent a railway company from violating such State's prohibition law;²⁴ nor to enforce a judgment for penalties rendered in its courts against a foreign corporation.²⁵ A State cannot sue another State to collect bonds and coupons of the defendant which have been assigned to the plaintiff by its own citizens in order that it may collect them and pay the proceeds to the assignors.²⁶ But a State may sue another State to collect bonds that have been given to the plaintiff absolutely.²⁷ A State may sue for an injunction against the collection by citizens of other States of certain bonds of the United States which are the property of such State, and for the delivery to it of such bonds, and for a declaration that the contract under which the defendants claim a title to such bond is void.²⁸ A State may maintain a bill against citizens of other States to enforce its title to a railroad.²⁹ The Supreme Court has no jurisdiction of a suit by a State against a citizen of the District of Columbia;³⁰ nor of a suit by a State against one of its own citizens,³¹ or to which one of

²⁰ *Louisiana v. Texas*, 176 U. S. 1, 44 L. ed. 347; *Oklahoma v. Atchison, T. & S. F. Ry. Co.*, 220 U. S. 277, 55 L. ed. 465; *Oklahoma v. Gulf, C. & S. F. Ry. Co.*, 220 U. S. 290, 55 L. ed. 469.

²¹ *Oklahoma v. Atchison, T. & S. F. Ry. Co.*, 220 U. S. 277, 55 L. ed. 465.

²² *Louisiana v. Texas*, 176 U. S. 1, 44 L. ed. 347.

²³ *Louisiana v. McAdoo*, 234 U. S. 627.

²⁴ *Oklahoma v. Gulf, C. & S. F. Ry. Co.*, 220 U. S. 290, 55 L. ed. 469.

²⁵ *Wisconsin v. Pelican Ins. Co.*, 127 U. S. 265, 32 L. ed. 239.

²⁶ *New Hampshire v. Louisiana*, 108 U. S. 76, 27 L. ed. 656.

²⁷ *South Dakota v. North Carolina*, 192 U. S. 286, 48 L. ed. 448; *infra*, § 104.

²⁸ *Texas v. White*, 7 Wall. 700, 741-743, 19 L. ed. 227, 242, 243.

²⁹ *Florida v. Anderson*, 91 U. S. 667, 23 L. ed. 290.

³⁰ *Re Massachusetts*, 197 U. S. 482, 49 L. ed. 845.

³¹ *Pennsylvania v. Quicksilver Co.*, 10 Wall. 553, 19 L. ed. 998; *Min-*

its citizens is an indispensable party.³³

The United States may sue a State in the Supreme Court.³³

The fact that a State is a stockholder in a corporation by or against which a suit is brought does not make the State a party to such suit.³⁴

The Supreme Court holds one term annually, at Washington, beginning on the first Monday in October, and such adjourned or special terms as it finds necessary for the dispatch of business.³⁵ In case of a contagious or epidemic disease, a term may be held at another place.³⁶

§ 3a. Practice in the original jurisdiction of the Supreme Court. The Supreme Court of the United States considers the former practice of the courts of Chancery and of King's Bench, in England, as affording outlines for its practice in the exercise of its original jurisdiction.¹ It has made a few rules regulating the same.² In suits to which a State is a party the practice in equity is followed;³ but the ordinary rules of procedure applicable to cases between individuals are not always applied and great liberality is extended to the State affected.⁴

It is the regular practice to obtain from the court, upon a motion, leave to file the bill. The motion is usually heard *ex parte*,⁵ and where the State is a party, leave is ordinarily granted as of course;⁶ but under special circumstances, the court will require

nesota v. Northern Securities Co., 184 U. S. 199, 46 L. ed. 499; Washington v. Northern Securities Co., 185 U. S. 254, 46 L. ed. 897.

³³ Minnesota v. Northern Securities Co., 184 U. S. 199, 46 L. ed. 499; Washington v. Northern Securities Co., 185 U. S. 254, 46 L. ed. 897; California v. Southern Pac. Co., 157 U. S. 229; New Mexico v. Lane, 243 U. S. 52.

³⁴ U. S. v. Texas, 143 U. S. 621, 36 L. ed. 285.

³⁵ Bank of U. S. v. Planters' Bank of Ga., 9 Wheat. 904, 6 L. ed. 244.

³⁶ Jud. Code, § 230, 36 St. at L. 1087.

³⁶ U. S. R. S., § 4799; 39 St. at L. Comp St., § 1207.

¹ § 3a. 1 Supreme Court Rule 3.

² Supreme Court Rules 3, 5.

³ Georgia v. Brailsford, 2 Dall. 402, 1 L. ed. 433; Kentucky v. Denison, 24 How. 66, 16 L. ed. 717.

⁴ Virginia v. West Virginia, 234 U. S. 117.

⁵ Georgia v. Grant, 6 Wall. 241, 18 L. ed. 848; Washington v. Northern Securities Co., 185 U. S. 254, 46 L. ed. 897.

⁶ Mississippi v. Johnson, 4 Wall. 475, 478, 18 L. ed. 437; Washington v. Northern Securities Co., 185 U. S. 254, 255, 46 L. ed. 897; Kansas

notice to be served upon the proposed defendant;⁷ and leave to file a bill has been denied.⁸ Written authority from the governor of a State is sufficient to authorize a suit on behalf of the State.⁹

All process of the court is in the name of the President of the United States.¹⁰ In a suit by a State against another State the service of a subpoena sixty days before the return day is sufficient.¹¹ Service should be made on both the governor and the attorney-general.¹² In one case a subpoena served upon the governor by leaving a copy at his house and there showing the original to the secretary of state was held sufficient.¹³

The filing of a pleading by the attorney-general of a State who has been admitted to practice in the Supreme Court of the United States is an appearance on behalf of such State.¹⁴ The rules concerning the time for pleading in suits between individuals do not apply to suits between the different States.¹⁵ The State of Massachusetts was allowed to answer an amended bill of the State of Rhode Island one year after such amended bill was filed.¹⁶ If the State fail to appear, or if the State withdraw its appearance, no coercive measures will be taken to compel its appearance, but the complainant may be allowed to proceed *ex parte*.¹⁷ A State is given full opportunity to comply with the

v. U. S., 204 U. S. 331, 337, 51 L. ed. 510, 511.

⁷ Louisiana v. Texas, 176 U. S. 1, 44 L. ed. 347; Minnesota v. Northern Securities Co., 184 U. S. 199, 46 L. ed. 499; Washington v. Northern Securities Co., 185 U. S. 254, 46 L. ed. 897.

⁸ Mississippi v. Johnson, 4 Wall. 475, 18 L. ed. 437; Georgia v. Grant, 6 Wall. 241, 18 L. ed. 848; Minnesota v. Northern Securities Co., 184 U. S. 199, 46 L. ed. 499; Iowa v. Slimmer, 248 U. S. 115.

⁹ Texas v. White, 7 Wall. 700, 719, 19 L. ed. 227, 235.

¹⁰ Supreme Court Rule 5; New Jersey v. New York, 6 Pet. 323, 8 L. ed. 414.

¹¹ Supreme Court Rule 5; Chisholm v. Georgia, 2 Dall. 419, 1 L.

ed. 440; Grayson v. Virginia, 3 Dall. 320, 1 L. ed. 619; New Jersey v. New York, 3 Pet. 461, 7 L. ed. 741; s. c., 5 Pet. 284, 8 L. ed. 127; Kentucky v. Dennison, 24 How. 66, 16 L. ed. 717.

¹² Supreme Court Rule 5.

¹³ Huger v. South Carolina, 3 Dall. 339, 1 L. ed. 627.

¹⁴ New Jersey v. New York, 6 Pet. 323, 8 L. ed. 414.

¹⁵ Rhode Island v. Massachusetts, 13 Pet. 23, 10 L. ed. 41; Virginia v. West Virginia, 234 U. S. 117.

¹⁶ Rhode Island v. Massachusetts, 13 Pet. 23, 10 L. ed. 41.

¹⁷ Massachusetts v. Rhode Island, 12 Pet. 755, 9 L. ed. 1272; Oswald v. New York, 2 Dall. 415, 1 L. ed. 438; Chisholm v. Georgia, 2 Dall. 419, 1 L. ed. 440.

decision of the court.¹⁸ A motion for execution will not be granted until after the session of the legislature succeeding the decision.¹⁹ In a suit to settle a disputed boundary, the most appropriate mode of proceeding is by bill and cross-bill.²⁰ In suits against a State the practice is very liberal, and the utmost liberality is exercised by the court in the correction of slips of practice or errors.²¹

The allegation that a defendant corporation is a "body politic in the law of and doing business in the State of California" is insufficient to establish that the defendant is a California corporation, and is insufficient to show that the defendant is not a Pennsylvania corporation.²²

The appellate jurisdiction of the Supreme Court is explained in the final chapter of this work. Incidental to such appellate jurisdiction, the Supreme Court has power in certain limited cases to issue writs of prohibition,²³ mandamus,²⁴ *habeas corpus*,²⁵ *certiorari*,²⁶ *scire facias*,²⁷ and other writs.²⁸

§ 4. The jurisdiction and terms of the circuit courts of appeals and the judicial circuits. There are nine Circuit Courts of Appeals, one in each circuit.¹ Their jurisdiction is exclusively appellate, and will be explained in the concluding chapter of this work. It includes the power to review, to set aside and to enforce the orders of the Federal Trade Commission.^{1a} Incidental to such appellate jurisdiction, they have the power to issue all writs not specifically provided for by statute, which

¹⁸ *Virginia v. West Virginia*, 241 U. S. 531.

¹⁹ *Ibid.*

²⁰ *Missouri v. Iowa*, 7 How. 660, 12 L. ed. 861.

²¹ *Iowa v. Illinois*, 151 U. S. 238, 38 L. ed. 145; *Rhode Island v. Massachusetts*, 13 Pet. 23, 10 L. ed. 41; *Virginia v. West Virginia*, 234 U. S. 117.

It has been said that, even in a case which should be disposed of without undue delay, "a State cannot be expected to move with the celerity of a private business man; it is enough if it proceeds, in the language of the English Chancery, with all deliberate speed." *Virginia*

v. West Virginia, 222 U. S. 17, 56 L. ed. 71.

²² *Pennsylvania v. Quicksilver Co.*, 10 Wall. 553, 19 L. ed. 998.

²³ *Jud. Code*, § 234, 36 St. at L. 1087. See *infra*, § 456.

²⁴ *Infra*, § 457.

²⁵ U. S. R. S., § 751. See *infra*, § 461.

²⁶ *Ibid.* See *infra*, §§ 460, 689.

²⁷ *Jud. Code*, § 262, 36 St. at L. 1087. See *infra*, § 469.

²⁸ *Ibid.* See *infra*, §§ 455, 459.

§ 4. 1 *Jud. Code*, § 116, 36 St. at L. 1087.

^{1a} 38 St. at L. 719, § 5, *Comp. St.*, § 8836e, *infra*, § 77h.

are necessary for the exercise of their respective jurisdiction and agreeable to the usages and principles of law.²

The territorial jurisdiction of the Circuit Courts of Appeals is as follows: The First Circuit includes the district of Rhode Island, Massachusetts, New Hampshire, Maine, and Porto Rico.³ The Second Circuit includes the districts of Vermont, Connecticut and New York. The Third Circuit includes the districts of Pennsylvania, New Jersey, and Delaware. The Circuit Court of Appeals there in proper cases reviews the decisions of the courts of the Virgin Islands.^{3a} The Fourth Circuit includes the districts of Maryland, Virginia, West Virginia, North Carolina and South Carolina. The Fifth Circuit includes the districts of Georgia, Florida, Alabama, Mississippi, Louisiana, and Texas. Final decisions of the District Court of the Canal Zone are reviewed in proper cases by the Circuit Court of Appeals for the Fifth Circuit.⁴ The Sixth Circuit includes the districts of Ohio, Michigan, Kentucky, and Tennessee. The Seventh Circuit includes the districts of Indiana, Illinois, and Wisconsin. The Eighth Circuit includes the districts of Colorado, Arkansas, Iowa, Kansas, Minnesota, Missouri, Nebraska, New Mexico, North Dakota, Oklahoma, South Dakota, Utah, and Wyoming. The Ninth Circuit includes the districts of Arizona, California, Hawaii,⁵ Idaho, Montana, Nevada, Oregon, and Washington.⁶ Final decisions of the District Court for Alaska⁷ and the United States Court for China,⁸ are reviewed in proper cases by the Circuit Court of Appeals for the Ninth Circuit.

The term of the Circuit Court of Appeals for the First Circuit is held in the City of Boston, Massachusetts, on the first Tuesday of October at 10 A. M. Stated sessions thereof are held at the same hour on the first Tuesday of every month. The

² Ibid. § 262. See *infra*, § 455.

³ Ibid. § 116 as Am'd. 36 St. at L. 1131; 38 St. at L. 803; Comp. St. § 1107; 39 St. at L. 966; Comp. St. 3803r. Wilder's S. S. Co. v. Low, C. C. A., 112 Fed. 161.

^{3a} 39 St. at L. 1132. The local tribunals on those islands retain the jurisdiction which they had before the cession. Ibid.

⁴ 37 St. at L. 565, § 9; Comp. St.

§ 10045.

⁵ Jud. Code, §§ 116, 133. Wilder's S. S. Co. v. Low, C. C. A., 112 Fed. 161.

⁶ Ibid. § 116.

⁷ Ibid. § 135.

⁸ Act of June 30, 1906, 34 St. at L. 814.

clerk's office is in the City of Boston. The term of the Circuit Court of Appeals for the Second Circuit is held in the City of New York on the third Tuesday of October. The clerk's office is in the City of New York. The terms of the Circuit Court of Appeals for the Third Circuit are held in the City of Philadelphia on the first Tuesday of March and the first Tuesday of October. The clerk's office is in Philadelphia. The terms of the Circuit Courts of Appeals for the Fourth Circuit are held in the City of Richmond, Virginia, on the first Tuesday of February, the first Tuesday of May and the first Tuesday of November. Special sessions of the court are held at Richmond, Virginia, on the second Tuesday of every month of the year, except in those months in which regular terms are held, and at Asheville, North Carolina, at such time as may be fixed by the judges thereof.⁹ The clerk's office is in Richmond. The terms of the Circuit Court of Appeals for the Fifth Circuit are held: at Atlanta, Georgia, on the first Monday in October; at Montgomery, Alabama, on the third Monday in October; at Fort Worth, Texas, on the first Monday in November; at New Orleans, Louisiana, on the third Monday in November. The clerk's office is in New Orleans. All appeals, writs of error and other appellate proceedings, taken or prosecuted from the District Courts in the State of Georgia, are heard and disposed of at the term of the Circuit Court of Appeals held in Atlanta, and all such, taken or prosecuted from the District Courts of Texas, held at Beaumont in the Eastern District of Texas, are heard at the term of the Court of Appeals held at New Orleans; with the exception in both districts of appeals from orders of injunctions and other cases, which, under the statutes and rules or in the opinion of the court, are entitled to be brought to a speedy hearing. The term of the Circuit Court of Appeals for the Sixth Circuit is held in the City of Cincinnati, Ohio, on the Tuesday after the first Monday of October, and adjourned sessions on the Tuesday after the first Monday of each other month in the year, except August and September. At the July sessions, no cases are heard except upon special order of the court. The clerk's office is at Cincinnati. The term of the Circuit Court of Appeals for the Seventh Circuit is held at Chicago, Illinois, on the first Tues-

⁹ C. 246, 39 St. at L. 385, Comp.
St. § 1118a.

day in October and continues until the first Tuesday of October of the succeeding year. Unless otherwise specially ordered, the court holds at Chicago three sessions for the hearing of causes during each term, beginning of the first Tuesdays in October, January and May. The clerk's office is in Chicago. The terms of the Circuit Court of Appeals for the Eighth Circuit are held: at St. Paul, Minnesota, on the first Monday of May; at Denver, Colorado, on the first Monday of September; and at St. Louis, on the first Monday of December. The clerk's office is at the City of St. Louis. Cases from Minnesota, North Dakota, South Dakota, Nebraska, Iowa, Kansas, Missouri, Arkansas, Oklahoma and the Indian Territory in which transcripts are filed on or before the 1st day of April, and cases from Colorado, Utah, Wyoming and New Mexico in which transcripts and stipulations of the parties for their hearing at the May term in St. Paul are filed on or before the 1st day of April, and those only, are heard at the succeeding May term of the court in St. Paul. Cases from Colorado, Wyoming, Utah and New Mexico in which transcripts are filed on or before the 1st day of July, and cases from the remainder of the Circuit in which transcripts and stipulations of the parties for their hearing at the September term in Denver are filed on or before the 1st day of July, and those only, are heard at the succeeding September term in Denver. Cases from Minnesota, North Dakota, South Dakota, Nebraska, Iowa, Kansas, Missouri, Arkansas, Oklahoma and the Indian Territory in which transcripts are filed on or before the 1st day of October, and cases from Colorado, Wyoming, Utah and New Mexico in which transcripts and stipulations of the parties for their hearing at the December term in St. Louis are filed on or before the 1st day of October, and those only are heard at the succeeding December term in St. Louis. The term of the Circuit Court of Appeals for the Ninth Circuit is held at San Francisco, California, on the first Monday of October. The clerk's office is at San Francisco, California.¹⁰

¹⁰ Jud. Code, § 126, 36 St. at L. 1087; U. S. R. S., § 604; 25 St. at L. 676; 26 St. at L. 830; 139 U. S. 707; 26 St. at L. 217; 33 St. at L. 59, 249, 548; 31 St. at L. 414. Original Rules of C. C. A., 150 Fed. xxv. Amended Rules of C. C. A., 150 Fed. xxxvii, and 'Fed. R.,' *passim*, reprinted in Appendix.

It seems that the term of a Circuit Court of Appeals may be extended.¹¹

§ 5. Jurisdiction of the District Courts in general. The unit of Federal territorial jurisdiction is in the judicial district. There is at least one district in each State of the Union. Some of the States are divided into several districts. And some districts are divided into two or more divisions.¹ The jurisdiction of the District Courts is thus defined by statute:

"The district courts shall have original jurisdiction as follows: First. Of all suits of a civil nature, at common law or in equity, brought by the United States,² or by any officer thereof authorized by law to sue,³ or between citizens of the same State claiming

¹¹ *Guaranty Tr. Co. v. Metropolitan Ry. Co.*, C. C. A., 177 Fed. 925.

§ 5. 1 Jud. Code, §§ 69, 115, *infra*, § 64.

² Such is a suit by the United States for the use of anyone of the five civilized tribes of Indians, including the Creek Nation, under Acts of March 1, 1901, Ch. 676, § 10, 31 St. at L. 864, and April 26, 1906, Ch. 1876, § 18, 34 St. at L. 144, to cancel patents or deeds to town lots obtained by fraud for less than the statutory price, or otherwise, "for the collection of any money or recovery of any land claimed by any of said tribes." *U. S. v. Rea-Read Mill & Elevator Co.*, 171 Fed. 501. It has been held that a suit by an individual upon a marshal's bond cannot be maintained in a Federal court unless the matter in dispute exceeds the jurisdictional amount, *Pierson v. Phillips*, 36 Fed. 837; and that such a suit upon a bond given by a contractor for the construction of a public work to secure payment to laborers and material man may be, irrespective of the amount involved, *U. S. Fidelity & G'y Co. v. U. S.* for the benefit

of Kenyon, 204 U. S. 349, 51 L. ed. 516. See *infra*, § 5a.

³ This includes actions by the receiver of a national bank appointed by the comptroller, *Johnson v. Rankin* (Texas), 95 S. W. 665; *infra*, § 35. It seems that a suit by an agent of the stockholders of a national bank, appointed in pursuance with the Revised Statutes, falls within this clause. *Snohomish County v. Puget Sound Nat. Bank*, 81 Fed. 518; *Guarantee Co. v. Hanway*, C. C. A., 104 Fed. 369; *Weeks v. International Trust Co.*, C. C. A., 125 Fed. 370, 373. Where the plaintiff, who was receiver of a national bank, assigned his cause of action to one of the defendants after the commencement of the suit, the suit was dismissed, *Weaver v. Kelly*, C. C. A., 92 Fed. 417, 34 C. C. A. 423. For cases brought by receivers appointed by the Federal courts, see *infra*, § 34. It has been said that this does not include an action by an independent contractor with the United States to protect an unlawful interference with work for the Government. *Pickering Land & Timber Co. v. Wisby*, 242 Fed. 993. *Contra*, *Wagner Elec. Mfg. Co. v. District*

lands under grants from different States;⁴ or, where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of three thousand dollars,⁵ and (a) arises under the Constitution or laws of the United States,⁶ or treaties made, or which shall be made, under their authority,⁷ or (b) is between citizens of different States,⁸ or (c) is between citizens of a State and foreign States, citizens, or subjects.⁹ No district court shall have cognizance of any suit (except upon foreign bills of exchange) to recover upon any promissory note or other chose in action in favor of any assignee, or of any subsequent holder if such instrument be payable to bearer and be not made by any corporation, unless such suit might have been prosecuted in such court to recover upon said note or other chose in action if no assignment had been made:¹⁰ *Provided, however,* That the foregoing provision as to the sum or value of the matter in controversy shall not be construed to apply to any of the cases mentioned in the succeeding paragraphs of this section."¹¹

Lodge No. 9, I. A. of M. 252 Fed. 597.

The United States may sue to collect a bond given by an employee of the Post Office Department for the faithful pursuance of his services. In case of a defalcation by him, it may collect the full amount thereof for the benefit of the persons owning property stolen by him. *U. S. v. U. S. Fidelity & Guaranty Co., C. C. A., 242 Fed. 16.* It has been held that such an action may be brought at common law and that then the defendant can not compel the interpleader of the persons interested in the result. *Ibid.* See *infra*, §§ 157, 158.

⁴ *Infra*, § 50.

⁵ This increases the jurisdictional amount, which formerly was \$2,000, exclusive of interest and costs, 24 St. at L. 552. For the construction of the clause, see *infra*, §§ 6-23. It has been held, that where the cause

of action arose prior to January 1st, 1912, the amount necessary for the jurisdiction is not enlarged, although the action is subsequently commenced, *Taylor v. Midland Valley R. Co., 197 Fed. 323*; construing *Jud. Code*, § 299.

⁶ *Infra*, §§ 24-39.

⁷ *Infra*, § 26.

⁸ *Infra*, §§ 40-49.

⁹ *Infra*, § 45.

It has been said since the Judicial Code omits the provision obtained in earlier acts that the jurisdiction of the Federal Court shall in these respects be concurrent with the courts of the several states, the former, where the jurisdiction is founded upon difference of citizenship, may take cognizance of cases not within the jurisdiction of the State Court in the same district. *Welch v. Union Casualty Co., 238 Fed. 968.*

¹⁰ *Infra*, § 63.

"No court of the United States shall have jurisdiction of any action or suit by or against any railroad company upon the ground that said railroad company was incorporated under an Act of Congress."¹²

"No case arising under an Act entitled 'An act relating to the liability of common carriers by railroad to their employees in certain cases' approved April twenty-second, one thousand nine hundred and eight, or any amendment thereto¹³ and brought in any State court of competent jurisdiction shall be removed to any court of the United States."¹⁴

"Second. Of all crimes and offenses cognizable under the authority of the United States."¹⁵

"Third. Of all civil causes of admiralty and maritime jurisdiction, saving to suitors in all cases the right of a common-law remedy where the common law is competent to give it, and to claimants the rights and remedies under the workmen's compensation law of any State; of all seizures on land or waters not within admiralty and maritime jurisdiction; of all prizes brought into the United States; and of all proceedings for the condemnation of property taken as prize."¹⁶

"Fourth. Of all suits arising under any law relating to the slave trade.

"Fifth. Of all cases arising under any law providing for internal revenue, or from revenue from imports or tonnage, except those cases arising under any law providing revenue from imports, jurisdiction of which has been conferred upon the court of Customs Appeals.

"Sixth. Of all cases arising under the postal laws."¹⁷

¹¹ It has been said that this clause does not enlarge the jurisdiction of the District Courts beyond that previously preserved by the Circuit Courts, but was added to the former statute to remove any uncertainty. *Salander v. City of Tacoma*, 208 Fed. 427.

¹² 38 St. at L. 804, Comp. St. § 1233a.

¹³ 35 St. at L. 65, Comp. St. §§ 8657, 8665.

¹⁴ Jud. Code, § 28, 36 St. at L. 1094, Comp. St. § 1010.

¹⁵ *Infra*, Chap. xxxi.

¹⁶ 36 St. at L. 1091; 40 St. at L. 395, Comp. St. § 991. See *infra*, Chap. xxxiii.

¹⁷ A suit by a postmaster to enjoin a Post Office inspector from delivering to a third person property in possession of the plaintiff arises under the Postal Law and may be removed to the Federal Court irrespec-

"Seventh. Of all suits at law or in equity arising under the patent,¹⁹ the copyright²⁰ and the trade mark laws.²⁰

"Eighth. Of all suits and proceedings arising under any law regulating commerce."²¹

"No suit brought in any State court of competent jurisdiction against a railroad company, or other corporation, or person, engaged in and carrying on the business of a common carrier, to

tive of the amount in controversy. Porter v. Coble, C. C. A. 246 Fed. 244.

¹⁹ *Infra*, §§ 29, 146, 147, 188, 277. U. S. R. S., § 4919: "Damages for the infringement of any patent may be recovered by action on the case, in the name of the party interested, either as patentee, assignee, or grantee. And whenever in any such action a verdict is rendered for the plaintiff, the court may enter judgment thereon for any sum above the amount found by the verdict as the actual damages sustained, according to the circumstances of the case, not exceeding three times the amount of such verdict, together with the costs." U. S. R. S., § 4921: For a case where an injunction and accounting were denied, when suit brought by buyer against seller of a patent, because of the sale of the patented machinery by the vendor in violation of the contract, see United Cigarette Mach. Co. v. Winston Cigarette Mach. Co., C. C. A., 194 Fed. 947. Where a bill charged that, after termination of a license, the licensees obtained large numbers of the patented devices from sources to complainants unknown and sold the same within the district without right or authority, it was held to arise under the patent laws and that the Federal court

might take jurisdiction of the same regardless of the amount involved. N. J. Patent Co. v. Martin, 172 Fed. 760. U. S. R. S., § 4918: "Whenever there are interfering patents, any person interested in any one of them, or in the working of the invention claimed under either of them, may have relief against the interfering patentee, and all parties interested under him, by suit in equity against the owners of the interfering patent; and the court, on notice to adverse parties, and other due proceedings had according to the course of equity, may adjudge and declare either of the patents void in whole or in part, or inoperative, or invalid in any particular part of the United States, according to the interest of the parties in the patent or the invention patented. But no such judgment or adjudication shall affect the right of any person except the parties to the suit and those deriving title under them subsequent to the rendition of such judgment." See *infra*, § 147. A suit to enjoin a tax on a patent does not arise under the patent laws, Holt v. Indiana Mfg Co., 176 U. S. 68, 44 L. ed. 374.

¹⁹ *Infra*, §§ 29, 150, 278.

²⁰ *Infra*, §§ 30, 148, 149, 279.

²¹ *Infra*, §§ 32a, 151.

recover damages for delay, loss of, or injury to property received for transportation by such common carrier under section twenty of the Act to regulate commerce, approved February fourth, eighteen hundred and eighty-seven, as amended June twenty-ninth, nineteen hundred and eight, February twenty-fifth, nineteen hundred and nine, and June eighteenth, nineteen hundred and ten, shall be removed to any court of the United States where the matter in controversy does not exceed, exclusive of interest and costs, the sum or value of \$3,000."²³ It has been held that a District Court has original jurisdiction of an action to recover freight where the plaintiff depends upon the Carmack Amendment²⁴ to the Interstate Commerce Act, although the amount involved is less than \$3,000.²⁵

"Ninth. Of all suits and proceedings for the enforcement of penalties and forfeitures incurred under any law of the United States."²⁶ Tenth. Of all suits by the assignee of any debenture for drawback of duties, issued under any law for the collection of duties, against the person to whom such debenture was originally granted, or against any indorser thereof, to recover the amount of such debenture. Eleventh. Of all suits brought by any person to recover damages for any injury to his person or property on account of any act done by him, under any law of the United States, for the protection or collection of any of the revenues thereof, or to enforce the right of citizens of the United States to vote in the several States. Twelfth. Of all suits authorized by law to be brought by any person for the recovery of damages on account of any injury to his person or property, or of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section nineteen hundred and eighty, Revised Statutes. Thirteenth. Of all suits authorized by law to be brought against any person who, having knowledge that any of the wrongs men-

²³ 38 St. at L. § 78; Comp. St. Fed. 430; *Cf. Adams v. Chicago Western R. Co.*, 210 Fed. 262.

²⁴ 34 St. at L. 584, 593.

²⁵ See *U. S. v. Mexican Nat. Ry.*

²⁶ *N. Y. Cent. R. Co. v. Mutual Orange Distributors*, C. C. A., 251

Co., 40 Fed. 769.

tioned in section nineteen hundred and eighty, Revised Statutes, are about to be done, and, having power to prevent or aid in preventing the same, neglects or refuses so to do, to recover damages for any such wrongful act. Fourteenth. Of all suits at law or in equity authorized by law to be brought by any person to redress the deprivation, under color of any law, statute, ordinance, regulation, custom or usage of any State, of any right, privilege, or immunity, secured by the Constitution of the United States, or of any right secured by any law of the United States providing for equal rights of citizens of the United States, or of all persons within the jurisdiction of the United States.²⁶ Fifteenth. Of all suits to recover possession of any office, except that of elector of President or Vice President, Representative in or Delegate to Congress, or member of a State legislature, authorized by law to be brought, wherein it appears that the sole question touching the title to such office arises out of the denial of the right to vote to any citizen offering to vote, on account of race, color, or previous condition of servitude: *Provided*, That such jurisdiction shall extend only so far as to determine the rights of the parties to such office by reason of the denial of the right guaranteed by the Constitution of the United States, and secured by any law, to enforce the right of citizens of the United States to vote in all the States. Sixteenth. Of all cases commenced by the United States, or by direction of any officer thereof, against any national banking association, and cases for winding up the affairs of any such bank; and of all suits brought by any banking association established in the district for which the court is held, under the provisions of title 'National Banks,' Revised Statutes,

²⁶ It has been held: that an action to recover money, exacted under a municipal ordinance which it is contended denies to plaintiff the equal protection of the law is not one authorized by "law" within the meaning of this clause and cannot be brought unless the value of the matter in dispute exclusive of interest before costs exceeds \$3,000. *Sal-*

ander v. City of Tacoma, 208 Fed. 427. And on the other hand, that a District Court irrespective of the amount in controversy has jurisdiction of a suit by an alien to enjoin the enforcement of all State Laws which interfere with his employment. *Raich v. Truax*, 219 Fed. 273, *aff'd* 239 U. S. 83.

to enjoin the Comptroller of the Currency, or any receiver acting under his direction, as provided by said title. And all national banking associations established under the laws of the United States shall, for the purposes of all other actions by or against them, real, personal, or mixed and all suits in equity, be deemed citizens of the States in which they are respectively located.²⁷ Seventeenth. Of all suits brought by any alien for a tort only in violation of the laws of nations or of a treaty of the United States. Eighteenth. Of all suits against consuls and vice consuls.²⁸ Nineteenth. Of all matters and proceedings in bankruptcy."²⁹

The Bankruptcy Act provides: "Suits by the trustee shall only be brought or prosecuted in the courts where the bankrupt, whose estate is being administered by such trustee, might have brought or prosecuted them if proceedings in bankruptcy had not been instituted, unless by consent of the proposed defendant, except suits for the recovery of property under section sixty, subdivision b, section sixty-seven, subdivision e, and section seventy, subdivision e."³⁰ Twentieth. Concurrent with the Court of Claims, of all claims not exceeding ten thousand dollars founded upon the Constitution of the United States or any law of Congress, or upon any regulation of an Executive Department, or upon any contract, express or implied, with the Government of the United States, or for damages, liquidated or unliqui-

²⁷ See *infra*, § 28.

²⁸ The Supreme Court of the United States has original jurisdiction in cases affecting consuls; Constitution, Art. III; U. S. R. S., § 687; *supra*, § 3. This jurisdiction is exclusive of the courts of the several states. Jud. Code, § 256, 36 St. at L. 1087, quoted *infra*. Such exclusive jurisdiction is constitutional. *Davis v. Packard*, 7 Peters, 276. L. ed.; *Valarino v. Thompson*, 7 N. Y. 576. The State courts formerly had jurisdiction of actions against consuls in civil cases; *Hall v. Young*, 3 Pick. (Mass.) 80, 15 Am.

Dec. 180; *Sartori v. Hamilton*, 13 N. J. L. 107; *Com. v. Kosloff*, 5 Serg. & R. (Pa.) 545; *Kidderlin v. Meyer*, 2 Miles (Pa.) 242; *Durand v. Halbach*, 1 Miles (Pa.) 46; *State v. De la Foret*, 2 Nott & M. (S. C.) 217; *Wilcox v. Luco*, 118 Cal. 639, 62 Am. St. Rep. 305, 50 Pac. 758. But see Jud. Code, § 256.

²⁹ See *infra*, Chapter xxxiv on Bankruptcy.

³⁰ Act of July 1, 1898, 30 St. at L. 544, § 23b as amended by Act of February 5, 1903, 32 St. at L. 797, and Act of June 25, 1910, 36 St. at L. 838. See *infra*, §§ 609, 610.

dated, in cases not sounding in tort, in respect to which claims the party would be entitled to redress against the United States, either in a court of law, equity, or admiralty if the United States were suable, and of all set-offs, counterclaims, claims for damages, whether liquidated or unliquidated, or other demands whatsoever on the part of the Government of the United States against any claimant against the Government in said court: *Provided, however,* That nothing in this paragraph shall be construed as giving to either the district courts or the Court of Claims jurisdiction to hear and determine claims growing out of the late Civil War, and commonly known as 'war claims' or to hear and determine other claims which had been rejected or reported on adversely prior to the third day of March, eighteen hundred and eighty-seven, by any court, department, or commission authorized to hear and determine the same, or to hear and determine claims for pensions; or as giving to the district courts jurisdiction of cases brought to recover fees, salary, or compensation for official services of officers of the United States or brought for such purpose by persons claiming as such officers or as assignees or legal representatives thereof; but no suit pending on the twenty-seventh day of June, eighteen hundred and ninety-eight, shall abate or be affected by this provision: *And provided further* That no suit against the Government of the United States shall be allowed under this paragraph unless the same shall have been brought within six years after the right accrued for which the claim is made: *Provided,* That the claims of married women, first accrued during marriage, of persons under the age of twenty-one years, first accrued during minority, and of idiots, lunatics, insane persons, and persons beyond the seas at the time the claim accrued, entitled to the claim, shall not be barred if the suit be brought within three years after the disability has ceased; but no other disability than these enumerated shall prevent any claim from being barred, nor shall any of the said disabilities operate cumulatively. All suits brought and tried under the provisions of this paragraph shall be tried by the court without a jury." ³¹

³¹ See *infra*, §§ 96, 97, and Chapter xxxv on Court of Claims.

In the event of disagreement as to a claim under the contract of insurance between the "bureau of war risk insurance" and any beneficiary or beneficiaries thereunder, an action on the claim may be brought against the United States in the district court of the United States in and for the district in which such beneficiaries or any one of them resides.³²

"Twenty-first. Of proceedings in equity, by writ of injunction, to restrain violations of the provisions of laws of the United States to prevent the unlawful inclosure of public lands; and shall be sufficient to give the court jurisdiction if service of original process be had in any civil proceeding on any agent or employee having charge or control of the inclosure." This authorizes the recovery of the remedial, but not exemplary damages in a suit in equity praying an injunction.³³ The Government can recover the reasonable value of the use of the lands wrongfully enclosed although they would not have been leased if there had been no enclosure.³⁴

"Twenty-second. Of all suits and proceedings arising under any law regulating the immigration of aliens, or under the contract labor laws.³⁵

"Twenty-third. Of all suits and proceedings arising under any law to protect trade and commerce against restraints and monopolies.³⁶

"Twenty-fourth. Of all actions, suits, or proceedings involving the right of any person, in whole or in part of Indian blood or descent, to any allotment of land under any law or treaty. And the judgment or decree of any such court in favor of any claimant to an allotment of land shall have the same effect, when properly certified to the Secretary of the Interior, as if such allotment had been allowed and approved by him; but this provision shall not apply to any lands now or heretofore held by either of the Five Civilized Tribes, the Osage

³² 40 St. at L. 410, § 405.

³³ *United States v. Bernard*, C. C. A., 202 Fed. 728. Suits by lawful possessors of Government land to enjoin trespassers may be brought

in the State courts. *Gauthier v. Morrison*, 232 U. S. 452.

³⁴ *Ibid.*

³⁵ See *infra*, § 463.

³⁶ *Infra*, § 151a.

Nation of Indians, nor to any of the lands within the Quapaw Indian Agency: *Provided*, That the right of appeal shall be allowed to either party as in other cases. Twenty-fifth. Of suits in equity brought by any tenant in common or joint tenant for the partition of land in cases where the United States is one of such tenants in common or joint tenants, such suits to be brought in the district in which such land is situated." ³⁷

"The district courts of the United States shall have original cognizance to entertain suits in equity begun by bills of interpleader where the same are filed by any insurance company or fraternal beneficiary society, duly verified, and where it is made to appear by such bill that one or more persons, being bona fide claimants against such company or society, reside within the jurisdiction of said court; that such company or society has made or issued some policy of insurance or certificate of membership providing for the payment of a sum of money of at least \$500 as insurance or benefits to a beneficiary or beneficiaries or to the heirs, next of kin, or legal representative of the person insured or member; that two or more adverse claimants, citizens of different States, are claiming or may claim to be entitled to such insurance or benefits and that such company or society deposits the amount of such insurance or benefits with the clerk of said court and abide the judgment of said court. In all such cases the court shall have the power to issue its process for said claimants, returnable at such time as the said court or a judge thereof shall determine, which shall be addressed to and served by the United States marshals for the respective districts wherein said claimants reside or may be found; to hear said bill of interpleader and decide thereon according to the practice in equity; to discharge said complainant from further liability upon the payment of said insurance or benefit as directed by the court, less complainant's actual court costs; and shall have the power to make such orders and decrees as may be suitable and proper and to issue the necessary writs usual and customary in such cases for the purpose of carrying out such orders and decrees: *Provided*, That in all cases where a beneficiary or beneficiaries are named in the policy of insurance or certificate of membership or where the same has been

³⁷ Jud. Code, § 24, 36 St. at L.
1087, as amended by 37 St. at L.
part 2, p. 46.

assigned and written notice thereof shall have been given to the insurance company or fraternal benefit society, the bill of interpleader shall be filed in the district where the beneficiary or beneficiaries may reside." ³⁸

They have also jurisdiction of proceedings to condemn for national public uses land within their respective districts; ³⁹ concurrently with the State courts, of proceedings for the naturalization of aliens, ⁴⁰ and of suits by beneficial purchasers of land

³⁸ Feb. 22, 1917, c. 113, 39 St. at L. 929; Comp. St. § 991a. Penn. Mut. Life Ins. Co. v. Henderson, 244 Fed. 877; see *infra*, §§ 157, 158.

³⁹ 25 St. at L. Ch. 728, p. 357. See *infra*, § 482.

⁴⁰ 34 St. at L. 596.

Since the power of the State Courts to grant naturalization is derived from a Federal Statute, it has been held that their certificates in a proper case can be set aside by a Federal Court. *U. S. v. Griminger*, 236 Fed. 285.

The certificate may be set aside if the uncontradicted evidence at the hearing upon the application for the same showed indisputable evidence that the petitioner was not qualified by residence for citizenship. *U. S. v. Ginsberg*, 243 U. S. 472. A certificate was set aside upon the ground that the holder had made a false oath of Renunciation of Allegiance to his native country when it appeared that when asked to buy a Liberty Bond he stated as a ground of refusal that he was of German descent and made other statements indicating allegiance and loyalty to his native country. *U. S. v. Darmer*, 249 Fed. 989. The certificate will not be cancelled because of irregularities. *U. S. v. Jorgenson*, 241 Fed. 412; as for example, when the certificate was granted on the day the petition was filed. *U. S.*

v. Salomon, C. C. A., 231 Fed. 929.

The statutory provision concerning the evidential effect of permanent residence in a foreign country within five years after obtaining the certificates applies to certificates issued before as well as subsequent to its enactment. *Luria v. U. S.*, 231 U. S. 9. Unverified certificates of persons who are not public officers as to the foreign residence are insufficient to overcome the presumption created by the statute. *Luria v. U. S.*, 231 U. S. 9.

The failure to file with the petition, the certificate from the Department of Commerce and Labor, does not deprive a State Court of jurisdiction. *U. S. v. Van Ness*, C. C. A., 230 Fed. 950. A certificate of citizenship issued upon the day when the petition was filed is not void and cannot be attacked collaterally. The remedy is by an objection taken in the proceedings for naturalization. *U. S. v. Salomon*, C. C. A., 231 Fed. 919. It has been held that when the witnesses whose names have been posted fail to appear the names of the other witnesses thereof, in their place, must be posted for ninety days. *Re Giaquinto*, 230 Fed. 1004. *Contra Re Neugebauer*, 172 Fed. 943. A witness who has resided for the requisite five years within the State, but not within the judicial district cannot establish by deposition any

erroneously patented under railroad or wagon land grants to establish their rights to such land.⁴¹

"The district courts and the United States commissioners shall have power to carry into effect, according to the true intent and meaning thereof, the award or arbitration or decree of any consul, vice consul, or commercial agent of any foreign nation, made or rendered by virtue of authority conferred on him as such consul, vice consul, or commercial agent, to sit as judge or arbitrator in such differences as may arise between the captains and crews of the vessels belonging to the nation whose interests are committed to his charge, application for the exercise

part of such residence. *U. S. v. Kolodner, C. C. A., 204 Fed. 240.* A hearing in the Judge's Chambers adjourning court is not held in open court and does not comply with the statute. *U. S. v. Ginsberg, 243 U. S. 472.* It was held that the declaration of an intention to become a citizen of the United States is not a part of a judicial proceeding and that a defect in the same cannot be subsequently cured by an amendment *nunc pro tunc*. *Re Stack, 200 Fed. 330.* Where the petitioner had filed his declaration under a false name he was required to file a new declaration. *Re Boorvis, 205 Fed. 401.* Where subsequent to the naturalization an alien changed his name, under an order of the State Court, it was held that the Federal Court where he had been naturalized had no jurisdiction to amend the proceedings so as to substitute the new name, for that under which he was naturalized. *Re Perkins, 204 Fed. 351.* See *infra*, § 206.

It is presumed that the findings of the Court which issued the certificate are correct, but this presumption is not conclusive and any errors of law may be reviewed. *U. S. v. Nopoulos, 225 Fed. 656.*

The affidavit which is the foundation of the proceedings to set aside

the certificate may be made on information and belief. *U. S. v. Leles, 227 Fed. 189.*

An affidavit was held to be sufficient when it stated upon information and belief that the holder of the certificate was not qualified to be naturalized in that he was not a person of good moral character for five years preceding his application that he procured naturalization in violation of law and upon the testimony of witnesses who were not under oath. *U. S. v. Leles, 227 Fed. 189.* The proceeding for cancellation is not a suit at common law and the defendant is not entitled to a trial by jury. *Luria v. U. S., 231 U. S. 9.*

See *U. S. v. Ojala, C. C. A., 182 Fed. 51.* It has been held: that a suit to cancel a certificate of naturalization is a special proceeding and that the pleadings and procedure may be moulded in any way which seems best calculated to meet the needs of justice, but that proof must be of the kind and force required to set aside a judgment, *U. S. v. Mansour, 170 Fed. 676.* See § 151b.

⁴¹ Act of March 2, 1896, 29 St. at L., Ch. 39, p. 42; *Oregon & C. R. Co. v. U. S., C. C. A., 144 Fed. 832.*

of such power being first made to such court or commissioner, by petition of such consul, vice consul, or commercial agent. And said courts and commissioners may issue all proper remedial process, mesne and final, to carry into full effect such award, arbitration, or decree, and to enforce obedience thereof by imprisonment in the jail or other place of confinement in the district in which the United States may lawfully imprison any person arrested under the authority of the United States, until such award, arbitration, or decree is complied with, or the parties are otherwise discharged therefrom, by the consent in writing of such consul, vice consul, or commercial agent, or his successor in office, or by the authority of the foreign government appointing such consul, vice consul, or commercial agent: *Provided, however*, That the expenses of the said imprisonment and maintenance of the prisoners, and the cost of the proceedings, shall be borne by such foreign government, or by its consul, vice consul, or commercial agent requiring such imprisonment. The marshals of the United States shall serve all such process, and do all other acts necessary and proper to carry into effect the premises, under the authority of the said courts and commissioners." ⁴²

The District Courts have also jurisdiction, by removal from the State courts, of all cases in which they have original jurisdiction and of which the State courts have concurrent jurisdiction, ⁴³ with the exceptions of those arising under the Employers' Liability Act, of April 22nd, 1908; and of suits to recover damages for delay, loss of or injury to, property received for transportation, where the matter in controversy exclusive of interest and costs does not exceed the value of \$3,000. ⁴⁴ Suits of the two latter classes when brought in a State court cannot be removed to any court of the United States. ⁴⁵

The District Courts have also other jurisdiction, by removal, of certain civil and criminal cases. ⁴⁶ This will be described in the subsequent chapter on the removal of causes. ⁴⁷

⁴² Jud. Code, § 271, 36 St. at L. 1087.

⁴³ Jud. Code, § 28.

⁴⁴ 36 St. at L. 1087; 38 St. at L. 278, Comp. St. § 1010 quoted *supra*.

⁴⁵ *Ibid*.

⁴⁶ Jud. Code, §§ 30, 34.

⁴⁷ *Infra*, §§ 537, 538.

It has been held that such a court has inherent jurisdiction to punish as a contempt the unlawful ouster of the court, its officers and records, from the rooms of a public building, where they are located, and as an incidental to the contempt proceedings it may issue a stay order against such a removal.⁴⁸

Such courts have also jurisdiction to compel the attendance of witnesses and the production of books or papers, before the Interstate Commerce Commission,⁴⁹ the Federal Trade Commission,⁵⁰ the Railroad Labor Board,⁵¹ the Bureau of War Risks Insurance,⁵² the Tax law and in investigations under the Anti-Monopoly law⁵³ and the Income Tax law,⁵⁴ and in other cases prescribed by special statutes. The District Courts have also certain ancillary jurisdiction which is hereinafter considered.⁵⁵

"The district courts shall have appellate jurisdiction of the judgments and orders of United States commissioners in cases arising under the Chinese exclusion laws." ⁵⁶

"The district court for the district of Wyoming shall have jurisdiction of all felonies committed within the Yellowstone National Park and appellate jurisdiction of judgments in cases of conviction before the commissioner authorized to be appointed under section five of an Act entitled 'An Act to protect the birds and animals in Yellowstone National Park and to punish crimes in said Park, and for other purposes,' approved May seventh, eighteen hundred and ninety-four." ⁵⁷ "The district court of the United States for the district of South Dakota shall have jurisdiction to hear, try, and determine all actions and proceedings in which any person shall be charged with the crime of murder, manslaughter, rape, assault with intent to kill, arson, burglary, larceny, or assault with a dangerous weapon, committed

⁴⁸ *Re Lyman*, 55 Fed. 29, 43.

⁴⁹ 32 St. at L. 847, § 3, 10 Fed. St. Ann. 170, Comp. St. Supp. 1911, pp. 1309, 1312, Pierce Fed. Code, § 6453; *infra*, §§ 77c, 339a, 343.

⁵⁰ 38 St. at L. 722, § 9, Comp. St., § 8836i, *infra*, §§ 77h, 339a, 343.

⁵¹ Act of Feb. 28, 1920, § 310.

⁵² 40 St. at L. 339, § 15.

⁵³ 26 St. at L. 209, Comp. St.

1901, p. 3200; 34 St. at L. 798, Comp. St. Supp. 1911, pp. 1319, 1320; *infra*, § 339.

⁵⁴ 39 St. at L. 776; 40 St. at L. 1148, § 1318; Foster on the Income Tax, § 85.

⁵⁵ § 51, *infra*.

⁵⁶ Jud. Code, § 25, 36 St. at L. 1087. See *infra*, Chapter XXXVI on Writs of Errors and Appeals.

⁵⁷ Jud. Code, § 26.

within the limits of any Indian reservation in the State of South Dakota." ⁵⁸

"The jurisdiction vested in the courts of the United States in the cases and proceedings hereinafter mentioned, shall be exclusive of the courts of the several States." ⁵⁹

First. Of all crimes and offenses cognizable under the authority of the United States.

Second. Of all suits for penalties and forfeitures incurred under the laws of the United States.

Third. Of all civil causes of admiralty and maritime jurisdiction, saving to suitors in all cases the right of a common-law remedy where the common law is competent to give it, and to claimants the rights and remedies under the workmen's compensation law of any State. ⁶⁰

Fourth. Of all seizures under the laws of the United States, on land or on waters not within admiralty and maritime jurisdiction; of all prizes brought into the United States; and of all proceedings for the condemnation of property taken as prize.

Fifth. Of all cases arising under the patent-right, or copy-right laws of the United States. ⁶¹

Sixth. Of all matters and proceedings in bankruptcy.

Seventh. Of all controversies of a civil nature, where a State is a party, except between a State and its citizens, or between a State and citizens of other States, or aliens.

Eighth. Of all suits and proceedings against ambassadors, or other public ministers, or their domestics, or domestic servants, or against consuls or vice-consuls. ⁶²

The jurisdiction of the District Courts is restricted in most instances by the residence of the parties or of their assignors. These restrictions are hereinafter considered. ⁶³

The District Courts are courts of limited jurisdiction. ⁶⁴ Par-

⁵⁸ Ibid. § 27.

⁵⁹ A State Court has no jurisdiction of a criminal prosecution for an assault by one Indian upon another which is committed in a State Reservation. *People v. Daly*, 212 N. Y. 183.

⁶⁰ 40 St. at L. 395, Comp. St. § 1233, *infra*, § 560.

⁶¹ See *infra*, §§ 29, 146, 147, 150, 188, 277, 278.

⁶² Jud. Code, § 256, 36 St. at L. 1087.

⁶³ See *infra*, §§ 61-63.

⁶⁴ *Re Hollins*, C. C. A., 229 Fed. 349.

ties cannot, by consent, give them jurisdiction of any matter not conferred upon them by the Constitution and Acts of Congress.⁶⁵

§ 5a. Jurisdiction of suits on contractors' bonds. Suits upon contractors' bonds. The Act of August 13, 1894, which has been amended February 24, 1905, provides:

"That hereafter any person or persons entering into a formal contract with the United States for the construction of any public building, or the prosecution and completion of any public work, or for repairs upon any public building or public work, shall be required, before commencing such work, to execute the usual penal bond, with good and sufficient sureties, with the additional obligation that such contractor or contractors shall promptly make payments to all persons supplying him or them with labor and materials in the prosecution of the work provided for in such contract; and any person, company, or corporation who has furnished labor or materials used in the construction or repair of any public building or public work, and payment for which has not been made, shall have the right to intervene and be made a party to any action instituted by the United States on the bond of the contractor, and to have their rights and claims adjudicated in such action and judgment rendered thereon, subject, however, to the priority of the claim and judgment of the United States.

"If the full amount of the liability of the surety on said bond is insufficient to pay the full amount of said claims and demands, then, after paying the full amount due the United States, the remainder shall be distributed pro rata among said interveners.

"If no suit should be brought by the United States within six months from the completion and final settlement of said contract, then the person or persons supplying the contractor with labor and materials shall, upon application therefor, and furnishing affidavit to the Department under the direction of which said work has been prosecuted that labor or materials for the prosecution of such work has been supplied by him or them, and payment for which has not been made, be furnished with a certified copy of said contract and bond, upon which he or they shall have a right of action, and shall be, and are hereby, authorized to bring suit in the name of the United States in the circuit

⁶⁵ Ibid.

court of the United States in the district in which said contract was to be performed and executed, irrespective of the amount in controversy in such suit, and not elsewhere, for his or their use and benefit, against said contractor and his sureties, and to prosecute the same to final judgment and execution:

"Provided, That where suit is instituted by any of such creditors on the bond of the contractor it shall not be commenced until after the complete performance of said contract and final settlement thereof, and shall be commenced within one year after the performance and final settlement of said contract, and not later:

"And provided further, That where suit is so instituted by a creditor or by creditors, only one action shall be brought, and any creditor may file his claim in such action and be made party thereto within one year from the completion of the work under said contract and not later. If the recovery on the bond should be inadequate to pay the amounts found due to all of said creditors, judgment shall be given to each creditor pro rata of the amount of the recovery. The surety on said bond may pay into court, for distribution among said claimants and creditors, the full amount of the sureties' liability, to wit, the penalty named in the bond, less any amount which said surety may have had to pay to the United States by reason of the execution of said bond, and upon so doing the surety will be relieved from further liability:

"Provided further, That in all suits instituted under the provisions of this Act such personal notice of the pendency of such suits, informing them of their right to intervene as the court may order, shall be given to all known creditors, and in addition thereto notice of publication in some newspaper of general circulation published in the State or town where the contract is being performed, for at least three successive weeks, the last publication to be at least three months before the time limited therefore."¹

The suit may be brought in the District Court irrespective of the amount involved.² When the United States brings the

§ 5a. 128 St. at L. 278, as amended 33 St. at L. 811, Comp. St. 6923; 33 St. at L. 728, 729; ch. 592 §§ 17, 19. * U. S. Fidelity and Guaranty Co. v. U. S. for the benefit of Kenyon, 204 U. S. 349, 51 L. ed. 516.

suit it seems that it should be brought in the district of the residence of the defendant against whom judgment is desired.³ When the suit is by a creditor in the name of the United States, it should be brought in the district in which the contract was to be performed.⁴ The District Court there held may issue process to be served in other districts upon the non-resident defendants.⁵

If the liability of the sureties is contested, the suit should be brought at common law.⁶ If the surety does not contest but pays into court the full amount of the liabilities for distribution, the proceeding becomes one for the distribution in court which is of equitable cognizance.⁷

No laborer or material man can bring suit until the six months prescribed in the statute have expired.⁸ The six months begins to run, not from the time of the final payment; but from the day when the amount which the government was finally bound to pay or entitled to receive was fixed administratively by the proper authority.⁹ Where the work of the contractor was in charge of the Secretary of the Treasury and under the general supervision of the Supervising Architect, it was held that the date of settlement was that when the Secretary of the Treasury approved the recommendation by the Supervising Architect upon the subject and ordered payment accordingly.¹⁰

The guarantee by the contractor to keep the work and materials in repair for a year after completion and acceptance,¹¹ the retainer by the United States at five per cent. of the contract price for a year after such acceptance,¹² the retainer by the United States a part of the contract price to cover the cost of completing part of the work, the balance to be paid after the completion,¹³ and the refusal of the contractor to agree to the settlement made by the department;¹⁴ do not postpone the run-

³ U. S. v. McGee, 171 Fed. 209; see *infra*, § 61a.

⁴ 28 St. at L. 278, as amended, 33 St. at L. 811, Comp. St. § 6923.

⁵ Baker Contract Co. v. United States, for use of Pennock, C. C. A., 204 Fed. 390.

⁶ Illinois Surety Co. v. U. S. to the use of Peeler, 240 U. S. 214, 223.

⁷ Ibid. 240 U. S. 214, 225.

⁸ U. S. Ex rel. Texas Portland

Cement v. McCord, 233 U. S. 157.

⁹ Illinois Surety Co. v. U. S. to the use of Peeler, 240 U. S. 214, 222.

¹⁰ Ibid.

¹¹ U. S. v. Ill. Surety Co., 195 Fed. 306.

¹² Ibid.

¹³ Robinson v. U. S., C. C. A., 251 Fed. 461, 464.

¹⁴ Ibid.

ning of the six months. When the original suit was prematurely begun, an intervention is not effectual as an original suit.¹⁵ When the original suit is duly brought, an amendment which does not plead a new cause of action may be allowed.¹⁶ When the original bill was prematurely brought an amended pleading filed more than one year after the final settlement must be treated as an original suit brought too late.

When the suit is brought by the United States for its own benefit, the government is not required to serve or file notice to claimants.¹⁷

The right of intervention given by the statute must be exercised in accordance with usual practice and limitations applicable to interventions in the Federal Courts.¹⁸ The intervention must be made within a year after the final settlement.¹⁹ An intervention by an alleged assignee who failed to prove the assignment cannot be held an intervention by the person through whom he claimed.²⁰ But where one makes a claim in his own name on behalf of another, it seems that the name of the real party in interest may be substituted.²¹ Any application for intervention is made too late when delayed until after the suit has been dismissed as to contractor for improper service, and as to the surety tried and submitted.²²

The provision for notice to other creditors by the creditor who began suit is directory and its omission does not deprive the court of jurisdiction nor relieve surety or contractor from liability.²³ It is proper practice to obtain from the court an

¹⁵ U. S. Ex rel. Texas Portland Cement Co. v. McCord, 233 U. S. 159.

¹⁶ Ill. Surety Co. v. U. S. in the use of Peeler, 240 U. S. 214.

¹⁷ U. S. v. McGee, 171 Fed. 209.

¹⁸ See *infra*, §§ 258-261.

¹⁹ Ill. Surety Co. v. U. S. to the use of Peeler, 240 U. S. 214.

²⁰ Ill. Surety Co. v. U. S. to the use of Peeler, 240 U. S. 214, 226.

²¹ Ibid, McDonald v. Nebraska, 101 Fed. 171, 178; 33 St. at L. 728, 729; C. H. 592, §§ 17, 19.

²² U. S. v. McGee, 171 Fed. 207.

²³ U. S. for the use of Alex. Bryant Co. v. N. Y. Steamfitting

Co., 235 U. S. 327, per McKenna J. "It is urged that it is a consequence of our construction that an action may be commenced on the last day of the year and that all opportunity for intervention may be precluded, for, counsel say, 'intervention cannot be conducted in a day' and it would seem as if the act intended 'to afford creditors an interval of three months within which to secure an intervention.' Even if this be the consequence, some of the provisions of the act, as we have intimated, must give way. We can only select those

order stating that all laborers and material men who have not been paid may, if they are entitled to intervene in the suit, have their rights adjudicated under the provision of the Act of Congress and to serve copies of the order by mail to all known cred-

which we consider the fittest to prevail to accomplish the purposes of the statute; and at the very start comes the suggestion that even if it be granted that the diligent creditor is under obligation to give notice to a waiting or tardy, or, it may be, unwilling one, how is the surety of the contractor concerned with the discharge of the obligation? At the most its concern is only to be protected against claims delayed beyond the limit of time provided by the act. We may refer again to *Vermont Marble Company v. National Surety Company*," 213 Fed. 429. "The court in that case, in careful distinction between the purposes of the provisos, said that the first and second confer a substantive right of action or intervention limited only by a time for assertion, that is, one year from the completion of the work; and that that time was 'obviously for the benefit of the sureties on the bond;' while the last proviso (the third) was 'just as obviously for the benefit of the creditors alone.' It was pointed out that indeed it was to the interest of the sureties not to bring in the other creditors, and yet they contended that the provision for the notice to the creditors was mandatory and jurisdictional and not simply directory. The same contention is made in this case. In other words, it is in effect contended that a provision which is to the interest of the Surety Company not to have observed the statute gave it a right

to have observed. Such a contradiction of interests and rights we cannot assume the statute intended to create nor that it was intended to give to the Surety Company a right to have done that which it is its interest not to have performed. The provision for notice therefore is not of the essence of jurisdiction over the case, nor a condition of the liability of the Surety Company. We need not go farther in this case.

"In the cited case it was held that the third proviso was directory only, and the conclusion has reason to sustain it. There can be no sacrifice of rights in it, neither of surety companies nor of creditors. Every creditor has the same rights and may institute the action provided for in the first proviso. If he does not choose to do so it is his own affair; and he may guard against surprise or deception. He knows the time limit of suit and of intervention. He knows that the suit must be brought in the District Court of the United States in the district where the contract was performed. It would seem as if the law owed him no further care. If he chooses he may institute proceedings if another has not done so. If another has, he knows in what court and within what time and he may intervene. He has, therefore, the means of suit or the means of intervention. An attentive waiting is all that is necessary for either, and indeed is his ultimate safe-

itors without any further notice.²⁴ The newspapers in which publication is made need not be selected by the court.²⁵ Where an order directing publication had named a year prior to its date, it was held, that this manifest error was too trivial for discussion and should be disregarded.²⁶

It has been held, that the filing of the affidavits and obtaining of a certified copy of the bond is not a condition precedent to the right to sue.²⁷

The United States are not necessary parties to a suit brought in their name upon such a bond.²⁸

The complainant should set forth the bond in full or allege that it was conditioned as required.²⁹ When the suit is described as brought for the use of one creditor, there is no need of an averment that there are no other persons with unpaid claims against the defendants under bond.³⁰ The statement of a claim by an intervenor need not show a failure of the government to sue.³¹ It has been said that the court will not permit its discontinuance until it appears that no intervenor is ready to prosecute the suit.³² The objection that the notice to other creditors has not been published may be raised by a special appearance and motion to set aside the service as well as by an answer.³³ It has been held that the six months statute of limitations is a condition to the cause of action granted by the statute and consequently need not be pleaded by the defendant.³⁴ Each successful claimant may be allowed to tax a docket fee,³⁵ but a surety who pays into court the amount of the penalty and is discharged

guard, as intervention must depend on a suit previously instituted."

²⁴ U. S. ex rel. Proctor Mfg. Co. v. Ill. Surety Co., C. C. A., 228 Fed. 304.

²⁵ Ibid.

²⁶ Ibid.

²⁷ U. S. v. Mass. Bonding & Ins. Co., 198 Fed. 923; Title Guaranty & Trust Co. v. Crane Co., 219 U. S. 24, 34. For other cases where the United States may sue upon a bond for the benefit of parties interested in the security, see *infra*, § 112.

²⁸ Title Guaranty & Trust Co. v. Crane Co., 219 U. S. 24, 34.

²⁹ U. S. v. Am. Surety Co., 127 Fed. 490.

³⁰ U. S. v. Perth Amboy Ship Building & Eng. Co., 137 Fed. 689.

³¹ Fidelity & Deposit Co. v. U. S., 229 Fed. 287.

³² Merchants' Nat. Bank v. U. S., C. C. A., 214 Fed. 200, 206.

³³ Merchants' Nat. Bank v. U. S., C. C. A., 214 Fed. 200.

³⁴ Stitzer v. U. S., C. C. A., 182 Fed. 513, 516. See *infra*, § 180e.

³⁵ Title Guaranty & Trust Co. v. Crane, 219 U. S. 24, 31 Sup. Ct., 140, 55 L. ed. 72.

from further liability cannot be given an allowance for counsel fees out of the fund when it is insufficient to pay the creditors of the principal.³⁶ The fund is distributed *pro rata* among those whose claims are allowed, including the United States.³⁷ It has been held that the government has no right to priority.³⁸

The Act extends to a sub-contractor of a sub-contractor.³⁹ Contracts for the construction of a ship are included with the statute.⁴⁰ The liability of the sureties is not *stricti juris*.⁴¹

Creditors for cartage and towage of materials to the spot where the work was performed for patterns and for making scaffolds are entitled to the benefit of the bond.⁴² A person, not a laborer or material man, injured by the negligence of a contractor has no remedy upon the bond, although he has a cause of action against the contractor.⁴³ It has been held: that the United States may recover upon a bond given by a clerk in the Post Office the loss caused by his speculations to the owners of the stolen money as well as the loss to the Government; and that the Government holds the amount recovered in excess of its own loss in trust for the benefit of those thus injured.⁴⁴

§ 6. Value of the matter in dispute. In general. The value of the matter in dispute in suits brought in the District Courts of the United States or removed thereto, when the jurisdiction depends upon difference of citizenship, or because the case arises under the Constitution or laws of the United States or treaties made under their authority, must ordinarily exceed, "exclusive of interest and costs, the sum or value of three thousand dollars."¹ The exceptions are stated in the preceding sec-

³⁶ U. S. v. Heaton, C. C. A., 128 Fed. 414.

³⁷ Am. Surety Co. v. Lawrenceville Cement Co., 96 Fed. 25; U. S. v. Am. Surety Co., 126 Fed. 811.

³⁸ Ibid. U. S. v. Heaton, C. C. A., 128 Fed. 414.

³⁹ U. S. ex rel. Hill v. Am. Surety Co., 200 U. S. 197; 26 Sup. Ct. 168; 50 L. ed. 437; Mankin v. U. S., 215 U. S. 533; 30 Sup. Ct. 174, 54 L. ed. 315.

⁴⁰ Title Guaranty & Tr. Co. v.

Crane Co., 219 U. S. 24, 31 Sup. Ct. 140, 55 L. ed. 72.

⁴¹ U. S. Ex rel. Hill v. Am. Surety Co., 200 U. S. 197, 26 Sup. Ct. 168, 50 L. ed. 437.

⁴² Title Guaranty & Trust Co. v. Crane Co., 219 U. S. 24, 34.

⁴³ U. S., for the use of Carnegie Institute of Technology v. C. A. Riffe Co., 247 Fed. 374.

⁴⁴ U. S. v. U. S. Fidelity & Guaranty Co., C. C. A., 247 Fed. 16.

§ 6. 1 Jud. Code, § 24, 36 St. at L. 1087.

tion.² This enlarges the former jurisdiction from two thousand to three thousand dollars. The statute does not apply to cases pending when it was passed.³ Whether it applies to causes of action that arose prior to February first, 1912, is a disputed question.⁴

The matter in dispute must be of such a nature as to be capable of being reduced to a pecuniary standard of value.⁵ Such is not the right to personal liberty. Consequently, an application for the writ of *habeas corpus* cannot be removed;⁶ and the writ of *habeas corpus* cannot issue originally from a District Court of the United States, to determine the right to the custody of a child, or in any other case, when it is not authorized by statute.⁷ Nor the right to a divorce.⁸ It has been said: that in a suit for a divorce, where the plaintiff prays alimony charging, that the defendant is the owner of valuable real estate and property interests, and also receives a yearly income of not less than \$10,000; it does not appear that the value of the matter in dispute exceeds the sum of \$2,000, since it is uncertain what amount of alimony the court may allow, and the alimony is only an incident to the right to a divorce.⁹ The same rule has been applied, by a State court, upon an application to remove a suit to set aside a

² *Supra*, § 5.

³ Jud. Code, § 299, 36 St. at L. 1087.

⁴ It has been held that it does not apply to causes of action that arose prior to February 1, 1912. *Taylor v. Midland Valley R. Co.*, 197 Fed. 327. *Contra Sloane v. Kramer Bros. & Co.*, 230 Fed. 727.

⁵ *Kurtz v. Moffitt*, 115 U. S. 487, 29 L. ed. 458. See also *Snow v. U. S.*, 118 U. S. 346, 354, 30 L. ed. 207, 209; *In re Burrus*, 136 U. S. 586, 593, 597, 34 L. ed. 500, 503, 514; *Perrine v. Slack*, 164 U. S. 452, 454, 41 L. ed. 510, 511; *Whitney v. Dick*, 202 U. S. 152, 50 L. ed. 963; *Ex parte Evert*, 1 Bond, 197; *In re Barry*, 42 Fed. 113; *Clifford v. Williams*, 131 Fed. 100. Such is not the right to compel the Secretary of State to assert a claim by the

petitioner against a foreign government. *U. S. ex rel. Holzendorf v. Hay*, 194 U. S. 373, 48 L. ed. 1025 (appellate jurisdiction).

⁶ *Kurtz v. Moffitt*, 115 U. S. 487, 29 L. ed. 458.

⁷ *Clifford v. Williams*, 131 Fed. 100. See *In re Burrus*, 136 U. S. 586, 593, 597, 34 L. ed. 500, 503, 514; *Perrine v. Slack*, 164 U. S. 452, 454, 41 L. ed. 510, 511; *Ex parte Evert*, 1 Bond, 197; *In re Barry*, 42 Fed. 113; also reported 136 U. S. 597, 34 L. ed. 514.

⁸ *Johnson v. Johnson*, 13 Fed. 193. The court might, however, take jurisdiction of a suit to enforce a decree awarding alimony. *Barber v. Barber*, 21 How. 582, 16 L. ed. 228.

⁹ *Bowman v. Bowman*, 30 Fed. 849.

decree of divorce.¹⁰ It has been held that, for a similar reason, a suit by a stockholder to compel the corporation to permit him to inspect its books and records is not removable,¹¹ but that the value of the right to appeal from the probate of a will is at least equal to the share of the appellant in case the decedent had died intestate.¹²

The value of the matter in dispute is not the amount of any contingent loss or damage which one of the parties may sustain by a decision against him; but the amount in dispute between the parties to the pending suit.¹³ Thus, the reason that, on account of its probative force, the judgment may operate as an estoppel in a subsequent proceeding;¹⁴ or affect his rights against a stranger to the suit;¹⁵ does not increase the value of the matter in dispute. In a suit by a State treasurer, to recover a balance of unpaid taxes, less than the jurisdictional amount, where the defense was, that the defendant had tendered, in payment of all the taxes assessed against him, coupons for more than the jurisdictional amount; it was held: that the matter in dispute was the right to tender all those coupons; and that the case might be removed.¹⁶ Prospective damages, which can be recovered in the action, or which the bill is filed to prevent, should be considered in the estimate,¹⁷ when they are alleged with sufficient certainty.¹⁸ Where relief is prayed in the alternative, it seems that that which involves the larger amount is the test of the jurisdiction.¹⁹ In a suit for an accounting the jurisdictional amount

¹⁰ *Caswell v. Caswell*, 120 Ill. 377, 11 N. E. 342.

¹¹ *Whitney v. Am. Shipbuilding Co.*, 197 Fed. 777.

¹² *Erwin v. Walsh*, 27 Fed. 579.

¹³ *Ross v. Prentiss*, 3 How. 771, 772, 11 L. ed. 824; *Elgin v. Marshall*, 106 U. S. 579, 27 L. ed. 249; *Bruce v. M. & K. R. Co.*, 117 U. S. 514.

¹⁴ *Elgin v. Marshall*, 106 U. S. 579, 27 L. ed. 249; *Bruce v. M. & K. R. Co.*, 117 U. S. 514, 29 L. ed. 990; *New England Mtg. Co. v. Gay*, 145 U. S. 123, 36 L. ed. 646. (All these were cases of appellate juris-

diction.) *Mayor, etc., of Baltimore v. Postal Tel. Cable Co.*, 62 Fed. 500.

¹⁵ *Smith v. Adams*, 130 U. S. 167, 32 L. ed. 895 (appellate jurisdiction).

¹⁶ *Green v. Brooks*, 28 Fed. 215.

¹⁷ *Draper v. Skerrett*, 116 Fed. 206; *Southern Cash Register Co. v. Montgomery*, 143 Fed. 700; *infra*, § 13.

¹⁸ *Oregon R. & Nav. Co. v. Shell*, 125 Fed. 979.

¹⁹ *Shappirio v. Goldberg*, 192 U. S. 232, 48 L. ed. 419 (appellate jurisdiction); *Hayward v. Nordberg*

is the value of the fund of which an account is sought;²⁰ but where no persons not joined as parties are interested, such as creditors who are not parties to the suit, the amount in controversy does not exceed the aggregate of the amounts claimed by the different parties from each other.²¹ In a bill for discovery, the amount involved in the suit concerning which discovery is to be used is the test of the jurisdiction.²²

Where the complaint or declaration contains several counts, or causes of action, in determining the value of the matter in dispute their aggregate amount is to be considered,²³ unless it appears that each is founded upon the same state of facts,²⁴ or that the plaintiff is not in fact the owner of all the claims upon which he sues,²⁵ or that they are improperly united;²⁶ but where after removal a demurrer to one of two causes of action was sustained and the remainder was for less than the jurisdictional amount, the case was remanded.²⁷

Thus, where the complaint, in form, stated two causes of action, each for the failure to deliver a telegram, and each alleging

Mfg. Co., 85 Fed. 4, 29 C. C. A. 438; *Greenfield v. U. S. Mfg. Co.*, 133 Fed. 784.

²⁰ *Rogers v. Lawton*, 162 Fed. 203.

²¹ *Mull v. Parrott Bros. Co.*, 218 Fed. 713 (partnership accounting); *John W. Hood & Co. v. Board of School Directors*, 210 Fed. 384.

²² *Mutual Life Ins. Co. v. Painter*, 220 Fed. 998.

²³ *Judson v. Macon County Fed. Cas. No. 7,568* (2 Dill. 213); *Stanley v. Albany County Sup'rs*, 15 Fed. 483; *Hammond v. Cleaveland*, 23 Fed. 1; *Bernheim v. Birnbaum*, 30 Fed. 885; *Armstrong v. Ettlesohn*, 36 Fed. 209; *Chase v. Sheldon Roller-Mills Co.*, 56 Fed. 625; *Bowden v. Burnham*, 59 Fed. 752, 8 C. C. A. 248, 19 U. S. App. 448; *Weaver v. Norway Tack Co.*, 80 Fed. 700; *Bergman v. Inman*, *Poulsen & Co.*, 91 Fed. 293; *Davis v. Mills*, 99 Fed. 39; *Southern Cash Register Co. v. Montgomery*, 143

Fed. 700. The State practice in this respect is not followed. *Yates v. Whyel Coke Co.*, 221 Fed. 603. *Heffner v. Gwynne-Treadwell Cotton Co.*, C. C. A., 160 Fed. 635; *Spokane Valley Land & Water Co. v. Kootenai County, Idaho*, 199 Fed. 481. *Kaus v. Am. Surety Co.*, 199 Fed. 972, where the jurisdiction was sustained because of the joinder of two causes of action against the same surety, upon bonds given by separate saloon-keepers, under the Iowa Civil Damage Act.

²⁴ *Pooser v. Western Union Tel. Co.*, 187 Fed. 1001; *Baltimore & O. R. Co. v. Ryan*, 31 Ind. (App.) 597, 68 N. E. 923.

²⁵ *Woodside v. Beckham*, 216 U. S. 117, 54 L. ed. 408.

²⁶ *Bucyrus Co. v. McArthur*, 219 Fed. 266; *Sloane v. Kramer Bros. & Co.*, 230 Fed. 727.

²⁷ *Jones v. Western Union Telegraph Co.*, 233 Fed. 301.

damages in the sum of \$1,900; the only difference being that in one it was alleged that the telegram was addressed to a woman, and in the other that it was addressed to her husband, it appearing that the telegram was the same, and that the plaintiff's counsel could not determine from the manuscript as to which of the two was the person to whom the telegram was addressed; it was held, that the cause could not be removed.²⁸ Where the declaration contained three counts aggregating in excess of the jurisdictional amount; the first upon a contract for services at an agreed price, less than this; the second upon a *quantum meruit* for the same services, alleging their value at a sum in excess thereof; the third for goods sold, money lent "and a like sum of money due on a contract," such as that specified in the first, "and a like sum for commissions" in effecting the sales therein specified; it was held, that the court had jurisdiction.²⁹ Under the former statute where the declaration contained a special count, on a fire insurance policy for \$2,250, alleging a total loss, and concluding, to plaintiff's damage for \$2,000, "for the recovery of which, with just costs, plaintiff brings," and common counts *in assumpsit* for \$2,000, each concluding as in the first; it was held, that the action could be removed.³⁰ Where a complaint in each of three counts claimed for personal injuries "the sum of \$1,900 damages," and in two other counts "the further sum of \$1,900;" it was held, that the case could be removed, although the court felt morally certain that it was intended to claim damages for but one cause of action.³¹ It has been held: that, where it clearly appears that the different causes of action alleged, consists merely of the common counts, the value of the matter in dispute should be determined by the amounts named in the bill of particulars.³²

It makes no difference if the claims have been assigned and no one of them is equal to the jurisdictional amount.³³

²⁸ *Pooser v. Western Union Tel. Co.*, 137 Fed. 1001.

²⁹ *Hayward v. Nordberg Mfg. Co.*, C. C. A., 85 Fed. 4.

³⁰ *Platt v. Phoenix Assur. Co.*, 37 Fed. 730.

³¹ *Thompson v. Southern Ry. Co.* 116 Fed. 890.

³² *Healy v. Prevost*, Fed. Cas. No. 6,297.

³³ *Hammond v. Cleveland*, 23 Fed. 1; *Bernheim v. Birnbaum*, 30 Fed. 885, 887; *Chase v. Sheldon Roller-Mills Co.*, 56 Fed. 625; *Bowden v. Burnham*, 59 Fed. 752, 8 C. C. A. 248, 19 U. S. App. 448; *Berg-*

Where the value of the amount in dispute cannot be reckoned from the other allegations in the bill, the statement therein that it exceeds \$3,000 exclusive of interest and costs will ordinarily be sufficient.³⁴ "Upon a bill for an injunction, where the amount involved cannot be deduced from the facts alleged, a simple allegation that the right sought to be protected is of the value of more than \$3,000, exclusive of interest and costs, will usually be held to be sufficient."³⁵

The pleadings or the petition for removal must show that the value of the matter in dispute exceeded the jurisdictional amount,³⁶ at the time the suit was brought.³⁷ Where the complaint was silent, the allegation in the answer was held to be conclusive.³⁸ An allegation, that the "amount in dispute" exceeds the jurisdictional amount, is not insufficient because it uses the word "amount" instead of "matter" in dispute.³⁹ It has been held: that the court may, where the bill or declaration is defective in that respect, retain jurisdiction and permit an amendment, which shows the jurisdictional value of the matter in dispute.⁴⁰

Where the plaintiff exaggerates the amount in dispute, the court may, on exception properly taken, try the question of jurisdiction separately, without a jury; and if the damages appear to have been purposely and fraudulently magnified, it may dismiss the case; but its decision is reviewable by the Supreme Court.⁴¹

man v. Inman, Poulsen & Co., 91 Fed. 293; Davis v. Mills, 99 Fed. 39; Brigham-Hopkins Co. v. Gross, 107 Fed. 769. But see Waite v. Santa Cruz, 184 U. S. 302, 46 L. ed. 552.

³⁴ Maurel v. Smith, 220 Fed. 195

³⁵ Texas & P. Ry. Co. v. Kute-man, C. C. A., 54 Fed. 547. See Hyde v. Victoria Land Co., 125 Fed. 970; Louisville & N. R. Co. v. Smith, C. C. A., 128 Fed. 1, 5; Southern Cash Register Co. v. National Cash Register Co., 143 Fed. 659; Spaulding v. Evenson, 149 Fed. 913.

³⁶ Strasburger v. Beecher, 44 Fed. 209; Back v. Sierra N. C. M. Co.,

46 Fed. 673; Harvey v. Raleigh & G. R. Co., 89 Fed. 115; Yellow A. M. & M. Co. v. Winchell, 95 Fed. 213.

³⁷ Strasburger v. Beecher, 44 Fed. 209.

³⁸ W. U. Tel. Co. v. White, 102 Fed. 705.

³⁹ Blackburn v. Portland Gold Min. Co., 175 U. S. 571, 44 L. ed. 276.

⁴⁰ Davis v. Kansas City, S. & M. R. Co., 32 Fed. 863; Johnston v. Trippe, 33 Fed. 530; Whalen v. Gordon, C. C. A., 95 Fed. 305. See Citizens' Bank v. Cannon, 164 U. S. 319, 41 L. ed. 451.

⁴¹ Globe Refining Co. v. Landa

The mere fact that the plaintiff recovers less than the jurisdictional amount does not justify a dismissal or a remand.⁴² A Texas case suggests that a distinction should be drawn between cases where the full amount claimed in the complaint is not recovered because of the plaintiff's failure to prove his allegations of fact and those where he fails because his claim is unfounded in law. It was held that where a demurrer was sustained to one of several claims for damages joined in one complaint and the aggregate amount thereof was thus reduced below the jurisdictional amount, the case must be dismissed;⁴³ but it has been said that the reasonable view would indicate that, when such claim was inserted in the original petition in good faith, the amount involved was in controversy, and the court having taken jurisdiction should render judgment for the remainder of the claims.⁴⁴ Where the plaintiff sued in good faith for a principal sum, in excess of the jurisdictional amount, and the defendant proved a set-off, the exact amount of which plaintiff did not know

Cotton Oil Co., 190 U. S. 540, 47 L. ed. 1171. See *Chicago Cheese Co. v. Fogg*, 53 Fed. 72; *Simon v. House*, 46 Fed. 317; *Holden v. Utah & M. Mach. Co.*, 82 Fed. 209; *Horst v. Merkley*, 59 Fed. 502; *Maxwell v. A. T. & S. F. R. Co.*, 34 Fed. 286; *Bedford Quarries Co. v. Welch*, 100 Fed. 513; *Bank of Arapahoe v. David Bradley Co.*, C. C. A., 72 Fed. 867; *LeRoy v. Hartwick*, 229 Fed. 857; *Mullin Lumber Co. v. Williamson & Brown Land & Lumber Co.*, C. C. A., 246 Fed. 232.

In *Hayne v. Woolley*, 180 Fed. 573, which was an action for damages by trespass in allowing cattle to run at large upon the plaintiff's land during the fall and winter season, the court held that the damages could not amount to more than \$200 or \$300, saying: "The damage in this respect, if any, would be very slight. It is a matter of common knowledge that, in many instances,

land is improved, rather than damaged, by permitting cattle to run upon it." See *infra*, § 7.

⁴² *Peeler v. Lathrop*, 48 Fed. 780, 1 C. C. A. 93, 2 U. S. App. 40; *Washington County v. Williams*, 111 Fed. 801, 49 C. C. A. 621.

Put-in-Bay Waterworks & Co. v. Ryan, 181 U. S. 409, 45 L. ed. 927; *Re Cleland*, 218 U. S. 120, 54 L. ed. 962; *Brent v. Chas. H. Lilly Co.*, 202 Fed. 335; *Armstrong v. Walters*, 223 Fed. 451; *Garrett v. Mallard*, C. C. A., 238 Fed. 335; *Central Commercial Co. v. Jones-Dusenbury Co.*, C. C. A. 251 Fed. 13.

⁴³ *Western Union Tel. Co. v. Arnold* (Texas, 1903) 77 S. W. 249; affirmed, 79 S. W. 8.

⁴⁴ *Columbia Law Review*, March, 1904; citing *Martin v. Goode*, 111 N. C. 228, 32 Am. St. Rep. 799; *Bank of Arapahoe v. David Bradley & Co.*, C. C. A., 72 Fed. 867.

when he began the suit; it was held, that the court might retain jurisdiction.⁴⁵

Although the plaintiff's pleading shows that more than the jurisdictional amount is due him he may waive the excess and sue for a less sum thus preventing a removal.⁴⁶ An amendment reducing the plaintiff's claim below \$3,000 will not divest the jurisdiction of the court over what remains; nor will the voluntary dismissal of the plaintiff's bill divest the jurisdiction of the court over a crossbill previously filed, to recover less.⁴⁷ An amendment making such reduction made in the State Court after notice of an application, but on the filing of the petition, for the removal, when authorized by the State practice, was held to reduce the value of the matter in dispute below the jurisdictional amount.⁴⁸

It has been held, that the burden of proof, that the matter in dispute is less than the jurisdictional amount, when the plaintiff's pleading alleges that fact, rests upon the defendant.⁴⁹ It has been held that statements by the plaintiff's assignor made before the assignment are not admissible against him to show a fraudulent attempt to prevent a removal.⁵⁰ Under the former practice it was said, that such an objection should be set up by a plea in abatement and is waived by an answer to the merits.⁵¹ But it has been held: that the objection may be raised by a gen-

⁴⁵ *Pickham v. Wheeler B. Mfg. Co.*, C. C. A., 77 Fed. 663; s. c., 69 Fed. 419; *Stillwell B. & S. V. Co. v. Williamston O. & F. Co.*, 80 Fed. 68. See also *Schunk v. Moline M. & S. Co.*, 147 U. S. 500, 37 L. ed. 255; *Kunkel v. Brown*, C. C. A., 99 Fed. 593; *Jones v. McCormick H. M. Co.*, C. C. A., 82 Fed. 295; *Hayward v. Norberg Mfg. Co.*, C. C. A., 85 Fed. 4; *Ung Lung Chung v. Holmes*, 98 Fed. 323; *Tennent-Stribling Shoe Co. v. Roper*, 94 Fed. 739; *Scott v. Donald*, 165 U. S. 58, 41 L. ed. 632; *Von Schroeder v. Brittan*, 93 Fed. 9; *infra*, §§ 7, 23.

⁴⁶ *Harley v. Firemen's Fund Ins. Co.*, 245 Fed. 471.

⁴⁷ *Kirby v. Am. Soda & Fountain Co.*, 194 U. S. 141, 48 L. ed. 911.

⁴⁸ *Anderson v. Western Union Tel. Co.*, 218 Fed. 78; *Central Commercial Co. v. Jones-Dusenbury Co.*, C. C. A., 251 Fed. 13.

⁴⁹ *Butchers' & Drovers' Stock-Yards Co. v. Louisville & N. R. Co.*, C. C. A., 67 Fed. 35; *Butters v. Carney*, 127 Fed. 622. But see *Greene v. Tacoma*, 53 Fed. 562.

⁵⁰ *Cf. infra*, § 22.

⁵¹ *Butchers' & D. Stock Y. Co. v. Louisville & N. E. Co.*, C. C. A., 67 Fed. 35. See *Pino v. New York*, 103 Fed. 337; §§ 125, 293. But see *Greene v. Tacoma*, 53 Fed. 562.

eral, or a specific, denial;⁵² and, if it appears on the trial, by the testimony of the plaintiff and his witnesses, that the amount as alleged in the complaint exceeded his reasonable expectation of recovery; the action should be dismissed.⁵³ It has been held that the statutes and rulings of the courts of the State are not conclusive upon the question whether a suit involves the jurisdictional amount.⁵⁴

§ 7. Value of the matter in dispute in action for damages. Where the suit is brought upon a contract in which the law liquidates the damages for a default, the amount of the damages as liquidated by the law, not the amount named in the plaintiff's pleading, is the value of the matter in dispute;¹ but where the alleged cause of action is one in which the law does not liquidate the damages, the amount for which the plaintiff demands judgment is alone to be considered;² unless it clearly appears that the amount named is merely colorable and beyond a reasonable expectation of recovery.³ Where there is room for

⁵² *Greene v. Tacoma*, 53 Fed. 562.

⁵³ *Holden v. Utah & M. Machinery Co.*, 82 Fed. 209.

⁵⁴ *Heffner v. Gwynne-Treadwell Cotton Co.*, C. C. A., 160 Fed. 635.

§ 7. ¹ *Wilson v. Daniel*, 3 Dallas 401, 407, 1 L. ed. 655, 657; *Barry v. Edmonds*, 116 U. S. 550, 560, 29 L. ed. 729, 732, *Vance v. W. A. Vandercook Co.*, 170 U. S. 468, 42 L. ed. 1111; *North Am. T. & T. Co. v. Morrison*, 178 U. S. 262, 44 L. ed. 1061; *Battle v. Atkinson*, 191 U. S. 559, 48 L. ed. 302, 24 S. Ct. 845, affirming 115 Fed. 384; *Cabot v. McMaster*, 61 Fed. 129; *Central Commercial Co. v. Jones-Dusenbury Co.*, C. C. A., 251 Fed. 13.

See *Remsen v. C. F. Blanke Tea & Coffee Co.*, 189 Fed. 418. Where the contract provided for liquidated damages it was held that the jurisdictional amount was limited to that sum. *Phillips v. Troutman*, 197 Fed. 325.

² *Wilson v. Daniel*, 3 Dall. 401,

41, 1 L. ed. 655, 657; *Smith v. Greenhow*, 109 U. S. 669, 27 L. ed. 1080; *Barry v. Edmonds*, 116 U. S. 550, 560, 29 L. ed. 729, 732; *Gorman v. Havird*, 141 U. S. 206, 35 L. ed. 717; *Judson v. Macon County*, Fed. Cas. No. 7,568 (2 Dill. 213); *Stanley v. Albany County Sup'rs* 15 Fed. 483; *Eisele v. Odie*, 128 Fed. 941; *Southern Cash Reg. Co. v. National Cash Reg. Co.*, 143 Fed. 659; s. c., 143 Fed. 700; *O. J. Lewis Mercantile Co. v. Klepner*, C. C. A., 176 Fed. 343; *Federal Wall Paper Co. v. Kampner*, 244 Fed. 240.

³ *Lee v. Watson*, 1 Wall. 337; 17 L. ed. 557; *Bowman v. Chicago & N. W. Ry. Co.*, 115 U. S. 611, 616, 29 L. ed. 502, 504; *Smith v. Greenhow*, 109 U. S. 669, 27 L. ed. 1080; *Mayor, etc., of Baltimore v. Postal Tel. C. Co.*, 62 Fed. 500; *Bank of Arapahoe v. David Bradley & Co.*, 72 Fed. 867; *Shields v. McCandlish*, 73 Fed. 318; *Hampton*

different theories as to the measure of damages, the plaintiff may not be required to limit himself to one of them; but if he does so limit himself the theory selected is the criterion of the value of the matter in dispute.⁴ It has been said that where the complaint contains the requisite allegation, the jurisdiction is not defeated because other matters therein stated have a tendency to show that such allegation is not well founded, unless they are such as to create a legal certainty of that conclusion.⁵ Should the latter fact appear, for the first time, upon the trial, it seems that the court would then be justified in dismissing the case at the end of the plaintiff's evidence.⁶

In an action for debt upon a bond, or a contract for the payment of money,⁷ the principal and interest alone are in dispute; and no more can be recovered, except costs, although the plaintiff lays his damages at a much larger amount. The value of the matter in dispute cannot, therefore, exceed the principal, with interest and costs,⁸ even though the defendants pleading admits that it is in excess of the jurisdictional amount.⁹

In an action for railroad extortion, under a statute providing that the injured party might recover the amount of damages sustained by the overcharge or discrimination, where the declaration specified the overcharges claimed, alleged that the amount of the recovery on that count should be a sum less than the jurisdictional amount, and further averred that the plaintiff had been damaged in a sum in excess of the jurisdictional amount by reason of the railway company's refusal to pay the damages first alleged; it was held, that the Federal court could not have jurisdiction.¹⁰ In a suit for damages for a breach of a contract to transport a passenger, it was held, that

Stave Co. v. Gardner, C. C. A., 154 Fed. 805; Fuerst Bros. & Co. v. Polasky, C. C. A., 240 Fed. 447 (an action for breach of warranty).

⁴ Armstrong v. Walters, 219 Fed. 320.

⁵ Henry & Sons & Co. v. Colorado Farm & Live Stock Co., C. C. A., 164 Fed. 986.

⁶ Maxwell v. A. T. & S. F. Ry. Co., 34 Fed. 286, 290; Cabot v. McMaster, 61 Fed. 129; Holden v.

Utah S. & M. M. Co., 82 Fed. 209. For what is sufficient evidence of good faith, see Peeler v. Lathrop, 84 Fed. 780; *infra*, § 363.

⁷ Wilson v. Daniel, 3 Dallas 401, 407, 1 L. ed. 655, 657.

⁸ Wilson v. Daniel, 3 Dallas 401, 407, 1 L. ed. 655, 657.

⁹ Royal Ins. Co. of Liverpool, Eng. v. Stoddard, C. C. A., 201 Fed. 915.

¹⁰ Barataria Canning Co. v. Louisville & N. R. Co., 143 Fed. 113.

damages claimed for loss of business and employment, which, it was alleged that the plaintiff could have obtained if the contract had been performed, were too remote and must be excluded from consideration in the estimate of the jurisdictional amount.¹¹ Upon a complaint alleging that plaintiff employed defendant to locate him on a half section of government land, which he entered under the homestead and timber acts, for which service he paid defendant \$200, and seeking to recover damages for false and fraudulent representations as to the quantity and quality of timber on such land; it was held, that it did not state a cause of action for the recovery of damages, beyond the amount paid defendant, if there could be any recovery, and that the action was not within the jurisdiction of a Federal court, although the damages were laid in a sum exceeding the jurisdictional amount.¹² An action was brought by a city in a State court, to recover a tax of \$2 for each of 509 telegraph poles maintained in the streets; but the declaration concluded: "And plaintiff claims \$10,000." It was held, that the actual amount in dispute was but the amount of the tax, \$1,018, and that the Federal Court could not take jurisdiction by removal.¹³ The law of Arkansas having limited plaintiff's recovery, in an action of unlawful detainer, to the rent due at the commencement of the suit and up to the time of rendering judgment, or the value of the occupation during the time of the unlawful detention of the premises, with damages for withholding the same; it was held, that a Federal court, in that State, did not have jurisdiction of such an action, when the complaint alleged that the amount due was the rent for nine months at \$25 per month,¹⁴ although damages were also claimed in a sum exceeding the jurisdictional amount, without showing that plaintiff was entitled to anything but actual damages.¹⁵ A cause is not removable, when the prayer for relief asks for "\$3,000 and all other proper relief;" if, under the pleadings, no other relief can be granted.¹⁶

¹¹ *North American Transportation & Trading Co. v. Morrison*, 178 U. S. 262, 44 L. ed. 1061.

¹² *Wines v. Cobb Real Estate Co.*, 128 Fed. 198.

¹³ *Baltimore v. Postal Tel. Cable Co.*, 62 Fed. 500.

¹⁴ *Sand. & H. Digest*, 670, § 3458.

¹⁵ *Battle v. Atkinson*, 115 Fed. 384; *aff'd* 191 U. S. 559, 48 L. ed. 302.

¹⁶ *Baltimore & O. R. Co. v. Workman*, 12 Ind. (App.), 494, 40 N. E. 751.

Where the State practice allows no greater damage than that prayed, the value of the matter in dispute will be considered to be no more than the amount stated in the plaintiff's prayer for relief, although the body of the complaint contains allegations showing greater damages.¹⁷ In a suit for the conversion of property, upon which plaintiff claimed liens, where the several liens were specifically set forth, and aggregated less than the jurisdictional amount; it was held: that a Circuit Court of the United States was without jurisdiction, although the damages claimed were the amount of a previous judgment establishing the liens against the original debtor for a sum, including interest and other expenses, exceeding such claims to which judgment the defendants, who had subsequently acquired the property, were not parties.¹⁸

In an action for the denial of the right to vote;¹⁹ or for false imprisonment;²⁰ or for assault and battery; or in any other case in which exemplary damages may properly be awarded, the law prescribes no limitation to the amount that can be recovered, and the amount claimed by the plaintiff is the sole criterion to which resort can be had in settling the question of jurisdiction.²¹

In an action against attorneys for negligence in failing to defend an action; it was held that in the absence of allegations showing that a successful defense might have been interposed, the recovery could not be more than nominal and the jurisdictional amount was consequently not involved.²² In an action for damages because of the circulation of a mutilated map with plaintiff's name, where the complaint did not show special damage, it was held that no more than nominal damages could be recovered and that the jurisdictional amount was not involved.²³ In an action for damages resulting from the death of plaintiff's

¹⁷ *Simmons v. Mutual Reserve Fund Life Ass'n*, 114 Fed. 785; *Swann v. Mutual Reserve Fund Life Ass'n*, 116 Fed. 232; *Barber v. Boston & M. R. Co.*, 145 Fed. 52.

¹⁸ *Bergman v. Inman, Poulsen & Co.*, 91 Fed. 293.

¹⁹ *Wiley v. Sinkler*, 179 U. S. 58, 21 S. Ct. 17, 45 L. ed. 84.

²⁰ *Hynes v. Briggs*, 41 Fed. 468.

²¹ *Wilson v. Daniel*, 3 Dallas 401, 407, 1 L. ed. 655, 657; *Barry v. Edmunds*, 116 U. S. 550, 560, 29 L. ed. 729, 732.

²² *Maryland Casualty Co. v. Price, C. C. A.*, 231 Fed. 397, affirming 224 Fed. 271.

²³ *Ohman v. City of New York*, 168 Fed. 953.

husband and father, the sum named and prayed for was "—thousand dollars;" it was held, that it did not appear that the case involved the jurisdictional amount.²⁴

Where the plaintiff brought his action in the Circuit Court of the United States claiming that it sounded in tort, in which exemplary damages might be allowed and that consequently, the matter in dispute exceeded the jurisdictional amount, which otherwise would not have been the case; it was held, that he was estopped from contending, after the defendant's death, that it was not in tort, but in contract; and that, therefore, it might be revived.²⁵

§ 8. Value of the matter in dispute in ejectment, and other suits to obtain the possession of land. It has been held: that, in ejectment, the value of the matter in dispute is that of the interest in the land, to recover which the suit is brought; although the defendant claims a less interest,¹ or only an easement² in the same; together with any special damages that are alleged, and can be recovered in the suit.³ It has been held: that where a bill to recover an interest in lands alleged, "that complainants are informed and believe that the whole of said lands are worth \$12,000, and the amount demanded by them herein is more than \$2,000" was argumentative; since it left the court to make a calculation, and was insufficient to show the jurisdiction.⁴ Under the former statute where in an action involving the title to land, the plaintiff claimed the right thereto without making a payment of \$2,200, demanded by one of the defendants, it was held, that the action was one involving more than \$2,000 and was removable.⁵ Where no special acts of damage are pleaded, only nominal damages can be recovered; and the amount of damages alleged in general language cannot affect the value of the matter

²⁴ *Yarde v. Baltimore & O. R. Co.*, 57 Fed. 913.

²⁵ *Iron Gate Bank v. Brady*, 184 U. S. 665, 46 L. ed. 739.

§ 8. ¹ *Way v. Clay*, 140 Fed. 352. See *Vicksburg, S. & P. R. Co. v. Smith*, 135 U. S. 195, 34 L. ed. 95; *Dupree v. Leggette*, 140 Fed. 776. *Contra*, *Thompson v. Kendrick's Lessee*, 6 Tenn. (5 Hayw.) 113. See *Jones v. Rowley*, 73 Fed. 286.

² *Greene v. Tacoma*, 53 Fed. 562; *Butters v. Carney*, 127 Fed. 622.

See *Vicksburg, S. & P. R. Co. v. Smith*, 135 U. S. 195, 34 L. ed. 95.

³ See *Way v. Clay*, 140 Fed. 352.

⁴ *Dupree v. Leggette*, 140 Fed. 776.

⁵ *Withers v. Johns Hopkins Place Sav. Bank*, 30 S. W. 766.

in dispute.⁶ Where the manner in which the land is used enhances its value to the defendant, that fact must be taken into consideration in the estimate.⁷ It has been held: that in an action of unlawful detainer in Arkansas, in the absence of an allegation of special damages, the value of the matter in dispute is no more than the amount of two years' rents, or the rental value for two years of the property in question, irrespective of its fee value.⁸

§ 9. Value of the matter in dispute in action to recover possession of personal property. In an action or proceeding to recover the possession of personal property, it seems, that the value of the property sought by the plaintiff, or by the claimant, is that of the matter in dispute.¹ It is not enlarged by a claim of special damages for injury to plaintiff's business, when the State practice would not allow the recovery thereof.² In replevin to collect rent by distress, the sum claimed as rent, if less than the value of the property replevied, but where replevin is brought as a means of trying the title to property, then the value of the whole; is the pecuniary test of jurisdiction.³ In a suit to compel the issue to complainant of a certificate for corporate stock, and the cancellation of a certificate previously issued to another, the par value of the stock was held to be the value of the matter in dispute.⁴ In a suit to compel inspectors to allow complainant an examination for a pilot's license, which they had refused to do, where the complaint alleged that the complainant was thereby deprived of a right given him by the laws of the United States, to his damage in "over one thousand dollars," and no objection was made in the court of first in-

⁶ Way v. Clay, 140 Fed. 352; Elk Garden Co. v. T. W. Thayer Co., 179 Fed. 556, under Virginia Code 1904, §§ 2750, 2751.

⁷ Greene v. Tacoma, 53 Fed. 562; King v. Southern Ry. Co., 119 Fed. 1016.

⁸ Battle v. Atkinson, 115 Fed. 384; affirmed 191 U. S. 559, 48 L. ed. 302.

§ 9. ¹ Peyton v. Robertson, 9 Wheaton, 527, 6 L. ed. 151; Gibson v. Shufeldt, 122 U. S. 27, 29, 30 L.

ed. 1083, 1084; Hoover & Allen Co. v. Columbia Straw-Paper Co., 68 Fed. 945; Ryan v. Seaboard R. R. Co., 89 Fed. 397.

² Vance v. W. A. Vandercreek Co., 170 U. S. 468, 42 L. ed. 1111, 18 S. Ct. 645; reversing 80 Fed. 786.

³ Peyton v. Robertson, 9 Wheaton, 527, 6 L. ed. 151; approved Gibson v. Shufeldt, 122 U. S. 27, 29, 30 L. ed. 1083, 1084.

⁴ Ryan v. Seaboard & R. R. Co. 89 Fed. 397.

stance because of the inadequacy of the matter in dispute; it was held upon appeal that it might be inferred that the damages would exceed the jurisdictional amount.⁵ In an action to recover a claim of less than \$2,000, begun by an attachment of property worth more, claimed by a receiver who removed the cause, it was held, that the value of the whole property was that of the matter in dispute.⁶

§ 10. Value of the matter in dispute in suits of foreclosure.

In a suit to foreclose a mortgage or other lien, the amount in dispute, for the purpose of determining the jurisdiction, is the sum sought to be recovered through the lien; ¹ together with any damages, not covered by the lien, for which judgment is prayed.² But it was held: that a suit by the vendor upon a contract to pay for land in installments, where the complaint prayed the court to ascertain the amount due and to become due and to fix a time for its payment, in default of which defendant "be foreclosed of all right or title to interest in or lien upon said land;" was brought, not for foreclosure, but to determine the rights of the parties in the land, and that the value of the real estate not the amount due, was the matter in dispute.³ Where a default in payment of interest makes the principal due, the sum of both is the jurisdictional amount.⁴

In a suit to foreclose a mortgage securing the sum of \$2,000, the bill alleged that plaintiff advanced an additional \$2.25 to pay the fee for recording the mortgage, "for which defendant is liable to him." It was held: that the averment of liability was a mere conclusion of law; and that the bill, therefore, failed to show that more than \$2,000 was involved.⁵ The value of the matter in dispute is not limited by the value of the property subject to the lien or mortgage.⁶

⁵ *Williams v. Molther*, C. C. A., 198 Fed. 460.

⁶ *Hoover & Allen Co. v. Columbia Straw-Paper Co.*, 68 Fed. 945.

§ 10. ¹ *Gibson v. Shufeldt*, 122 U. S. 27, 30, 30 L. ed. 1083, 1084; *Stillwell, B. & S. V. Co. v. Williams-ton, O. & F. Co.*, 80 Fed. 68; *Wake-man v. Throckmorton*, 124 Fed. 1010.

² *Lilienthal v. McCormick*, 117 Fed. 89, 54 C. C. A. 475.

³ *Squire v. Robertson*, 191 Fed. 733.

⁴ *Lowenthal v. Georgia Coast & P. R. Co.*, 233 Fed. 1010.

⁵ *Less v. English*, 85 Fed. 471, 29 C. C. A. 275.

⁶ *Stillwell-Bierce & Smith-Vaile Co. v. Williamston Oil & Fertilizer*

§ 11. Value of the matter in dispute in suits to redeem. In a suit to redeem land, the value of the equity of redemption is the value of the matter in dispute.¹ Where the bill prayed, that a trust deed purporting to be security for a loan and a subsequent deed executed upon a foreclosure thereof be set aside, or in the alternative, that complainants be permitted to redeem on payment of the mortgage debt, interest and costs; it was held, that the value of the matter in dispute was that of the land, not the amount required to redeem.²

§ 12. Value of the matter in dispute in suits to quiet title. In a suit to quiet title or to remove a cloud therefrom the value of the matter in controversy is ordinarily that of so much of plaintiff's property as is affected by the adverse claim.¹ Where the complainant sued to recover possession of a part of a tract of land and to quiet his title to the whole, it was held that the value of the whole was the criterion.² Where the land was part of a railroad's right of way, one hundred feet distant from its tracks, which had never been used in the operation of the railroad; it was held that the value of that part of the land, not the value of the company's right to operate the railroad, was that of the matter in dispute.³ In a suit to cancel a paper purporting to be a marriage contract, which, if valid, gave the alleged wife an interest in the property of the plaintiff, it was held, that the amount of the provision, which the woman would be entitled to receive were the contract held binding, was the value of the matter in dispute.⁴ Where plaintiff sued to quiet title and to set aside a

Co., 80 Fed. 68; Bucyrus Co. v. McArthur, 219 Fed. 266.

§ 11. ¹Carne v. Russ, 152 U. S. 250, 38 L. ed. 428.

²Greenfield v. U. S. Mtg. Co., 133 Fed. 784.

§ 12. ¹Parker v. Morrill, 106 U. S. 1, 27 L. ed. 72; Lehigh, Z. & I. Co. v. N. J. Z. & I. Co., 43 Fed. 545; Simon v. House, 46 Fed. 317; Riggs v. Clark, 71 Fed. 560, 18 C. C. A. 242, 37 U. S. App. 626; Felch v. Travis, 92 Fed. 210; Woodside v. Ciceroni, 93 Fed. 1, 35 C. C. A. 177; Cowell v. City Water-Supply Co., 96 Fed. 769; Cowell v. City Wa-

ter-Supply Co., 121 Fed. 53, 57 C. C. A. 393; Hyde v. Victoria Land Co., 125 Fed. 970; Building & Loan Ass'n of Dakota v. Cunningham (Texas, 1898), 47 S. W. 714; Sloane v. Kramer Bros. & Co., 230 Fed. 727, 730, quoting with approval the former text.

²Connecticut General Life Ins. Co. v. Weldon, C. C. A., 246 Fed. 265.

³Union Pac. R. Co. v. Cunningham, 173 Fed. 90.

⁴Sharon v. Terry, 36 Fed. 337. See Fidelity & Deposit Co. v. Mo-shier, 151 Fed. 806.

deed of trust on certain land, and also to vacate a deed executed to the purchaser under foreclosure of such deed of trust, but asked in the alternative that, if the deeds be not set aside, she be permitted to redeem on payment of the mortgage debt, interest and costs; it was held, that the amount involved was the value of the land, and not the amount required to redeem.⁵ Allegations in a complaint for the cancellation of a lease, and to enjoin the lessees from using the premises: that the value of the leased premises was \$10,000; and that the rental value of the property was \$2,400 a year; it was held: were sufficient to give jurisdiction to the Federal court.⁶ It was held: that the Circuit Court had no jurisdiction of a suit to correct an ambiguity in the deed of a railroad right of way, and to restrain the removal of gates at a crossing in the enclosure thereof, where the value of the realty and the damage accruing to adjacent property from the road's construction were not shown to exceed the jurisdictional amount; and the fact that animals might stray on the track through the threatened openings in the enclosure, and cause wrecks occasioning great damage, did not help the case; since, when jurisdiction depends on a particular sum, suits where the right involved cannot be calculated in money are not within it.⁷ In suits to set aside, as clouds upon the title to lands: a tax;⁸ an assessment for a street improvement;⁹ and to cancel certain street improvement certificates;¹⁰ it was held, that the amount of the tax, assessment and certificates, respectively, was the value of the matter in dispute; not the value of the lands affected.¹¹

§ 13. Value of the matter in dispute in suits for injunctions.

In a suit for an injunction, the value of the matter in dispute is that of the object of the bill,¹ namely, the value, to the plaintiff, of the right for which he prays protection;² or the value, to the

⁵ *Greenfield v. U. S. Mtg. Co.*, 133 Fed. 784.

⁶ *Reese v. Zimm*, 103 Fed. 97.

⁷ *Oregon R. & Nav. Co. v. Shell*, 125 Fed. 979.

⁸ *Douglas Company v. Stone*, 191 U. S. 557; s. c., 110 Fed. 812; *Purnell v. Page*, 128 Fed. 496; *Turner v. Jackson Lumber Co.*, C. C. A., 159 Fed. 923.

⁹ *Eachus v. Hartwell*, 112 Fed. 564.

¹⁰ *Shewalter v. Lexington*, 143 Fed. 161.

¹¹ See *infra*, §§ 13-16.

§ 13. ¹ *Western Union Tel. Co. v. City Council*, 56 Fed. 419, 420; citing with approval *Foster's Fed. Pr.*, (2nd ed.) § 16.

² *Bitterman v. Louisville & N.*

defendant, of the acts of which the plaintiff prays prevention;³ together with the amount of the damages which the plaintiff claims that he has already sustained and prays to have awarded to him.⁴ It is not limited by the amount of damages claimed by the plaintiff to have already accrued.⁵ It has been held that the amount of such damages cannot be considered nor added to the value of the right sought to be protected.⁶ When the value of the right sought to be protected is uncertain, the averment in the bill upon that subject will usually govern,⁷ provided it can

R. Co., 207 U. S. 205, 52 L. ed. 171; Oleson v. Northern Pac. R. Co., 44 Fed. 1; Herbert v. Rainey, 54 Fed. 248; Nashville, C. & St. L. Ry. Co. v. McConnell, 82 Fed. 65; Von Schroeder v. Brittan, 93 Fed. 9; Humes v. City of Fort Smith, Ark., 93 Fed. 857; Maffet v. Quine, 95 Fed. 109; rehearing denied, 93 Fed. 347; State of Arkansas v. Kansas & T. Coal Co., 96 Fed. 353; Delaware, L. & W. R. Co. v. Frank, 110 Fed. 689; Riverside & A. Ry. Co. v. City of Riverside, 118 Fed. 736; American Fisheries Co. v. Lennen, 118 Fed. 869; Cowell v. City Water-Supply Co., 121 Fed. 53, 57 C. C. A. 393; reversing decree 96 Fed. 769; McKee v. Chautauqua Assembly, 124 Fed. 808; State v. Frost, 89 N. W. 915, 113 Wis. 623; Morris v. Bean, 146 Fed. 423; Spaulding v. Evenson, 149 Fed. 913; Rocky Mountain Bell Tel. Co. v. Montana Federation of Labor, 156 Fed. 809; Northern Pac. Ry. Co. v. Pacific Coast Lumber Mfrs. Ass'n., C. C. A., 165 Fed. 1, 11, the right to maintain a schedule of charges for transportation.

³ Cowell v. City Water-Supply Co., C. C. A., 121 Fed. 53, 57 C. C. A. 393; reversing decree 96 Fed. 769; Am. Smelting & Refining Co. v. Godfrey, C. C. A., 158 Fed. 225, 14 Ann. Cas. 8; Mississippi & Mo.

R. R. Co. v. Ward, 2 Black, 485, 17 L. ed. 811; Whitman v. Hubbell, 30 Fed. 81; Oleson v. Northern Pac. R. Co., 44 Fed. 1; Rainey v. Herbert, C. C. A., 55 Fed. 443; American Fisheries Co. v. Lennen, 118 Fed. 869; Amelia Milling Co. v. Tennessee Coal, Iron & R. Co., 123 Fed. 811; Memphis v. Postal Tel. Cable Co., C. C. A., 145 Fed. 602.

⁴ Scott v. Donald, 165 U. S. 107, 115, 41 L. ed. 648, 654.

⁵ Scott v. Donald, 165 U. S. 107, 115, 41 L. ed. 648, 654; Whitman v. Hubbell, 30 Fed. 81; Rainey v. Herbert, 55 Fed. 443; Nashville, C. & St. L. Ry. Co. v. McConnell, 82 Fed. 65; American Fisheries Co. v. Lennen, 118 Fed. 869; Rocky Mountain Bell Tel. Co. v. Montana Federation of Labor, 156 Fed. 809.

⁶ Sloane v. Kramer Bros. & Co., 230 Fed. 727; Bureau of National Literature v. Sells, 211 Fed. 379. But see Draper v. Skerrett, 116 Fed. 206.

⁷ Texas & P. Ry. Co. v. Kuteman, 54 Fed. 547; Studebaker v. Salina Waterworks Co., 195 Fed. 164; Martin v. City Water Co., 197 Fed. 462; both of which involved the right to measure its charges by meters; Enders v. Supreme Lodge Knights and Ladies of Honor, 176 Fed. 832, the right of an insurance association to levy an assessment.

be reasonably inferred to have some pecuniary value; but where a right, such as that to inspect the books or records of a corporation, is ordinarily not one of pecuniary value, the rule is otherwise.⁸ In a bill by the owner, to enjoin a trespass, which it was alleged would entirely destroy the use of certain land; it was held, that the value of the land was the test.⁹ Where a mortgagor sued to enjoin the sale of land under a mortgage, which it was claimed was void; it was held: that the value of the matter in dispute was that of the mortgage, although the suit also prayed judgment against the defendant for money usuriously charged and received by it, which was less than the jurisdictional amount.¹⁰ In a suit by a mortgagee, to enjoin an act which he claimed would impair the value of his security, it was held: that the amount of the damage, which would result from the threatened act, was the test.¹¹ In a suit to enjoin the illegal seizure of imported liquors; the value to the plaintiff of the right to make such importations, and of the articles, which he intended to import and which defendants threatened to seize.¹² When a railroad company sued to enjoin the collection of penalties of \$500 each by a commission and a shipper, alleging that the penalties, for which it would be sued in the future, would exceed the jurisdictional amount; and that the right sought to be protected was more than that amount; it was held, that the jurisdiction sufficiently appeared, although the dispute arose concerning demurrage to the amount of \$146.¹³ It was so held of a similar suit against a commissioner alone.¹⁴ In a suit by a railroad company, to enjoin a shipper from a multiplicity of suits to recover overcharges; it was held, that the value of the matter in dispute was the value to the plaintiff of the right to maintain its schedule rates.¹⁵ In a suit by the receiver of a water company to restrain

⁸ *Whitney v. Am. Shipbuilding Co.*, 197 Fed. 777.

⁹ *Smith v. Bivens*, 56 Fed. 352; *Northern Pac. Ry. Co. v. Cunningham*, 103 Fed. 708; *Sheriff v. Turner*, 119 Fed. 231. But see *Hagge v. Kansas City S. Ry. Co.*, 104 Fed. 391.

¹⁰ *Dickinson v. Union Mtg. & Tr. Co.*, 64 Fed. 895.

¹¹ *Clapp v. Spokane*, 53 Fed. 515.

¹² *Scott v. Donald*, 165 U. S. 107, 115, 41 L. ed. 648, 654.

¹³ *McNeill v. Southern Ry. Co.*, 202 U. S. 543, 548, 50 L. ed. 1142, 1145.

¹⁴ *Railroad Commission v. Texas & P. Ry. Co.*, C. C. A., 144 Fed. 68.

¹⁵ *Texas & P. Ry. Co. v. Kute-man*, C. C. A., 54 Fed. 547.

a multiplicity of suits by customers to compel him to reduce the water rates; it was held, that the value of the right to maintain his schedule rates was the test of jurisdiction.¹⁶ In suits by a railway company, to enjoin the scalping or resale of non-transferable tickets; the value of the business sought to be protected was held to be the test.¹⁷

In a suit to restrain the infringement of a trademark, and to compel an account of the profits; the value of the matter in dispute is the value of the trademark, not the amount of the profits which the defendant has derived from its use.¹⁸ In a suit to enjoin the unlawful use of a trade name; the damages already incurred, plus those which the bill alleged would be suffered in the future, unless the relief prayed was granted.¹⁹ But in a suit to enjoin an unlawful use of complainant's trade name, where it was not alleged that the acts complained of would destroy the value of the name; the value thereof was held not to be that of the matter in dispute.²⁰

In a suit to enjoin the unlawful use of market quotations posted in the plaintiff's exchange; the value of the exclusive right to the same is the test.²¹ In a suit to enjoin the cancellation of a contract, it was held, that the matter in dispute was the right to maintain the contract; which was to be measured by the profits, not by the gross receipts, from the defendant thereunder, nor by the cost to the plaintiff of preparation to perform its part of the same.²² But in another case, it was held: that the value of the matter in dispute was the

¹⁶ *Lanning v. Osborne*, 79 Fed. 657.

¹⁷ *Bitterman v. Louisville & N. R. Co.*, 207 U. S. 205, 52 L. ed. 171; affirming *Louisville & N. R. Co. v. Bitterman*, C. C. A., 144 Fed. 34; *Del., L. & W. R. Co. v. Frank*, 110 Fed. 689. In a suit for specific performance of a contract to carry the complainants free during their lives, the value of the right to the same was held to be that of the matter in dispute. *Mottley v. Louisville & N. R. Co.*, 150 Fed. 406.

¹⁸ *Symonds v. Greene*, 28 Fed.

834; *Hennessey v. Herrmann*, 89 Fed. 669; *Draper v. Skerrett*, 116 Fed. 206.

¹⁹ *Draper v. Skerrett*, 116 Fed. 206.

²⁰ *Winchester Repeating Arms Co. v. Butler*, 128 Fed. 976.

²¹ *Board of Trade v. Cella Commission Co.*, C. C. A., 145 Fed. 28, where an allegation that complainant realizes \$30,000 a year from the right it sued to protect was held to be sufficient.

²² *Riverside & A. Ry. Co. v. Riverside*, 118 Fed. 736, 737, 738, 743.

amount, which the plaintiff had contracted to pay in cash upon an exchange of property.²³

In a suit to restrain the unlawful use by a railroad of a right of way over plaintiff's land, the damage to the whole tract as well as the value of the land taken for the right of way is to be considered;²⁴ but in a suit to enjoin the use, as a railroad, of a highway, it was held: that the value of the matter in dispute was that of the use of the highway for the railway company.²⁵ Where a suit was brought by a city against a telegraph company, to recover \$1,772 for street rentals for the maintenance of defendant's poles and wires, and the bill prayed for the payment of the rentals or forfeiture of defendant's right in the streets, and that its occupation thereof should cease; it was held: that the matter in controversy was not necessarily limited to the amount of the money sought to be recovered; and hence that a certified petition of removal, stating that the value of the matter in controversy was more than the statutory amount, showed that the amount in controversy was sufficient to confer Federal jurisdiction.²⁶

In a suit to enjoin the destruction of property, the value of that threatened with destruction not of that already destroyed is the jurisdictional test.²⁷

In an action to abate a nuisance, it has been held: that the value of the article sought to be abated, or of the acts sought to be enjoined, is the test of the jurisdiction.²⁸ It has been said: that the amount involved, for jurisdictional purposes, in a suit to enjoin the maintenance of a nuisance, cannot be measured solely by the damage suffered by complainant; nor by the actual outlay of money, which defendant would be required to make if the relief should be granted; but the value of the right, of which he is

²³ Kirby v. Am. Soda Fountain Co., 194 U. S. 141, 48 L. ed. 911.

²⁴ Denver & R. G. R. Co. v. Mills, C. C. A., 222 Fed. 481.

²⁵ Oleson v. Northern Pac. R. Co., 44 Fed. 1.

²⁶ Memphis v. Postal Tel. Cable Co., C. C. A., 145 Fed. 602.

²⁷ Tri-City Central Trades Council v. American Steel Foundries, C. C. A., 238 Fed. 728.

²⁸ Mississippi & Mo. R. R. Co. v. Ward, 2 Black, 485, 17 L. ed. 311 (a railroad bridge); Whitman v. Hubbell, 30 Fed. 81 (an awning, where the value of the right to use the awning was held to be the test); Rainey v. Herbert, C. C. A., 55 Fed. 443 (coke ovens); Am. Smelting & Refining Co. v. Godfrey, C. C. A., 158 Fed. 225, 14 Ann. Cas. 8.

sought to be deprived, is to be taken into consideration.²⁹ Where there was no allegation of the value of the structures sought to be abated, which were obstructions to navigation; and the damages alleged to have been suffered because of the same, prior to the beginning of the suit, were less than the jurisdictional sum; it was held, that the jurisdiction did not appear.³⁰ In a suit by a telephone company to restrain the erection of poles and wires so as to injure complainant's line it was held that the criterion was the value of the right of complainant to be free from wrongful interference by defendant with the operation of its line and the conduct of its business; not the expense to defendant of the removal of the latter's interfering poles and wires.³¹

In a suit to enjoin the defendants from continuing a business, in violation of a contract with complainant, it was held: that the court had jurisdiction, where the value of the plant owned and operated by them, and the amount of their annual business, exceeded such amount.³²

In a suit to enjoin the Director General from the removal of machine shops, proof that such removal would cause a saving of \$400.00 a month was held to establish that the value of the matter in dispute exceeded \$3,000 exclusive of interest and costs.³³

In a suit in the nature of an interpleader, the pecuniary test of the jurisdiction is the amount claimed by the defendant, whom the complainant seeks to enjoin, not the amount which complaint admits to be due and seeks to deposit in court.³⁴

§ 14. Value of the matter in dispute upon taxpayers' bills.

In a suit to enjoin the collection of a tax, the amount of the tax, not the value of the property which the defendant threatens to seize,¹ nor of that, the title to which is clouded,² is the test of

²⁹ *Amelia Milling Co. v. Tennessee Coal, Iron & R. Co.*, 123 Fed. 811.

³⁰ *Kenyon v. Knipe*, 46 Fed. 309.

³¹ *Glenwood Light and Water Co. v. Mutual Light, Heat and Power Co.*

³² *American Fisheries Co. v. Lennen*, 118 Fed. 869.

³³ *Nueces Valley Town-Site Co. v. McAdoo*, 257 Fed. 143.

³⁴ *Hayward & Clark v. McDonald*, C. C. A., 192 Fed. 890. But see *infra*, §§ 157, 158.

§ 14. ¹ *Washington & G. R. Co. v. District of Columbia*, 146 U. S. 227, 232, 36 L. ed. 951, 953; *King v. Wilson*, Fed. Cas. No. 7,810 (1 Dill. 555); *Linehan Railway Transfer Co. v. Pendergrass*, 70 Fed. 1, 16 C. C. A. 585, 36 U. S. App. 48; *Eachus v. Hartwell*, 112 Fed. 564;

jurisdiction. But, it has been held: that, where an injunction is sought against the collection of an annual tax or license fee, imposed upon a franchise or upon the right to exercise a certain occupation, resistance to the payment of which would result in the destruction of the plaintiff's business; the value of the right to exemption, including the threatened damage to this business, not the amount of the tax or license fee which has accrued, is to be considered.³ Upon a bill to enjoin an income tax upon a salary annexed to an office, claimed to be exempt; the specific tax sought to be enforced, not the right to exemption, was held to be the test.⁴ It has been held, upon a bill to enjoin the collection of a land tax, filed by a corporation claiming an exemption; that the amount of the tax claimed to be already due was the sole test, since it could not be assumed that the assessment for subsequent years would be for a like amount.⁵ The cases conflict as to whether, in a suit to enjoin a municipality from issuing bonds, or otherwise incurring indebtedness, the pecuniary test of jurisdiction is the amount of the tax, to which the complainant would be thereby subjected, or the whole debt, the creation of which complainant seeks to prevent.⁶ In a suit to enjoin a municipality from issuing bonds, to an amount charged to be in

Field v. Barber Asphalt Pav. Co., 117 Fed. 925; *Turner v. Jackson Lumber Co.*, C. C. A., 159 Fed. 926; *Risley v. City of Utica*, 168 Fed. 737; *Everglades D. League v. Napoleon B. Broward D. Dist.*, 253 Fed. 246.

³ *Douglas Company v. Stone*, 191 U. S. 557, 24 S. Ct. 843, 48 L. ed. 801; s. c., affirming 110 Fed. 812; *Eachus v. Hartwell*, 112 Fed. 564; *Purnell v. Page*, 128 Fed. 496; *Turner v. Jackson Lumber Co.*, C. C. A. 159 Fed. 923.

⁴ *American Fertilizing Co. v. Board of Agriculture*, 43 Fed. 609, 11 L.R.A. 179; *Western Union Tel. Co. v. City Council*, 56 Fed. 419; *Humes v. City of Fort Smith, Ark.*, 93 Fed. 857; *Southern Exp. Co. v. City of Ensley*, 116 Fed. 756; *Hutchinson v. Beckham*, 118 Fed.

399, 55 C. C. A. 333; *Berryman v. Board of Trustees of Whitman College*, 222 U. S. 834; *Postal Telegraph-Cable Co. v. City of Mobile*, 179 Fed. 955; *Jewel Tea Co. v. Lee's Summit, Mo.*, 198 Fed. 532.

⁴ *Purnell v. Page*, 128 Fed. 496.

⁵ *Citizens' Bank of Louisiana v. Cannon*, 164 U. S. 319, 41 L. ed. 451. *Contra*, *Board of Trustees of Whitman College v. Berryman*, 156 Fed. 112.

⁶ In the following cases, the amount of the plaintiff's tax was held to be the test: *El Paso Water Co. v. El Paso*, 152 U. S. 157, 159, 38 L. ed. 395, 397; *Colvin v. Jacksonville*, 158 U. S. 456, 460; *Adams v. Douglas County*, Fed. Cas. No. 52; *McCahon*, 235, 1 Kan. 627; *Murphy v. East Portland*, 42 Fed. 308.

excess of the constitutional limit of its indebtedness; the value of the power of the city to issue such bonds, not the tax to which the complainant would be thereby subject, was held to be the value of the matter in dispute.⁷ It has been held: that upon a taxpayer's bill, to enjoin the execution of a contract for a public work; the value of the contract, and not the amount of the tax complainant might be required to pay in consequence, was the amount in dispute.⁸

§ 15. Value of the matter in dispute upon creditors' bills. It has been held: that, upon a creditor's bill, the value of the complainant's claim, not the value of the property sought to be reached,¹ nor the value of the claim, payment of which he seeks to enjoin,² is that of the matter in dispute, when the creditor sues in his own right alone; but that when the creditor sues on behalf of himself and the other creditors, for the administration of a trust fund,³ or to collect money or other property applicable to the payment of its debts,⁴ the amount of such fund or property determines the question of jurisdiction. In one case the value of immature claims was added to that of those already matured, when determining the jurisdictional amount.⁵

§ 16. Value of the matter in dispute upon stockholders' bills. It has been held: that upon stockholders' bills, to enforce causes

⁷ *Ottuma v. City Water Supply Co.*, C. C. A., 59 L.R.A. 604, 119 Fed. 315; *City of Helena v. Helena Waterworks Co.*, C. C. A., 173 Fed. 18; *Larabee v. Dolley*, 175 Fed. 365.

See *Brown v. Trousdale*, 138 U. S. 389, 11 Sup. Ct. 308, 34 L. ed. 987. But see *Risley v. City of Utica*, 168 Fed. 737.

⁸ *Johnston v. City of Pittsburgh*, 106 Fed. 753.

¹ *Werner v. Murphy*, 60 Fed. 769; *Alkire Gr. Co. v. Riche-sin*, 91 Fed. 79; *Cowell v. City Water Supply Co.*, 121 Fed. 53; reversing s. c., 96 Fed. 769; *Casey v. Baker*, 212 Fed. 247. See *Bruce v. Manchester & K. R. R. Co.*, 117 U. S. 514, 29 L. ed. 990; *Estes v. Gunter*, 121 U. S. 183, 30 L. ed. 884;

Handley v. Stutz, 137 U. S. 366, 34 L. ed. 706; *Put-in-Bay Waterworks etc., Co. v. Ryan*, 181 U. S. 409. Cf. *Huff v. Bidwell*, C. C. A., 151 Fed. 563.

² *Smithson v. Hubbell*, 81 Fed. 593. But see *Taxpayers' Bills*, *infra*, § 161g.

³ *Putnam v. Timothy, D. G. & C. Co.*, 79 Fed. 454; *Jones v. Mutual Fidelity Co.*, 123 Fed. 506. See *Alsop v. Conway*, C. C. A., 188 Fed. 568. But see *Bruce v. Manchester & K. R. R. Co.*, 117 U. S. 514, 29 L. ed. 990.

⁴ *Conway v. Owensboro Sav. Bank & Tr. Co.*, 165 Fed. 822, to enforce the liability of stockholders.

⁵ *Johnston v. Straus*, 26 Fed. 57.

of action belonging to corporations;¹ or to enjoin actions, which are *ultra vires*;² or to protect the assets of the company from waste,³ or for the appointment of a receiver of the corporate assets,⁴ or for the distribution of the same,⁵ the value of the matter in dispute is that of the corporate right sought to be enforced, or of the amount of loss which the corporation would suffer from the threatened unlawful action, or the value of the assets of the corporation, as the case may be; not the value of the plaintiff's stock. In a suit to compel the issue to complainant of a certificate of corporate stock, and the cancellation of one issued to another; it was held, that the value of the matter in dispute was at least the par value of the stock, where there were circumstances tending to show that the defendants had valued it at a higher sum.⁶ But in a suit to compel a transfer of stock and payment of the depreciation in its market value on the day of the demand for transfer and the highest market value between such day and judgment, it appearing that the reason for the refusal was to protect the corporation from liability for an inheritance tax; it was held that the amount of such tax was the pecuniary test of the jurisdiction.⁷ There can be no pecuniary valuation of the matter in dispute in a suit by a stockholder to compel the corporation to allow him to inspect its books and records.⁸

§ 16. ¹Hill v. Glasgow R. Co., 41 Fed. 610. See § 145, *infra*. *Contra*, Massa v. Cutting, 30 Fed. 1; Harvey v. Raleigh & G. R. Co., 89 Fed. 115.

²McKee v. Chautauqua Assembly, 124 Fed. 808; Larabee v. Dolley, 175 Fed. 365; Howard v. Nat. Telephone Co., 182 Fed. 215, where a preferred stockholder sued to compel the rescission of a transfer of a majority of the common stock, alleging that his stock was of the par value of \$3,100 and that this and the other preferred stock was threatened with destruction in value by the illegal control of the assets obtained by the transferee of the common stock.

³Carpenter v. Knollwood Cemetery, 198 Fed. 297.

⁴Towle v. Am. Bldg., L. & Inv. Soc., 60 Fed. 131; Robinson v. W. Va. Loan Co., 90 Fed. 770; Taylor v. Decatur M. & L. Co., 112 Fed. 449; Jacobs v. Mexican Sugar Co., 130 Fed. 589; *Re* Cleland, 218 U. S. 120, 54 L. ed. 962.

⁵Kent v. Honsinger, 167 Fed. 619.

⁶Ryan v. Seaboard & R. R. Co., 89 Fed. 397, 404.

⁷Jessup v. Chicago, & N. W. Ry. Co., 188 Fed. 931.

⁸Whitney v. Am. Shipbuilding Co., 197 Fed. 777.

§ 17. Value of the matter in dispute when there are joint plaintiffs. Where a number of plaintiffs, claiming under the same title, and having a joint or a common and undivided interest in the relief sought, unite in a suit, the adverse party having no interest in the apportionment or distribution of the amount recovered among them; the value of their united interests is that of the matter in dispute; at least when they are all indispensable parties.¹ It was so held, of a suit by several of the next of kin for an accounting by an administrator.² Where life tenants and remaindermen join as plaintiffs in a bill seeking an injunction against threatened injury to the corpus of the estate; the amount of their joint interest is the test of jurisdiction.³ Where a number of shippers united in a suit to enjoin a railway company from enforcing a proposed schedule of charges for transportation, jurisdiction was maintained, although the interest of no single one of them was equal to the jurisdictional amount.⁴ In proceedings for a *writ of mandamus* to compel the collection of a single tax, levied for the joint benefit of all the relators, in which they had a common and undivided interest of different amounts; it was held, that the value of the matter in dispute, upon a writ of error, was measured by the whole amount of the tax, and not by the separate parts of the same which each of the relators would receive after its collection.⁵ In a suit by the owners of separate lots, who derived title from a common grantor, to quiet their title as against a defendant who claimed to own all the land; it was held, that the amount in controversy was the value of the whole tract of land owned by the complainants,

§ 17. ¹ So held when the holders of several notes sued jointly to enforce a vendor's lien, in which they were all entitled to share. *Troy Bank v. Whitehead & Co.*, 222 U. S. 39, 56 L. ed. 81. Where several of the next of kin sued to recover assets, converted by the husband of an administratrix; held, that their joint interest was the test of the jurisdiction. *Shields v. Thomas*, 17 How. 3, 15 L. ed. 93.

² *Prince v. Towns*, 33 Fed. 161; *Thornton v. Tison*, 95 Ala. 589, 10 South, 639.

³ *Herbert v. Rainey*, 54 Fed. 248; *aff'd*, C. C. A., 55 Fed. 443.

⁴ *Northern Pac. Ry. Co. v. Pacific Coast Lumber Mfrs. Ass'n.*, C. C. A., 165 Fed. 1, 11. There the right of the railway company to maintain the schedule seems to have been the test. See, also, *Market Co. v. Hoffman*, 101 U. S. 112, 118, 25 L. ed. 782.

⁵ *Crawford v. Haller*, 111 U. S. 796, 28 L. ed. 602; *Davies v. Corbin*, 112 U. S. 36, 28 L. ed. 627.

and not the value of the lots owned severally by each.⁶ Where all the insurers of property damaged by fire, united in a submission to arbitration, and afterwards joined in a bill to set aside the award, it was held: the controversy was single, and the amount in controversy was the amount of the award.⁷ Where several creditors joined in a suit for the appointment of a receiver of the assets of a corporation; it was held, that there was jurisdiction, when their joint claims exceeded the jurisdictional sum, exclusive of interest and costs; although each of their individual claims was less.⁸ In a suit by the holders of bonds to enjoin strikers from interfering with the operation of their obligor because the acts threatened would decrease the value of their security; it was held that the amount in controversy was the value of the bonds held by all the plaintiffs.⁹ A finding that the plaintiffs below were *bona fide* holders of bonds and entitled to sue in the Circuit Court, was held to imply that they were joint owners and was sufficient to support the jurisdiction.¹⁰

Where two or more plaintiffs, having several interests, unite for the convenience of litigation in a single suit, it can only be sustained as to those whose claims exceed the jurisdictional amount.¹¹ Thus several persons who have by similar frauds been induced to buy stock cannot give the court jurisdiction by adding the amounts which they separately claim when they unite in the same suit for a rescission of their purchases.¹² Where a number of claimants to separate tracts of land under the same Act of Congress unite in a suit to establish their claims, the value of their lands cannot be added together for the purpose of estimating the value of the matter in dispute.¹³ A creditors' bill can-

⁶ Lovett v. Prentice, 44 Fed. 459.

⁷ Hartford Fire Ins. Co. v. Bonner Mercantile Co., 56 Fed. 378, 5 C. C. A. 524; 15 U. S. App. 134; reversing s. c., 44 Fed. 151, 11 L. R. A. 623.

⁸ Jones v. Mutual Fidelity Co., 123 Fed. 506.

⁹ Carter v. Fortney, 170 Fed. 463.

¹⁰ Green County, Kentucky v. Thomas' Executor, 211 U. S. 598, 53 L. ed. 343; Troy Bank v. White-

head & Co., 222 U. S. 39, 56 L. ed. 81.

¹¹ Separate claims, by different persons, for work, labor and services, cannot be joined, in order, by their aggregate amount, to confer jurisdiction, though a joinder be authorized by State statute. Holt v. Bergevin, 60 Fed. 1.

¹² Robinson v. Wenner, 253 Fed. 790.

¹³ Bateman v. Southern Oregon Co., C. C. A., 217 Fed. 933.

not be maintained by several complainants, holding independent demands against the debtor for less than the jurisdictional amount, although the aggregate of all the demands exceeds the same; when they do not sue on behalf of others, not parties.¹⁴ The same ruling was made when several purchasers of different parcels of the same tract of land sued to impress the land with a lien for their payments on the purchase price and prayed for the appointment of a receiver and for the administration of the assets of the vendee which was a corporation.¹⁵ A similar ruling was made when two heirs, each claiming a separate undivided share of the estate of their father, sued to set aside his will for mistake and for a decree establishing their respective rights.¹⁶ In a suit by heirs for an accounting by the defendant of property of the intestate, which he had received, and for a distribution of the same, since any heir might have maintained the suit for his respective share without joining the others, it was held, that there was no jurisdiction, because the interest of none of the plaintiffs exceeded \$2,000.¹⁷ It was similarly held, when determining the jurisdiction upon appeal in a suit by a legatee, to compel other legatees to pay over to the executor assets which they had received.¹⁸ A bill by several land owners to enjoin the collection or assessment of assessments or taxes against their respective property, cannot be maintained, except as to those whose tax or assessment would exceed the jurisdictional amount, although each relies upon the same ground of objection.¹⁹ The same ruling was made when several tax-payers joined in a suit to recover back taxes that they had paid.²⁰ It was so held, also, as to the jurisdiction upon appeal.²¹

It was held that when several employees of a railroad company

¹⁴ Putney v. Whitmire, 66 Fed. 385. See Gibson v. Shufeldt, 122 U. S. 27, 30 L. ed. 1083.

¹⁵ Howard v. Linnhaven Orchard Co., 288 Fed. 523.

¹⁶ Pinel v. Pinel, 240 U. S. 594.

¹⁷ Rich v. Bray, 37 Fed. 273, 2 L.R.A. 225.

¹⁸ Miller v. Clark, 138 U. S. 223, 225, 34 L. ed. 966.

¹⁹ Wheless v. City of St. Louis, 180 U. S. 379, 45 L. ed. 583; affirm-

ing decree, 96 Fed. 865; Rogers v. Hennepin County, 239 U. S. 621.

²⁰ Risley v. City of Utica, 179 Fed. 875; King v. Wilson, Fed. Cas. No. 7,810 (1 Dill, 555); Schulenberg-Boeckeler Lumber Co. v. Town of Hayward, 20 Fed. 422.

²¹ Ogden City v. Armstrong, 168 U. S. 224, 42 L. ed. 444, 18 S. Ct. 98; affirming judgment 12 Utah, 476, 43 P. 119.

sued to enjoin a State officer from enforcing a statutory penalty against their employer, in case it failed to discharge all of the same claims to which the complainants belonged; that the value of their respective interests could not be aggregated when estimating the value of the matter in dispute.²² It has been said that a suit by several land owners, who are injured by a common nuisance, can only be maintained as to those who show that the injury, past and prospective, of each exceeds the jurisdictional amount.²³ In a suit by several owners of water rights in a stream, joining as complainants for convenience only, to enjoin the obstruction or the diversion of water therefrom, by defendants, it was held, that the matter in dispute with each complainant must exceed the jurisdictional amount in order to give a Federal court jurisdiction.²⁴ A suit under a Colorado statute, imposing a certain individual responsibility upon shareholders in banks, it was held, could not be maintained, except by those creditors whose individual claims exceeded the jurisdictional amount.²⁵ The amounts of separate tontine life insurance policies cannot be added together in estimating the value of the matter in dispute in a suit where the holders unite, not suing on behalf of the rest of those interested in the fund, but praying for an accounting of the tontine fund and the appointment of a receiver.²⁶ Where it appeared, from a bill brought by a number of insurance companies to set aside an award as to the amount of a loss, that the amount of insurance given by each of the plaintiffs exceeded the jurisdictional sum, and there was nothing to show that the loss was to be apportioned *pro rata* to the amount of each policy; it was held, that the court could not presume that such was the case and that there was jurisdiction, although the total insurance exceeded the loss fixed by the award; since the insured might select certain of the policies and sue upon them for their full value.²⁷

²² *Simpson v. Geary*, C. C. A., 204 Fed. 507.

²³ *Hagge v. Kansas City S. Ry. Co.*, 104 Fed. 391, 393.

²⁴ *Eaton v. Hoge*, C. C. A., 141 Fed. 64.

²⁵ *Auer v. Lombard*, 72 Fed. 209, 19 C. C. A. 72, 33 U. S. App. 438.

²⁶ *Eberhard v. Northwestern Mut. Life Ins. Co.*, 241 Fed. 353.

²⁷ *Hartford Fire Ins. Co. v. Bonner Mercantile Co.*, 44 Fed. 151, 11 L.R.A. 623; *Empire City Fire Ins. Co. v. American Cent. Ins. Co.*, C. C. A., 218 Fed. 214.

The consolidation after answer of two actions upon different contracts, brought by the same plaintiff against the same defendant, which aggregate more than the jurisdictional amount, but neither of which is separately equal thereto; does not render the consolidated cause removable as a single action, although the defense to each is the same.²⁸

§ 17a. The value of the matter in dispute in suits on behalf of a class. Where a suit is brought by one or more, for themselves, and all others of a class jointly interested, for the relief of the whole class; the aggregate interest of the whole class constitutes the matter in dispute.¹ Where a bill by several taxpayers, in behalf of all, attacked the validity of certain county bonds issued to aid in constructing a railway, prayed an injunction restraining the sheriff from collecting a tax levied for the payment of interest, and the county judge from making any further levies, and also a decree that the bonds were invalid, and that all the holders be brought in by publication and perpetually enjoined from collecting principal or interest; it was held: that the main controversy was as to the validity of the bonds; and therefore was not separable, when determining the jurisdictional amount, into controversies affecting the amount due from the separate taxpayers.²

The bill or petition must show the pecuniary interest of the parties on whose behalf the suit is brought.³

Such a suit, where the class is similarly situated, but not jointly interested, can only be maintained by a plaintiff whose individual interest exceeds the jurisdictional amount.⁴ Thus it

²⁸ E. A. Holmes & Co. v. U. S. Fire Ins. Co., 142 Fed. 863.

§ 17a. ¹ Hill v. Glasgow R. Co., 41 Fed. 610; Towle v. Am. Bldg., L. & Inv. Soc., 60 Fed. 131; Putnam v. Timothy, D. G. & C. Co., 79 Fed. 454; Johnston v. Pittsburgh, 106 Fed. 753; Taylor v. Decatur, M. & L. Co., 112 Fed. 449; Ottumwa v. City Water-Supply Co., C. C. A., 119 Fed. 315, 59 L.R.A. 604; Jones v. Mutual Fidelity Co., 123 Fed. 506; McKee v. Chautauqua Assembly, 124 Fed. 808. See taxpayers'

bills, § 14, *supra*; creditors' bills, § 15, *supra*; stockholders' bills, § 16, *supra*; and cases therein cited.

² Brown v. Trousdale, 138 U. S. 389, 11 Sup. Ct. 308, 34 L. ed. 987.

³ Adams v. Douglas County, Fed. Cas. No. 52; McCahon, 235, 1 Kans. 627; Sioux Falls Nat. Bank v. Swenson, 48 Fed. 621.

⁴ El Paso Water Co. v. El Paso, 152 U. S. 157, 159; Colvin v. Jacksonville, 158 U. S. 456, 460; Adams v. Douglas County, Fed. Cas. No. 52; McCahon, 235, 1 Kan. 627; Title

has been held that a landowner cannot sue on behalf of himself and all others similarly interested to enjoin a street railway company from crossing certain streets, where it is not shown that the injury to his property, if the injunction is not granted, would exceed \$3,000.⁵ Upon a bill by a bank, on behalf of itself and its stockholders, to enjoin taxes assessed against the bank and them, which did not aver that the plaintiff had in his hands, or under its control, any dividends belonging to the stockholders that could be applied to pay the taxes; it was held, that the claim was in separate and distinct rights, and that the jurisdictional amount must be determined by the amount of the tax against the complainant.⁶

§ 18. Value of the matter in dispute when there are joint defendants. Where two or more defendants are joined by the same plaintiff in one suit, the pecuniary test of jurisdiction is ordinarily the joint or several character of their liability. If their liability is joint, the value of the matters in controversy between the plaintiff and them all is that of the matter in dispute.¹ Where a number of claims are so tied together, by combination or conspiracy, as to make the relief single in regard to the same, the aggregate amount thereof is the pecuniary test of jurisdiction.² When several actions at law pending in a State court between the same parties, each for less than the jurisdictional amount but aggregating in excess thereof, all depend upon the same state of facts, and by stipulation judgment is entered in all in accordance with the result of the trial of one; a single suit in equity may be maintained to restrain the enforcement of all the judgments, on the ground of fraud in obtaining them, and such a suit may be removed.³ Where separate actions at law by insured against insurers on policies, to which the same defense was interposed, and under which the liability, if any, was proportional, were removed to the Federal court, with the excep-

Guaranty Co. v. Allen, 240 U. S. 136; Nolen v. Reichman, 225 Fed. 812.

⁵ Orleans-Kenner Electric Ry. Co. v. Dunbar, C. C. A., 218 Fed. 344.

⁶ Sioux Falls Nat. Bank v. Swenson, 48 Fed. 621.

§ 18. ¹ Western Union Tel. Co. v. Norman, 77 Fed. 13; Pacific

Live-Stock Co. v. Hanley, 98 Fed. 327.

² McDaniel v. Traylor, 212 U. S. 428, 53 L. ed. 584.

³ Marshall v. Holmes, 141 U. S. 589, 12 Sup. Ct. 62, 35 L. ed. 870; reversing Calhoun v. McKnight, 39 La. Ann. 325, 1 South. 612.

tion of one in which the amount involved was insufficient; it was held, that prosecution of this action, as well as of the others, might be enjoined by a bill in equity in the Federal court to have the liabilities of insurers there determined and adjusted.⁴ A suit by heirs, to set aside judgments, none of which exceeded \$2,000, rendered by a probate court against their ancestor's estate, through a fraudulent combination, was held to be within the jurisdiction of the Circuit Court of the United States when the real estate, upon which the judgments were liens, exceeded in value the jurisdictional amount.⁵

If the liability is several, ordinarily, the suit can only be sustained as against those whose respective controversies with the plaintiff involve matters exceeding, as regards each, the jurisdictional amount.⁶ Upon a creditors' bill, to enjoin the enforcement of several attachments against the debtor's property; it was held, that there was no jurisdiction, when the amount of none of the attachments exceeded the jurisdictional amount.⁷ Jurisdiction cannot be conferred on a court, to enjoin the collection of taxes assessed in several parishes by joining in one bill against the different collectors the whole amount of such taxes; the separate assessments not being sufficient to give jurisdiction.⁸ In a suit by a railroad company against officers of several counties,

⁴ Virginia-Carolina Chemical Co., v. Home Ins. Co., C. C. A., 113 Fed. 1.

⁵ McDaniel v. Traylor, 196 U. S. 415, 49 L. ed. 533, reversing 123 Fed. 338.

⁶ Where Rev. St. Wis. 1898, S. 2609a, authorized the joinder of several causes of action against several insurance companies liable for a single loss under several policies; *held*, that since, notwithstanding such joinder, the liability of each was separate, and not joint, the Federal court had no jurisdiction of such an action where the alleged liability of each insurance company did not exceed the jurisdictional amount. Wisconsin Cent. Ry. Co. v. Phoenix Ins. Co., 123 Fed. 989. Where Rev. St. Ind. 1881,

§ 2442 (Rev. St. 1894, § 2597), provided that "the heirs, devisees and distributees of a decedent shall be liable, to the extent of the property received by them from such decedent's estate, to any creditor whose claim remains unpaid;" *held*, that the liability of two or more heirs, devisees, or distributees of a decedent is several, and not joint, and, though another statute provides that they may be jointly sued, the Federal court has no jurisdiction of a suit against them unless the liability of each exceeds such amount. Busey v. Smith, 67 Fed. 13.

⁷ Chamberlain v. Browning, 177 U. S. 605 (appellate jurisdiction).

⁸ Citizens' Bank of Louisiana v. Cannon, 164 U. S. 319, 41 L. ed. 451.

to avoid assessments and taxes levied on its lands, the amount involved cannot be brought within the jurisdiction of the District Court by taking the aggregate of the sums involved as to each defendant; but the jurisdiction as to each must be determined by the amount in controversy between him and the railroad company.⁹ But where a board imposed a uniform acreage tax upon the lands of the complainant in different counties it was held that the collector in each county could be joined in the suit although in one of the counties the tax was less than the jurisdictional amount.¹⁰ To give a District Court jurisdiction of a suit to quiet title to a tract of land, in which a number of persons are joined as defendants, between whom no privity of title exists, and each of whom claims title to a separate part of the tract; the value of the property in controversy between each defendant and the complainant must exceed the jurisdictional amount.¹¹ In a suit in a District Court against a number of defendants, to quiet title to a tract of land alleged to be of sufficient value to sustain the jurisdiction of the court; it must appear from the bill, that all the defendants have a privity of interest, derived from a common source of title, or that the separate claim of each defendant is of the jurisdictional amount; since, where the defendants claim separately, the suit is separable, and the requisite amount must be involved in each separate controversy.¹² It was held: that two of several tenants in common, who were citizens of another State and had been joined in condemnation proceedings with their co-tenants and the mortgagees of the interest of one of the others who were citizens of the same State as plaintiff, were not entitled to a removal of the proceedings to the Federal Court, when the aggregate of their claims exceeded the jurisdictional sum, but the amount of their separate claims was less than that amount.¹³

⁹ *Walter v. Northeastern R. Co.*, 147 U. S. 370, 37 L. ed. 206; *Keels v. Central R. Co.*, 147 U. S. 374, 37 L. ed. 208; *Northern Pac. R. Co. v. Walker*, 148 U. S. 391, 37 L. ed. 494; *Fishback v. W. U. Tel. Co.*, 161 U. S. 96, 40 L. ed. 630.

¹⁰ *Everglades Drainage League v. Napoleon B. Broward Drainage Dist.*, 256 Fed. 246.

¹¹ *Stemmler v. McNeill*, 102 Fed. 660.

¹² *Stemmler v. McNeill*, 102 Fed. 660; distinguishing *Bates v. Carpenter*, 98 Fed. 452; *Cooper v. Preston*, 105 Fed. 403.

¹³ *Trotier v. St. Louis, B. & S. Ry. Co.*, 54 N. E. 487, 180 Ill. 471; *Texas & P. Ry. Co. v. Dishman & Tribble (Texas)*, 85 S. W. 319.

But in some cases, in the nature of bills of peace, when defendants had committed or threatened separate infringements of the same right of the plaintiff; it was held, that the value of such right was the test.¹⁴ In a suit to quiet the title to several tracts of land, held by different defendants under separate patents, which plaintiff claimed as assignee of several contracts by the same county officer; each providing that on payment of the purchase price, therein specified, a patent should issue for the land, therein described; the bill alleging that the purchase money had been duly tendered to the county officers, who were made parties to the bill, and not accepted by them, and praying that the patentees be decreed to hold the land in trust for the plaintiff; it was held: that, for the purpose of determining the jurisdiction of the Supreme Court upon appeal, the suit was to be considered as in effect for specific performance of the county's contracts, and the matter in dispute was the aggregate amount tendered to the county officers, although each several interest of the patentees was insufficient had its owner been the sole respondent.¹⁵ It was held: that a bill for an injunction against taxes, brought by a railroad company against a revenue agent who represented all the parties interested, sufficiently stated the jurisdictional amount, when it alleged that the taxes assessed amounted to a much larger sum, which was specified: and that a question not arising on the face of the bill as to how the taxes, when collected, should be disposed of, and in what proportions and amounts they should be parcelled out to interested municipalities, was immaterial.¹⁶ In a suit by a railroad company against a number of landowners, to enjoin threatened interference with its use of its right of way through their lands; it was held, that the value of the right sought to be protected, and not the value of the land constituting the right of way across the lands of defendants, constituted the jurisdictional test.¹⁷ It was held: that a bill, to enjoin defendants from diverting the waters of a stream, in violation of complainant's prior right thereto, which

¹⁴ *Louisville & N. R. Co. v. Bit-
terman*, C. C. A., 144 Fed. 34.

¹⁵ *Corbin v. County of Black
Hawk*, 105 U. S. 659, 664, 26 L. ed.
1136.

¹⁶ *Illinois Cent. R. Co. v. Adams*,

180 U. S. 28, 21 Sup. Ct. 251, 45 L.
ed. 410. Similar is *Western Union
Tel. Co. v. Norman*, 77 Fed. 13.

¹⁷ *Louisville & N. R. Co. v. Smith*,
C. C. A., 128 Fed. 1, 63 C. C. A. 1.

was alleged to be of the value of \$2,000, and also to recover damages in the sum of \$2,500, sustained by complainant by reason of the joint action of defendants in diverting such waters, showed the amount in controversy to be sufficient.¹⁸ In suits by railway carriers, to restrain different scalpers from buying and selling tickets, which were not transferable; it was held, that the value of the matter in dispute was that of the right to the injunction; and the jurisdiction was sustained, although none of the defendants had dealt in, or threatened to deal in, tickets of the jurisdictional amount.¹⁹ It was held that where the plaintiff failed to prove combination between the defendants, such a bill was properly dismissed.²⁰ Where a bill had been dismissed, which had been filed by a creditor preferred under an assignment, praying for a declaration that the assignment, with its preferences, was valid and that different attaching creditors, each of whose claim was less than the jurisdictional amount, be enjoined from enforcing attachments levied by them separately; it was held, that the amount of the complainant's preferred claim, which exceeded that sum, was the test of the jurisdiction of the appellate court.²¹

§ 19. Consideration of interest in estimating the value of the matter in dispute. The interest excluded from the computation includes interest accrued on the demand, before the suit was brought, and which is collected only as an incident of the principal; ¹ but not interest, which is the subject of a separate contract as a coupon, and which might be the subject of a separate suit.² The face value of coupons due before the suit, may be added to the principal named in the bond when the jurisdictional amount is determined; ³ except, it has been held in a single case, where

¹⁸ *Morris v. Bean*, 123 Fed. 618.

A similar ruling was made in *Pacific Live Stock Co. v. Hanley*, 98 Fed. 327.

¹⁹ *Nashville, C. & St. L. Ry. Co. v. McConnell*, 82 Fed. 65; *Louisville & N. R. Co. v. Bitterman*, C. C. A., 144 Fed. 34; s. c., 207 U. S. 205, 52 L. ed. 171.

²⁰ *McDaniel v. Traylor*, 212 U. S. 428, 53 L. ed. 584.

²¹ *Estes v. Gunter*, 121 U. S. 183, 30 L. ed. 884.

§ 19. ¹ *Moore v. Edgefield*, 32 Fed. 493; *Simmons v. Mutual Reserve Fund Life Ass'n*, 114 Fed. 785; *Gilson v. Mutual Reserve Fund Life Ass'n*, 129 Fed. 1003.

² *Edwards v. Bates County*, 163 U. S. 269, 16 Sup. Ct. 967, 41 L. ed. 155; overruling *Howard v. Bates County*, 43 Fed. 276.

³ *Edwards v. Bates County*, 163

the day of payment, named in the bond, had not yet arrived, but by its terms it became due on the nonpayment of a coupon for interest; it being said by the court, that "the coupons cannot be considered as interest, for the purpose of maturing the debt, and as separate distinct obligations for the purpose of giving this court jurisdiction."⁴ Interest, which has accrued upon bonds and coupons after their maturity, cannot be considered.⁵ Where the relief sought did not include interest as such, together with a principal to which it was incidental; but a calculation of interest was used as an instrumentality in determining the amount of damages caused by a breach of warranty,⁶ or by fraudulent misrepresentations as to the value of stock⁷ and for the conversion of a written obligation;⁸ and where interest was claimed as damages, although not provided for in the contract;⁹ it was held: that such interest was a part of the jurisdictional amount. Where the bill claimed payment of a sum as the amount of a debt for an advance by a building and loan association; it was held, that the court could not arbitrarily assume that this was usurious interest cloaked with such name.¹⁰ In a suit to foreclose a mortgage, insurance premiums paid by the mortgagee, when claimed in the bill, are considered to be a part of the jurisdictional amount.¹¹

§ 20. Consideration of costs in estimating the value of the matter in dispute. Notarial fees for the presentment and protest of a note in suit, although paid before the action was brought, were considered to be costs, not damages, and excluded

U. S. 269, 16 Sup. Ct. 967, 41 L. ed. 155.

⁴ *Home and Foreign Inv. & Agency Co. v. Ray*, 69 Fed. 657.

⁵ *Greene County v. Kortrecht*, C. C. A., 81 Fed. 241.

⁶ *Brown v. Webster*, 156 U. S. 328, 39 L. ed. 440. See *Central Commercial Co. v. Jones-Dusenbury Co.*, C. C. A., 251 Fed. 13.

⁷ *Chesbrough v. Woodworth*, C. C. A., 251 Fed. 881.

⁸ *Intermela v. Perkins*, C. C. A., 205 Fed. 603.

⁹ *Continental Casualty Co. v.*

Spradlin, C. C. A., 170 Fed. 322; *Central Commercial Co. v. Jones-Dusenbury Co.*, C. C. A., 237 Fed. 13. *Contra*, *Voorhees v. Aetna Life Ins. Co.*, 250 Fed. 484; *A. H. Marshall Co., Inc. v. Buick Motor Co.*, 251 Fed. 685.

¹⁰ *Bldg. & L. Ass'n v. Price*, 169 U. S. 45, 42 L. ed. 655, 18 S. Ct. 251; *Turner v. Southern H. Bldg. & L. Ass'n*, C. C. A., 101 Fed. 308; *Building & Loan Ass'n of Dakota v. Cunningham (Texas)*, 47 S. W. 714.

¹¹ *Coolidge v. Ray*, 75 Fed. 39.

from the computation of the jurisdictional amount.¹ It has been held: that where a statute authorizes the inclusion of an attorney's fee in the judgment, the same is part of the costs and is not included in the jurisdictional amount;² but the case is otherwise where the fee is awarded by stipulation and not by statute.³ Where a suit was brought to enjoin a public officer from issuing certain certificates without the payment of costs and penalties which had accrued before the purchase, such costs were included in computing the jurisdictional amount.⁴

§ 21. Consideration of counterclaims in estimating the value of the matter in dispute.—Whether the amount of a counterclaim, pleaded by the defendant, should be added to that of the plaintiff's claim, to determine the jurisdictional amount, has been the subject of conflicting adjudications.¹ It has been held that the question is so doubtful that a motion to remand the cause in such a case should be granted.² Where the suit was one

¹ 20. *Baker v. Howell*, 44 Fed. 113. *Contra*, *Dallyn v. Brady*, 205 Fed. 430.

² *Peters v. Queen Ins. Co. of America*, 182 Fed. 113.

³ *Rogers v. Riley*, 85 Fed. 471; *Springstead v. Crawfordsville State Bank*, 231 U. S. 541; *LeRoy v. Hartwick*, 229 Fed. 857. See *Lee Line Steamers v. Robinson*, C. C. A., 232 Fed. 417, 418.

⁴ *Glen Ins. Co. v. Romero*, County Treasurer, C. C. A., 254 Fed. 233.

§ 21. ¹ Held, that it should be: in *Stinson v. Dousman*, 20 How. (U. S.) 461, 464, 467, 15 L. ed. 966, 968, 969 (appellate jurisdiction in equity); *Lovell v. Cragin*, 136 U. S. 130, 34 L. ed. 372 (appellate jurisdiction in equity); *Kirby v. Am. Soda Fountain Co.*, 194 U. S. 141, 48 L. ed. 911, 24 Sup. Ct. 619 (jurisdiction of Circuit Court where cross-bill was filed); *Clarkson v. Manson*, 4 Fed. 257 (18 Blatchf. 443); *Carson & R. L. Co. v. Holtzclaw*, 39 Fed. 578; *Wolcott v. Watson*, 46 Fed. 529; *Wolcott v.*

Sprague, 55 Fed. 545; *Lee v. Continental Ins. Co.*, 74 Fed. 424; *Price & Hart v. T. J. Ellis & Co.*, 129 Fed. 482; *American Sheet & Tin Plate Co. v. Winzeler*, 227 Fed. 321; *Central Commercial Co. v. Jones-Dusenbury Co.*, 251 Fed. 13; *Clarkson v. Manson* (N. Y.), 60 How. Pr. 45; reversing 59 How. Pr. 480. See *Champion v. Grand Rapids, etc., Ry. Co.*, 145 Mich. 676, 108 N. W. 1078. *Contra*, *Falls W. Mfg. Co. v. Broderick*, 6 Fed. 654; *La Montague v. T. W. Harvey Lumber Co.*, 44 Fed. 645; *Bennett v. Devine*, 45 Fed. 705; *Industrial & Mining Guaranty Co. v. Electrical Supply Co.*, 58 Fed. 732, 7 C. C. A. 471, 16 U. S. App. 196 (cross-bill); *McKown v. Kansas & T. Coal Co.*, 105 Fed. 657. *Cf.* *West v. Aurora City*, 6 Wall. 139, 18 L. ed. 819; *McGinity v. White*, 3 Dillon, 350; s. c., Fed. Cas. No. 8,802; *Sturgeon River Boom Co. v. W. H. Sawyer Lumber Co.*, 89 Fed. 113.

² *Crane Co. v. Guancia Centrale* (S. D. N. Y.) 132 Fed. 713.

appealed from a justice to the State Circuit Court, and defendant filed there a plea of set-off, claiming \$3,000 against plaintiff, but under the statute of Tennessee he could recover no more than \$500 in such court; it was held, that the latter sum was the matter in dispute, and the Federal court could have no jurisdiction by removal under the act of 1875.³ Where the counterclaim belongs to a class which by the State practice is barred unless pleaded in the suit; it must be added to the sum demanded by the plaintiff when determining the jurisdictional amount.⁴ It has been said that a defendant who pleads a counterclaim in a court of the United States is estopped from denying jurisdiction because of the insufficiency of the amount in dispute.⁵ An adjudication sustaining a set-off, counterclaim, or partial defense, so as to reduce the recovery below the jurisdictional amount, something still being allowed the plaintiff, is no reason for a dismissal or remand; provided that it does not appear that the original claim was exaggerated in bad faith.⁶ The filing of a cross-bill, by one defendant against another, does not deprive him of the right of removal.⁷ It has been held: that the pleading in a State court, by the original defendant, of a counterclaim, or demand in reconvention, which exceeds the jurisdictional amount, does not put the original plaintiff in the position of a defendant so that he can remove the case.⁸

§ 22. Effect of admissions by the defendant upon the value of the matter in dispute. An admission or disclaimer, in the defendant's answer, which makes the subsequent matter in dis-

³ *New York I. & P. Co. v. Milburn Gin & Machine Co.*, 35 Fed. 225. *Cf. Bennett v. Forrest*, 69 Fed. 421.

⁴ *Lee v. Continental I. & S. Co.*, 74 Fed. 424.

⁵ *O. J. Lewis Mercantile Co. v. Klepner*, C. C. A., 176 Fed. 343.

⁶ *Lozano v. Wehmer*, 22 Fed. 755; *Peeler v. Lathrop*, 48 Fed. 780, 1 C. C. A. 93, 2 U. S. App. 40; *Wheeler Bliss Mfg. Co. v. Pickham*, 69 Fed. 419; *Stillwell-Bierce & Smith-Vaile Co. v. Williamston Oil & Fertilizer Co.*, 80 Fed. 68; *Wash-*

ington County v. Williams, 111 Fed. 801, 49 C. C. A. 621.

⁷ *Jackson & S. Co. v. Pearson*, 60 Fed. 113, 123. *Contra Bennett v. Devine*, 45 Fed. 705 (counterclaim).

⁸ *Waco Hardware Co. v. Michigan Stove Co.*, C. C. A., 91 Fed. 289; *McKown v. Kansas & T. Coal Co.*, 105 Fed. 657; *Smithers v. Smith (Texas)*, 80 S. W. 646; rehearing granted 81 S. W. 283. *Contra, Price & Hart v. T. J. Ellis & Co.*, 129 Fed. 482.

pute less than the jurisdictional amount, will not divest the Federal court of jurisdiction of a suit begun there by the plaintiff;¹ but where the plaintiff sued to recover the possession of a large tract of land, and the defendant, in a plea of abatement, denied that he was in possession of more than a small part of the same, and alleged that the value thereof was less than the jurisdictional amount; the court intimated without deciding that the jurisdiction might be thereby defeated.² Whether such an admission or disclaimer will defeat the right of removal has not yet been authoritatively decided.³ Where the defendant, before a removal was attempted, admitted the plaintiff's claim, but disputed the validity of an attachment in the case, and made no formal claim for damages; it was held, that sufficient did not appear to show that the matter in dispute exceeded the jurisdictional amount, although the property attached was more than such sum.⁴

§ 23. Effect of a defense apparent in the plaintiff's pleading upon the value of the matter in dispute. The fact that the plaintiff's pleading shows a sufficient defense to part of his claim to reduce it below the jurisdictional amount, does not divest the court of jurisdiction;¹ unless it is apparent that such part of the

§ 22. ¹ *Re Metropolitan Railway Receivership*, 208 U. S. 90, 52 L. ed. 403, in which the author was counsel; *Fuller v. Metropolitan Life Ins. Co.*, 37 Fed. 163; *Stillwell-Bierce & Smith-Vaile Co. v. Williamston Oil & Fertilizer Co.*, 80 Fed. 68.

² *Jones v. Rowley*, 73 Fed. 286.

³ A decision of a State court seems to hold that it will defeat the right of removal. *Thompson v. Kendrick's Lessee*, 6 Tenn. (5 Hayw.) 113. But see *supra*, § 6. See *Cooper v. Preston*, 105 Fed. 403.

⁴ *Keith v. Levi*, 2 Fed. 743 (1 McCrary, 343).

§ 23. ¹ *Schunk v. Moline, Milburn & Stoddart Co.*, 147 U. S. 500, 13 Sup. Ct. Rep. 416, 37 L. ed. 255, following *Gaines v. Fuentes*, 92 U.

S. 10, 23 L. ed. 524; *Upton v. McLaughlin*, 105 U. S. 640, 26 L. ed. 1197, and distinguishing *Bowman v. Chicago & N. W. Ry. Co.*, 115 U. S. 611, 6 Sup. Ct. 192, 29 L. ed. 502; *Johnston v. Straus*, 26 Fed. 57; *Hardin v. Cass County*, 42 Fed. 652 (statute of limitations); *Industrial & Min. G'y. Co. v. Electrical Supply Co.*, C. C. A., 58 Fed. 732; *Bank of Arapahoe v. David Bradley & Co.*, C. C. A., 72 Fed. 867; *Interstate Building & Loan Ass'n v. Edgefield Hotel Co.*, 109 Fed. 692; *Waterfield v. Rice*, 111 Fed. 625, 49 C. C. A. 504 (statute of limitations); *Washington County v. Williams*, C. C. A., 111 Fed. 801, 811; *Board of Com'rs of Kearny County, Kan. v. Vandriss*, C. C. A., 115 Fed. 866 (statute of limitations); *Armstrong v. Walters*,

claim was not made in good faith, but was manifestly fictitious;² or else that the court has no jurisdiction thereof.³

§ 24. Suits arising under the Constitution or laws of the United States. In general. A suit arises under the Constitution or law of the United States whenever its correct decision depends on the construction of either.¹

219 Fed. 320; *Mullin Lumber Co. v. Williamson & Brown Land & Lumber Co.*, C. C. A., 246 Fed. 232.

² *Edwards v. Bates County*, 55 Fed. 436; reversed on another point, 163 U. S. 269, 273; *Chicago Cheese Co. v. Fogg*, 53 Fed. 72.

³ *Coulter v. Fargo*, 127 Fed. 912, 62 C. C. A. 144.

§ 24. 1 *Cohens v. Virginia*, 6 Wheat. 264, 379, 5 L. ed. 257, 285; *Feibelman v. Packard*, 109 U. S. 421, 27 L. ed. 984; *Tennessee v. Davis*, 100 U. S. 257, 264, 25 L. ed. 648, 650; *Starin v. New York*, 115 U. S. 248, 257, 29 L. ed. 388, 390; *Southern Pac. R. Co. v. California*, 118 U. S. 109, 112, 30 L. ed. 103, 104; *Wiley v. Sinkler*, 179 U. S. 58, 45 L. ed. 84; *Swafford v. Templeton*, 185 U. S. 487, 46 L. ed. 1005; *New Orleans v. Seixas (Louisiana)*, 35 La. Ann. 36; *McKee v. Brooks (Texas)*, 64 Tex. 255. Complainant brought suit in a State court to subject a judgment, obtained by the defendant against the United States in the Court of Claims, to the payment of a judgment he had against defendant, and for an injunction to restrain defendant from collecting, transferring, or otherwise disposing of said claim against the government, and for the appointment of a receiver to collect and hold the fund. The suit was removed to the United States court, and, upon motion to remand, held that it involved the construction of R. S. § 3477, which declares that all "transfers

and assignments made of any claim upon the United States * * * shall be absolutely null and void, unless they are freely made, and executed in the presence of at least two attesting witnesses," &c., and the motion was therefore denied. *Willard v. Mueller*, 23 Fed. 209. A proceeding to exclude a bridge company from the use of a franchise to operate railroad tracks in a public street does not raise a Federal question, although such tracks lead to its bridge, built under Acts July 14, 1862, and Feb. 17, 1865, authorizing the construction of a railroad bridge over the Ohio river, and declaring that it "shall be a lawful structure, and shall be recognized and known as a post route," since those acts do not attempt to give the right to the use of the street as an approach. *Kentucky v. Louisville Bridge Co.*, 42 Fed. 241. In an action against a railroad company to enforce a schedule of rates adopted by the railroad commission, the State court refused to remove the cause to the Federal court on the ground that under Act of Congress of July 25, 1866, its road in the State was made subject to national control only, and therefore was not subject to State legislation; the act referred to giving defendant's lessor aid in the construction of the road, which in all other matters was to be governed by the law of the State. *State v. Southern Pac. Co.*, 23 Or. 424, 31 Pac. 960. No removable question

It has been said: that a suit cannot be removed, from a State court to a Federal court, simply because, in its progress, a construction of the Constitution or of a law of the United States may be necessary, unless it, in part at least, arises out of a controversy in regard to the operation and effect of some provision in such Constitution or law upon the facts involved.²

The mere fact that, in the progress of the trial of a case, it may become necessary to construe the Constitution or laws of the United States, does not give the Federal courts jurisdiction thereof; but the decision must depend on such construction.^{2a}

In order to remove a cause, on the ground that it arises under a statute of the United States, the record must affirmatively show, from the facts alleged, that some disputed construction of the statute will arise for decision. Where the contest is about the facts only, there can be no removal.³ A case removed to a Federal court, on the ground that the suit arose under the Constitution or laws of the United States, will be remanded where

arises from the fact that plaintiff acquired title from the United States to the funds loaned defendant, and to recover which suit is brought. *Houston & T. C. R. Co. v. State (Texas)*, 41 S. W. 157. The State of South Carolina filed a bill in one of its own courts, alleging that defendant corporation was chartered by the State to build and operate a railroad between the interior and the seaboard; that since it was built the Central Company, a Georgia corporation, and a competitor of defendant, had purchased enough of the stock and bonds of defendant to give it control of the corporation, and had diverted the business of defendant, and crushed competition; that the Central Company had no power to purchase stock in defendant corporation, and that the latter was disabled to fulfill the purposes for which it was chartered. It prayed that such holdings by the Central Company be declared *ultra vires*, and that defendant's charter

be forfeited. The petition for removal alleged that the Central Company was an instrument of interstate commerce, and that for the purposes of such commerce, and under the interstate commerce clause of the Constitution and the laws passed in pursuance thereof, it had power to purchase defendant's stock, and control its operation. *Held*, that the determination of the controversy thus developed involved the construction of the Constitution and laws of the United States and so presented a Federal question. *South Carolina v. Port Royal & A. R. Co.*, 56 Fed. 333.

² *Gold Washing & Water Co. v. Keyes*, 96 U. S. 199, 24 L. ed. 656; 38 St. at L. 583, Comp. St. § 4125b *Bankers Trust Co. v. Tex. & Pac. Ry.*, 241 U. S. 295; *Wise v. Nixon*, 78 Fed. 203.

^{2a} *Wise v. Nixon*, 78 Fed. 203.

³ *Austin v. Gagan*, 39 Fed. 626, 5 L.R.A. 476.

the record fails to show: that there will arise some contested point of law depending upon the Constitution or laws of the United States, what the question is and how it will arise.⁴ It has been said: that a cause is not removable simply because an act of Congress must be construed or applied; but that there must be a dispute as to the construction of the act, and facts to show the dispute must appear in the record.⁵

A suit to determine the validity of the action of State authorities with reference to a tax imposed by the United States involves a Federal question.⁶ It has been held: that a cause involving the question whether an express company or its customer must furnish the stamp required by the war revenue act of 1898, to be affixed to a receipt given by the company is one arising under a law of the United States;⁷ but that a suit between two companies to determine which of them is liable for the income tax upon dividends does not, although the collector is joined as a defendant, when no controversy is raised effecting the rights of the United States.⁸ It has been held that Federal questions are raised in suits brought by a State attorney general, to test the validity of a consolidation of railroad companies, which affect their rights under acts of Congress.⁹ It has been said that where the plaintiff pleads a breach of the rules and regulations made by a Department of the United States, the case does not arise under a law of the United States, unless a recovery of damages for a disregard of such regulations is expressly authorized by statute.¹⁰

Suits against directors of national banks for damages sustained by individuals in consequence of violation of the National Banking Laws.¹¹ Suits for malicious prosecution or false imprisonment upon a charge of the violation of a law of the United States,¹² or where the illegality depends upon a right granted

⁴ *McFadden v. Robinson*, 22 Fed. 10, 10 *Sawyer*, 398.

⁵ *Fitzgerald v. Missouri Pac. R. Co.*, 45 Fed. 812.

⁶ *Dinsmore v. Southern Exp. Co.*, 92 Fed. 714.

⁷ *Crawford v. Hubbell*, 89 Fed. 1. See, however, *Attorney General v. American Express Co. (Michigan)*, 77 N. W. 317.

⁸ *Rensselaer & S. R. Co. v. Dela-*

ware & Hudson Co., C. C. A., 257 Fed. 555.

⁹ *Ames v. Kansas*, 111 U. S. 449, 28 L. ed. 482.

¹⁰ *Beck v. Johnson*, 169 Fed. 154, 163.

¹¹ *Chesbrough v. Woodworth*, 244 U. S. 72. See *infra* § 28.

¹² *Ma-ka-ta-wah-quaw-twa v. Rebok*, 111 Fed. 12.

by a statute of the United States;¹³ an action for damages for preventing plaintiff from voting at a Congressional election;¹⁴ but not under ordinary circumstances a controversy as to the right to the custody of an Indian child;¹⁵ arise under the laws of the United States.

The Federal question in the case must be substantial, and not merely colorable.¹⁶ "When a proposition has once been decided by the Supreme Court of the United States; it can no longer be said that in it there still remains a Federal question."¹⁷ The right of removal of a suit involving a Federal question, is not affected by the fact that the Supreme Court has laid down, in previous decisions on different facts, general principles, which will probably control the decision.¹⁸ It was said: that the decisions of the Supreme Court, in cases from the Circuit Courts, and those on writs of error to State courts were equally instructive in determining when there is a Federal question, such as to support the jurisdiction of the Circuit Court, originally or upon removal.¹⁹ Where the complaint shows upon its face, that the

¹³ *Peters v. Malin*, 111 Fed. 244.

¹⁴ *Knight v. Shelton*, 134 Fed. 423.

¹⁵ *In re Celestine*, 114 Fed. 551.

¹⁶ *Starin v. New York*, 115 U. S. 248, 257, 29 L. ed. 388, 390; *Southern Pac. R. Co. v. California*, 118 U. S. 109, 112, 30 L. ed. 103, 104; *New Orleans v. Benjamin*, 153 U. S. 411, 38 L. ed. 764; *St. Joseph & G. I. R. Co. v. Steele*, 167 U. S. 659, 42 L. ed. 315; *McCain v. Des Moines*, 174 U. S. 168, 43 L. ed. 936; *W. U. Tel. Co. v. Ann Arbor R. Co.*, 178 U. S. 239, 44 L. ed. 1052; *Swafford v. Templeton*, 185 U. S. 457, 494, 46 L. ed. 1005, 1008; *Cummings v. Chicago*, 188 U. S. 410, 47 L. ed. 525; *Bankers' Mut. Casualty Co. v. Minneapolis, St. P. & S. S. M. Ry. Co.*, 192 U. S. 371, 48 L. ed. 484; *Underground R. R. Co. v. New York*, 193 U. S. 416, 48 L. ed. 733; *Barney v. New York*, 193 U. S. 430, 48 L. ed. 737; *Newburyport Water Co. v. Newburyport*, 193 U. S. 561, 48 L. ed. 795; *Sloan v. U. S.*, 193 U. S.

614, 48 L. ed. 814; *Farrell v. O'Brien*, 199 U. S. 89, 50 L. ed. 101; *Harris v. Rosenberger*, C. C. A., 145 Fed. 449; *Blue Bird Min. Co. v. Largey*, 49 Fed. 289, 291; *St. Louis, I. M. & S. Ry. Co. v. Davis*, 132 Fed. 629; *Montana Catholic Missions v. Missoula County*, 200 U. S. 118, 50 L. ed. 398.

¹⁷ *Brewer, J.*, in *Kansas v. Bradley*, 26 Fed. 289, 290. See *Western Union Tel. Co. v. Ann Arbor R. Co.*, 178 U. S. 239, 44 L. ed. 1052, reversed 90 Fed. 379, 33 C. C. A. 113; *Kentucky v. Louisville Bridge Co.*, 42 Fed. 241; *People of State of California v. Brown's Valley Irr. Dist.*, 119 Fed. 535; *Arkansas v. Choctaw & M. R. Co.*, 134 Fed. 106; *Myrtle v. Nevada, C. & O. Ry. Co.*, 137 Fed. 193; *Harris v. Rosenberger*, C. C. A., 145 Fed. 449.

¹⁸ *Mallon v. Hyde*, 76 Fed. 388.

¹⁹ *Nashville, C. & St. L. Ry. Co. v. Taylor*, 86 Fed. 168.

relief sought would be inconsistent with a provision of the Federal Constitution, such as the grant of power to regulate commerce between the States, or the Fourteenth Amendment; this only demonstrates that the suit cannot be maintained at all, not that the cause of action arises under the Constitution or laws of the United States.²⁰ Where the plaintiff sought to recover damages because the defendant, as Chief Justice of the Superior Court of the State, had remitted a case to an inferior court; it was held, that there was nothing to show a ground of Federal jurisdiction.²¹

A suit does not arise under the Constitution or law of the United States, unless the Federal question appears clearly, not merely by inference,²² upon the face of the plaintiff's initial pleading in his statement of his own case,²³ and in a necessary allegation in such pleading.²⁴ In a suit to remove a cloud from

²⁰ *Arkansas v. Kansas & T. Coal Co.*, 183 U. S. 185; *South Carolina v. Virginian-Carolina Chemical Co.*, 117 Fed. 727, 731. See *Washington v. Island Lime Co.*, 117 Fed. 777.

²¹ *Kinney v. Mitchell*, 138 Fed. 270.

²² *Hanford v. Davies*, 163 U. S. 273, 41 L. ed. 157; *W. U. Tel. Co. v. Ann Arbor R. Co.*, 178 U. S. 239, 44 L. ed. 1052.

²³ *Chappell v. Waterworth*, 155 U. S. 102, 39 L. ed. 85; *Tennessee v. Union and Planters' Bank*, 152 U. S. 454, 38 L. ed. 511; *Postal Tel. Cable Co. v. Alabama*, 155 U. S. 482, 39 L. ed. 231; *East Lake Land Co. v. Brown*, 155 U. S. 488, 39 L. ed. 233; *Oregon Short Line & U. N. R. Co. v. Skottowe*, 162 U. S. 490, 40 L. ed. 1048; *Walker v. Collins*, 167 U. S. 57, 42 L. ed. 76; *Galveston, H. & S. A. Ry. Co. v. State of Texas*, 170 U. S. 226, 42 L. ed. 1017; *Third St. & S. Ry. Co. v. Lewis*, 173 U. S. 457, 43 L. ed. 766; *Minnesota v. Northern Securities Co.*, 194 U. S. 48, 48 L. ed. 870; reversing 123 Fed. 692; *Iowa v. Chicago, M. & St. P.*

R. Co., 33 Fed. 391; appeals dismissed, *Chicago, M. & St. P. Ry. Co. v. Iowa*, 145 U. S. 632, 36 L. ed. 857; *Haggin v. Lewis*, 66 Fed. 199; *Caples v. Texas & P. R. Co.*, 67 Fed. 9; *Holland v. Texas & P. R. Co.*, 67 Fed. 9; *Cruz v. Texas & P. R. Co.*, 67 Fed. 9; *Wichita Nat. Bank v. Smith*, 72 Fed. 568, 19 C. A. 42, 36 U. S. App. 530; *Florida v. Charlotte Harbor Phosphate Co.*, 74 Fed. 578, 20 C. C. A. 538, 41 U. S. App. 405; *Dewey Min. Co. v. Miller*, 96 Fed. 1; *South Carolina v. Virginia-Carolina Chemical Co.*, 117 Fed. 727; *Wichita v. Missouri & K. Telephone Co.*, 122 Fed. 100; *Darton v. Sperry (Connecticut)*, 41 Atl. 1052, 71 Conn. 339; *Mills v. Central R. Co. of New Jersey (New Jersey)*, 7 N. J. Law J. 230; *State v. Port Royal & A. Ry. Co. (South Carolina)*, 45 S. C. 413, 23 S. E. 363; *Texas & P. Ry. Co. v. Caples (Texas)*, 36 S. W. 516.

²⁴ *Wise v. Nixon*, 78 Fed. 203; *California Oil & Gas Co. of Arizona v. Miller*, 96 Fed. 12; *Henuy v. La Compagnie Generale Transatlan-*

the plaintiff's title, the facts which show his title and the existence and invalidity of the paper sought to be cancelled are essential parts of the plaintiff's equity which must be alleged in the bill and if they show that a Federal question is involved, the Federal Court has jurisdiction.²⁵ The appearance of a Federal question in the defendant's answer,²⁶ or petition for removal,²⁷ or even, it has been held, in his demurrer,²⁸ or in the plaintiff's pleading in reply or rebuttal,²⁹ or in a bill of repleader by the plaintiff,³⁰ is insufficient. A Federal question, first raised by the defendant, must be tried by the State court, subject to review by the Supreme Court of the United States upon writ of error.³¹ To give a court of the United States jurisdiction of a cause, on the ground that it presents a Federal question, such question

tique, etc., 96 Fed. 497; *Filhiol v. Torney*, 119 Fed. 974; *McLane v. Leicht (Iowa)*, 69 Ia. 401, 29 N. W. 327.

²⁵ *Hopkins v. Walker*, 244 U. S. 486; *Lancaster v. Kathleen Oil Co.*, 241 U. S. 551.

²⁶ *Guarantee Co. of North Dakota v. Hanway*, 104 Fed. 369, 44 C. C. A. 312; *Lincoln v. Lincoln St. Ry. Co.*, 77 Fed. 658; *Broadway Ins. Co. v. Chicago G. W. Ry. Co.*, 101 Fed. 507; *Ralya Market Co v. Armour & Co.*, 102 Fed. 530; *Mayo v. Dockery*, 108 Fed. 897; *Mitchell Engineering & Machinery Co. v. Worthington*, 140 Fed. 947; *Cella v. Brown*, 144 Fed. 742. It has been held that this rule does not apply where the cause of action arose in a district ceded by a State to the United States.

"The rule is applicable rather to provisions of the Constitution and laws in effect throughout the United States than to laws depending for their effect upon the territorial jurisdiction, as in the case of reservations and sites purchased for federal purposes and uses. In the first class, the state's jurisdiction is gen-

eral, and the federal jurisdiction exceptional, and therefore to be made specially to appear. But, when the federal jurisdiction originates because of the territory within which the cause of action arose, its jurisdiction is general, and that of the state—so far as it exists—exceptional. The reason upon which the rule is based, then, requires the state's jurisdiction, rather than that of the federal courts, to be specially shown." *Steele v. Halligan*, 229 Fed. 1110, 1119.

²⁷ *Ibid.* *Bronson v. Board of Sup'rs of Emmet and Kossuth Counties (Iowa)*, 237 Fed. 212.

²⁸ *Indiana v. Alleghany Oil Co.*, 85 Fed. 870; *Shields v. Boardman*, 98 Fed. 455.

²⁹ *Houston & T. C. R. Co. v. State (Texas)*, 41 S. W. 157; *Houston & T. C. R. Co. v. State of Texas*, 177 U. S. 66, 44 L. ed. 673. But see, *Smith v. Greenhow*, 109 U. S. 669, 27 L. ed. 1080.

³⁰ *Cella v. Brown*, 144 Fed. 742.

³¹ *Tennessee v. Union & Planters' Bank*, 152 U. S. 451, 462, 38 L. ed. 511, 514.

must appear from plaintiff's statement of his own cause of action, and his right to the relief sought must depend directly upon the construction of some provision of the Constitution or laws of the United States.³² Where the controversy might have arisen both under the laws in the United States and under the common law or a State statute, the complaint must clearly show that it arises under the former.³³ Jurisdiction cannot be sustained upon allegations that defendant does or may assert some right under such Constitution or laws as a defense.³⁴ An averment by the plaintiff, that the defendant will set up a defense based upon a Federal statute or the Constitution of the United States,³⁵ or

³² *Montana Ore-Purchasing Co. v. Boston & M. Consol. Copper & Silver Min. Co.*, C. C. A., 93 Fed. 274, 35 C. C. A. 1; *Shulthis v. McDougal*, 225 U. S. 561, 56 L. ed. 1205; *Hare v. Birkenfield*, C. C. A., 181 Fed. 825; *Boyd v. Great Western Coal & Coke Co.*, 189 Fed. 115; *The Dalles & Rockland Ferry Co. v. Hendryx*, 189 Fed. 266.

³³ *Shulthis v. McDougal*, 225 U. S. 561; *Beck v. Johnson*, 169 Fed. 154. But see *Nelson v. Southern Ry. Co.*, 172 Fed. 478; *Bottoms v. St. Louis & S. F. R. Co.*, 179 Fed. 318. It was contended by the defendant that these two cases arose under the Employers' Liability Act (35 St. at L. 65), but the Federal court refused to take jurisdiction because there was no reference to the statute in the plaintiff's pleadings. *Miller v. Illinois Cent. R. Co.*, 168 Fed. 982, where, although the pleading set forth this Federal statute, it did not show that the construction thereof was involved. *Contra*, *Smith v. Detroit & T. S. L. R. Co.*, 175 Fed. 506. See *Missouri, K. & T. Ry. Co. v. Wulf*, 226 U. S. 570, *infra*, § 211. In *Clark v. Southern Pac. Co.*, 175 Fed. 122, it was held that the petition sufficiently

showed that the case arose under that Act of Congress.

³⁴ *Shulthis v. McDougal*, 225 U. S. 561, 56 L. ed. 1205; *Montana Ore-Purchasing Co. v. Boston & M. Consol. Copper & Silver Min. Co.*, C. C. A., 93 Fed. 274, 35 C. C. A. 1; *Hare v. Birkenfield*, C. C. A., 181 Fed. 825; *Boyd v. Great Western Coal & Coke Co.*, 189 Fed. 115; *The Dalles & Rockland Ferry Co. v. Hendryx*, 189 Fed. 266; *Kansas City Southern Ry. Co. v. Quigley*, 181 Fed. 190, a bill *quia timet*; *Taylor v. Anderson*, 234 U. S. 74.

³⁵ *Florida Cent. & P. Co. v. Bell*, 176 U. S. 321, 44 L. ed. 486; *City Ry. Co. v. Citizens' St. R. Co.*, 166 U. S. 557, 41 L. ed. 1114; *Boston & M. Consol. Copper & Silver Min. Co. v. Montana Ore-Purchasing Co.*, 188 U. S. 632, 47 L. ed. 626; *Id.*, 188 U. S. 645, 47 L. ed. 634; affirming, C. C. A., 93 Fed. 274; *Filhiol v. Torney*, 194 U. S. 356, 48 L. ed. 1014; affirming 119 Fed. 974; *Devine v. Los Angeles*, 202 U. S. 313, 50 L. ed. 1046; *Louisville & Nashville R. R. Co. v. Mottley*, 211 U. S. 149, 53 L. ed. 126; *Kansas v. Atchison, T. & S. F. Ry. Co.*, 77 Fed. 339; *Montana O. P. Co. v. Boston & M. C. C. & S. M. Co.*, C. C. A., 93 Fed. 274; *Peabody Gold Min. Co.*

based upon a State statute repugnant to the Federal Constitution,³⁶ will not bring the case within the Federal jurisdiction; even though the plaintiff sues to quiet his own title, which does not depend upon a Federal statute.³⁷ Where a complaint in the State court alleged that complainants claimed under a designated State statute, not set out in full in the complaint, and that defendant's claim arose under a previous statute, also designated, which was alleged to be contrary to the State Constitution; the Federal court, upon defendant's petition for removal, on the ground that the latter statute was contrary to the United States Constitution as impairing the obligation of their contract under the former statute, took judicial notice of the statutes in determining its jurisdiction.³⁸ It has been said: that the rule, that a cause is not removable, as one arising under the Constitution or laws of the United States, unless such fact appears from the plaintiff's pleading, applies only to cases in which the Federal question is one inherent in the controversy itself; so that if raised by the defendant, and determined against him by the State court, he may remove it to the Supreme Court for review by appeal or writ of error; that such rule cannot be extended as to permit a plaintiff to prevent the removal of a suit against a receiver of a Federal court by omitting to state, in his pleadings, by what court defendant was appointed receiver; and that such an omission, when relied upon to prevent the removal of the cause, may fairly be considered as a fraud upon the jurisdiction of the Federal court, whether so intended or not.³⁹

v. Gold Hill Min. Co., C. C. A., 111 Fed. 817. But see Walla Walla City v. Walla Walla Water Co., 172 U. S. 1, 43 L. ed. 341; Cox v. Gilmer, 88 Fed. 343; Yazoo & M. V. R. Co. v. Adams, 81 Miss. 90, 32 So. 937.

³⁶ Devine v. Los Angeles, 202 U. S. 313, 50 L. ed. 1046; Cox v. Gilmer, 88 Fed. 343. But see South Carolina v. Coosaw Min. Co., 45 Fed. 804; Green v. Oemler, 151 Fed. 936.

³⁷ Boston & M. Consol. Copper & Silver Min. Co. v. Montana Ore Purchasing Co., 188 U. S. 632, 47 L. ed.

626; affirming, C. C. A., 93 Fed. 274; Devine v. Los Angeles, 202 U. S. 313, 50 L. ed. 1046; California Oil & Gas Co. of Arizona v. Miller, 96 Fed. 12.

³⁸ South Carolina v. Coosaw Min. Co., 45 Fed. 804.

³⁹ Winters v. Drake, 102 Fed. 545. See Washington v. Island Lime Co., 117 Fed. 777, 778; where it was held, that the pleading did not show fraud in concealing the real controversy by an insufficient statement of the facts constituting plaintiff's cause of action. See also *infra*, § 27.

The court will take judicial notice of the fact that a defendant corporation was incorporated by an act of Congress, although the plaintiff has averred that it was incorporated under the State laws.⁴⁰ Although a complaint by a settler claiming title under the pre-emption laws of the United States against a railroad company stated that defendant claimed under the laws of the Territory of Washington authorizing railroad companies to appropriate land for right of way, it disclosed a cause of action arising under the laws of the United States, so as to authorize a removal from a State court to the Federal court, the court having judicial knowledge that the authority of the Territory to legislate as to the matter in question was derived from the act of Congress, granting to railroad companies the right of way through the public lands of the United States.⁴¹ "Resort cannot be had to the expedient of importing into the record the legislation of the State as judicially known to its courts, and holding the validity of such legislation to have been drawn in question, and a decision necessarily rendered thereon, in arriving at conclusions upon the matters actually presented and considered. A definite issue as to the validity of the statute or the possession of the right must be distinctly deducible from the record."⁴² It has been held that a suit cannot be removed because it was brought in violation of a proclamation of the President not authorized by law.⁴³ In an action for false imprisonment, averments in the declaration that defendants, acting as judges of an election, caused plaintiff's arrest and imprisonment under color of a State law which is repugnant to the Constitution of the United States, are not open to the objection of anticipating the defense for the purpose of showing that a Federal question is involved.⁴⁴

⁴⁰ *Texas & P. Ry. Co. v. Cody*, 166 U. S. 606, 41 L. ed. 1132; *Texas & P. Ry. Co. v. Barrett*, 166 U. S. 617, 41 L. ed. 1136; *Spokane Falls & N. Ry. Co. v. Ziegler*, 167 U. S. 65, 42 L. ed. 79; *Scott v. Choctaw, O. & G. R. Co.*, 112 Fed. 180. See, however, *Oregon Short Line & U. No. Ry. Co. v. Skottowe*, 162 U. S. 490, 40 L. ed. 1048; cited *infra*, § 27. *Contra*, *Texas & P. Ry. Co. v. High-*

tower (Texas), 12 Tex. Civ. App. 41, 33 S. W. 541.

⁴¹ *Spokane Falls & N. Ry. Co. v. Ziegler*, 167 U. S. 65, 42 L. ed. 79.

⁴² *Powell v. Brunswick County*, 150 U. S. 433, 440; *Fuller, C. J.*

⁴³ *Muir v. Louisville & N. R. Co.*, 247 Fed. 888.

⁴⁴ *Cox v. Gilmer*, 88 Fed. 343.

Where the facts stated in the plaintiff's petition set forth a cause of action authorized by both an act of Congress and a State statute, although he did not specifically refer to either, it was held that the case might be removed.⁴⁵

The existence in the case, of other questions than that arising under the Constitution or laws of the United States, does not impair the right of removal.⁴⁶ It was said: that the clause in the removal act of 1888, authorizing the removal of civil suits arising under the Constitution or laws of the United States, relates only to the entire action and does not permit the removal of a part thereof when the rest is not removable.⁴⁷ A bill to enjoin the enforcement of a municipal ordinance authorizing a street-railroad company to condemn for its use certain parts of the track of another corporation was entertained by a Circuit Court of the United States upon the ground, that the violation of a previous grant to the latter company, which complainant alleged, impaired the obligation of a contract. It was held: that this did not give that court jurisdiction to decide a question arising on a supplemental bill as to the right of condemnation by the former company under its charter, when pursuant to such charter the city had determined, pending the suit, that the streets were not wide enough for two companies to lay tracks side by side; because the matter involved was beyond the scope of the controversy, which gave the court jurisdiction of the case originally.⁴⁸ Where the bill brings before the court for determination a Federal question not merely colorable, but raised in good faith not merely for the purpose of giving jurisdiction to the District Court of the United States, the court can take jurisdiction and does not lose the same by deciding the case

⁴⁵ *Hall v. Chicago, R. I. & P. Ry. Co.*, 149 Fed. 654.

⁴⁶ *Connor v. Scott*, Fed. Cas. No. 3,119 (4 Dill. 242); *Fisk v. Union Pac. R. Co.*, Fed. Cas. No. 4,827 (6 Blatchf. 362); s. c., Fed. Cas. No. 4,828 (8 Blatchf. 243); *Illinois v. Illinois Cent. R. Co.*, 16 Fed. 881; *People v. Sanitary Dist. of Chicago*, 98 Fed. 150; *Manigault v. S. M. Ward & Co.*, 123 Fed. 707; *Mastin v. Chicago, R. I. & P. Ry. Co.*, 123

Fed. 827; *New Orleans, M. & T. R. Co. v. State of Mississippi (Ky.)*, 2 Ky. Law Rep. 137.

⁴⁷ *Texas v. Day Land & Cattle Co.*, 49 Fed. 593; *Iowa Loan & Trust Co. v. Fairweather*, 252 Fed. 605; Chapter XXXII, on Removal of Causes, *infra*.

⁴⁸ *Mercantile Trust & Deposit Co. v. Collins Park & Belt R. Co.*, 107 Fed. 762. See *August Busch & Co. v. Webb*, 122 Fed. 655, 662.

upon other points and omitting to decide the Federal questions of deciding them adversely to the party claiming their benefit.⁴⁹ It has been said, that in such a case the court has no jurisdiction unless these extraneous questions are incidental to the Federal question.⁵⁰ It was formerly held that, when a case involving several questions has been removed because one of them arises under the Constitution or laws of the United States, after a decision of the court disposing of the Federal question there should be a remand;⁵¹ but that a Federal question, which is not frivolous, cannot be decided upon a motion to remand.⁵²

It has been said: that the nature of the action, and not the character of the defense, constitutes the test of the determina-

⁴⁹ *Siler v. Louisville & Nashville R. Co.*, 213 U. S. 175, 53 L. ed. 753, 29 Sup. Ct. Rep. 451; *Ohio River & Western Ry. Co. v. Dittey*, 232 U. S. 576; *Louisville & Nashville R. R. Co. v. Finn*, 235 U. S. 601; *Louisville & Nashville R. R. Co. v. Greene*, 244 U. S. 522; *Omaha H. Ry. Co. v. Cable Tr. Co.*, 32 Fed. 727; per *Brewer, J.*; *s. c.*, 33 Fed. 689; *Nashville, C. & St. L. Ry. Co. v. Taylor*, 86 Fed. 168, 178, 188; *Louisville Tr. Co. v. Stone, C. C. A.*, 107 Fed. 305, 309, 310; *Bernstein v. Danwitz*, 190 Fed. 604; *Central R. Co. of New Jersey v. Jersey City*, 199 Fed. 237, 246; *Michigan Railroad Tax Cases*, 138 Fed. 223; *Oregon R. & Navigation Co. v. Campbell*, 173 Fed. 957; *Larabee v. Doley*, 175 Fed. 365; *Risley v. City of Utica*, 179 Fed. 875; *Washington-Oregon Corp. v. City of Chehalis*, 202 Fed. 592; *Cleveland, C., C. & St. L. Ry. Co. v. Hirsch, C. C. A.*, 204 Fed. 850; *Portland Ry., Light & Power Co. v. City of Portland*, 210 Fed. 667. But see *Underground Railroad v. City of New York*, 193 U. S. 416, 48 L. ed. 733, 24 Sup. Ct. 494, affirming, *s. c.*, 116 Fed. 952; *Mercantile Tr. & Deposit Co.*

v. Collins Park & Belt R. Co., 107 Fed. 762, 765; *People's Gaslight & Coke Co. v. City of Chicago*, 114 Fed. 384, holding that where the bill did not show that an ordinance fixing the rate for the price of gas, impaired the obligation of a contract, or took property without due process of law, the court could not consider the question whether the city had the power, under the laws of the State, to enact such an ordinance; *Minnesota v. Northern Securities Co.*, 194 U. S. 48, 48 L. ed. 870; *Cf. Penn. Mut. L. I. Co. v. Austin*, 168 U. S. 685, 695, 42 L. ed. 626, 630; and *infra*. The cases where relief against the infringement of rights claimed under a patent, copyright, or registered trade mark have been denied are explained in subsequent sections; *infra*, §§ 146, 148, 150. As to the rule in patent trade mark and copyright cases, see *infra*, §§ 146, 148, 150, 363.

⁵⁰ *Tullar & Tullar v. Illinois Cent. R. Co.*, 213 Fed. 280.

⁵¹ *Hamblin v. Chicago, B. & Q. R. Co.*, 43 Fed. 401.

⁵² *Lowry v. Chicago, B. & Q. R. Co.*, 46 Fed. 83.

tion whether it arises under the laws of the United States; and that if the case made by the complaint arises under an act of Congress, the right of removal by the defendant is not lost by insufficient denials in the answer,⁵³ or by the interposition of a good defense.⁵⁴ It has been held: that a Federal court loses jurisdiction of a suit originally brought there, and that the same will be dismissed, upon the defendant's filing a disclaimer of any interest in the matter concerning which the plaintiff claims title under the laws of the United States, and denying that it has made any claim to the same.⁵⁵

In a suit in a Federal court, raising the question whether the State was attempting to impair the obligation of a contract, a decision that this question was *res adjudicata* as against the State does not oust the Federal jurisdiction on the theory that it makes the case turn on a question not Federal.⁵⁶

Where the requisite difference of citizenship did not exist, it was held that the Federal Court could not take jurisdiction of a counterclaim not affecting matters set forth in the bill which might have been the subject of an independent suit and the determination of which did not involve the decision of a federal question.⁵⁷

§ 25. Suits arising under the Constitution of the United States. A suit arises under the Constitution of the United States when the plaintiff's cause of action depends upon the violation of a right under the same by an individual who does not act under color of any statutory authority;¹ or where the

⁵³ *Miller v. Tobin*, 18 Fed. 609, 9 Sawyer, 401.

⁵⁴ *Guarantee Co. of North Dakota v. Hanway*, 104 Fed. 369, 44 C. C. A. 312; *Benedict v. City of New York*, C. C. A., 247 Fed. 758.

⁵⁵ *Robinson v. Anderson*, 121 U. S. 522, 524, 30 L. ed. 1021; *Excelsior Wooden Pipe Co. v. Pacific Bridge Co.*, 185 U. S. 282, 287, 46 L. ed. 910, 913; *Boston & M. Consol. C. & S. Min. Co. v. Montana Ore P. Co.*, 188 U. S. 632, 47 L. ed. 626; *Crystal Springs Land & Water Co. v. Los Angeles*, 82 Fed. 114.

⁵⁶ *Bank of Kentucky v. Stone*, 88 Fed. 383.

⁵⁷ *Cleveland Engineering Co. v. Galion D. M. Truck Co.*, 243 Fed. 405.

§ 25. ¹ An action to recover damages for preventing plaintiff from exercising the right to vote for a member of Congress is one arising under the Constitution of the United States. *Wiley v. Sinkler*, 179 U. S. 58, 45 L. ed. 84; *Knight v. Shelton*, 134 Fed. 423; *T. B. Harms & Francis, Day & Hunter v. Stern*, C. C. A., 229 Fed. 42; *Swindell v. Youngs-*

cause of action depends upon the unconstitutionality of an act of Congress;² or the repugnancy of a State statute to the Federal Constitution;³ the repugnancy to the Federal Constitution of a municipal ordinance,⁴ or of a resolution of a city council which has the effect of an ordinance of a State municipality,⁵ when either was passed in accordance with the legal forms⁶ and under color of statutory authority, even though the same is not authorized by the statutes of the State,^{6a} or, it has been held, where its validity depends upon a statute, which the defendant contends in good faith to be in violation of the Constitution, and there is ground for a reasonable doubt as to the soundness of the contention;⁷ or where complaint shows that the plaintiff's claim would be defeated by a construction of the Federal Constitution, as to which there is room for a reasonable doubt.⁸ The pleadings need not state what particular clause of the Constitution is in question.⁹ It has been said: that it is not essential to the jurisdic-

town Sheet & Tube Co., C. C. A., 230 Fed. 438.

² *Patton v. Brady*, 184 U. S. 608, 46 L. ed. 713.

³ *Covington & L. Turnpike Road Co. v. Sanford*, 164 U. S. 578, 41 L. ed. 560; *Green v. Oemler*, 151 Fed. 936; *Rail & River Coal Co. v. Yapple*, 214 Fed. 273; *N. W. Halsey & Co. v. Merrick*, 228 Fed. 805; *Nolen v. Riechman*, 225 Fed. 812.

⁴ *Walla Walla City v. Walla Walla Water Co.*, 172 U. S. 1, 43 L. ed. 341; *Cuyahoga River Power Co. v. City of Akron*, 240 U. S. 462.

⁵ *Des Moines City Ry. Co. v. Des Moines*, 151 Fed. 854.

⁶ *Mayor, etc., of Savannah v. Holst*, C. C. A., 132 Fed. 901; reversing 131 Fed. 931; *Louisville v. Cumberland Tel. & T. Co.*, C. C. A., 155 Fed. 725, 12 Ann. Cas. 500; *Seattle El. Co. v. Seattle, R. & S. Ry. Co.*, C. C. A., 185 Fed. 365; *City & County of San Francisco v. United Railroads of San Francisco*, C. C. A., 190 Fed. 507.

^{6a} *Portland Ry., Light & Power*

Co. v. City of Portland, 210 Fed. 667; *Ashland Electric Power & Light Co. v. City of Ashland*, 217 Fed. 158.

⁷ *Railroad Co. v. Mississippi*, 102 U. S. 135, 141, 26 L. ed. 96, 98; *Amos v. Kansas*, 111 U. S. 449, 23 L. ed. 482; *Southern Pac. R. R. Co. v. California*, 118 U. S. 109, 30 L. ed. 103; *Kansas v. Walruff*, 26 Fed. 178; *Kessinger v. Hinkhouse*, 27 Fed. 883; *Mahin v. Pfeiffer*, 27 Fed. 892; *Minnesota v. Duluth & I. R. R. Co.*, 87 Fed. 497. *Contra*, *Kentucky v. Chicago I. & L. Ry. Co.*, 123 Fed. 457. To the same effect are: *Lemen v. Wagner* (Iowa), 68 Iowa 660, 27 N. W. 814; *Judge v. Arlen* (Iowa), 71 Iowa 186, 32 N. W. 326; *Dickinson v. Herb Brewing Co.* (Iowa), 73 Iowa 705, 36 N. W. 651; *Shear v. Bolinger* (Iowa), 74 Iowa 757, 37 N. W. 164.

⁸ *Minnesota v. Duluth & I. R. R. Co.*, 87 Fed. 497.

⁹ *Crystal Springs Land & Water Co. v. Los Angeles*, 76 Fed. 148.

tion of a Federal court over a suit based on an alleged impairment of a contract by a State, that there should be a valid contract, or that the impairment complained of should in fact be effected; but it is sufficient, for jurisdictional purposes, if the plaintiff in good faith claim the existence of such contract and its impairment.¹⁰ Where a bill is filed to enjoin the enforcement of a municipal ordinance,¹¹ or resolution of a city council, which has the effect of an ordinance,¹² or to prevent the passage of one,¹³ which will violate an existing contract with the complainant; the case arises under the Constitution of the United States; provided that the ordinance is otherwise within the powers of the municipality. A breach by the State officers of a contract is not equivalent to the taking of property without due process of law and will not give the Federal court jurisdiction of a suit to enjoin the same.¹⁴

A municipal ordinance, not passed in accordance with legislative authority, is not an impairment by the State of the obligation of a contract and a suit to enjoin its enforcement, when it is in other respects due process of law, does not arise under

¹⁰ *Pacific Electric Co. v. Los Angeles*, 118 Fed. 746. But see *Risley v. City of Utica*, 179 Fed. 875; *Columbus Ry. Power & Light Co. v. City of Columbus, Ohio*, 249 U. S. 399; *Mutual Film Co. v. Industrial Commission of Ohio*, 215 Fed. 138.

¹¹ *Walla Walla City v. Walla Walla Water Co.*, 172 U. S. 1, 43 L. ed. 341; affirming 60 Fed. 957; *Mercantile Tr. & D. Co. v. Columbus*, 203 U. S. 311, 51 L. ed. 198; *Indianapolis Gas Co. v. Indianapolis*, 82 Fed. 245; *Consolidated Water Co. v. San Diego*, 84 Fed. 369; *Michigan Tel. Co. v. Charlotte*, 93 Fed. 11; *Consolidated Water Co. v. San Diego*, 93 Fed. 849, 35 C. C. A. 631; *Iron Mountain R. Co. of Memphis v. Memphis*, C. C. A., 96 Fed. 113; *Kimball v. City of Cedar Rapids*, 99 Fed. 130; *Mercantile Trust & Deposit Co. of Baltimore v. Collins Park & B. R. Co.*, 99 Fed.

812; *Anoka Water Works, Electric Light & Power Co. v. City of Anoka*, 109 Fed. 580; *American Water Works & Guarantee Co. v. Home Water Co.*, 115 Fed. 171; *Riverside & A. Ry. Co. v. Riverside*, 118 Fed. 736; *Des Moines City Ry. Co. v. Des Moines*, 151 Fed. 854. But see *Bienville Water-Supply Co. v. Mobile*, 175 U. S. 109, 44 L. ed. 92; affirming 95 Fed. 539.

¹² *Des Moines City Ry. Co. v. Des Moines*, 151 Fed. 854.

¹³ *Vicksburg Waterworks Co. v. Vicksburg*, 185 U. S. 65, 46 L. ed. 808; s. c., as *Vicksburg v. Vicksburg Waterworks Co.*, 202 U. S. 453, 50 L. ed. 1102; *Farmers' Loan & Tr. Co. v. Meridian*, 139 Fed. 673. But see *infra*, § 271a.

¹⁴ *Manila Investment Co. v. Trammell*, 239 U. S. 31; *City of Monroe v. Detroit, M. & T. S. L. Ry. Co.*, 257 Fed. 782.

the Constitution of the United States.¹⁵ Where the complaint averred that the enforcement of the ordinance would deprive the complainant of its property without due process of law and the State constitution contained a prohibition of such deprivation; it was held that the remedy must be first sought in the State courts.¹⁶ It has been said: that under the settled doctrine that the courts can only deal with the question of the constitutionality of a legislative act after it has been passed, and are without jurisdiction to interfere with proposed or pending legislation, either State or municipal, the action of a city council in adopting the report of a committee finding that the franchise of a street railway company will expire at a certain time, contrary to the contention of the company, and recommending that the council take measures to dispossess the company at the expiration of such time unless there is a previous renewal, does not give a Federal court jurisdiction of a suit to determine the controversy between the company and the city in respect to the terms of the grant, on the ground that it presents a constitutional question as to the impairment of the contract rights of the company.¹⁷ Where, in addition to these facts, it appeared that the receivers of the corporation had received a notice from the superintendent of streets, that all permits issued to the company to work and make repairs upon the streets of the city were to be revoked at a specified time, it was held, that the receivers had a cause of action arising under the Constitution of the United States.¹⁸ The mere refusal of a municipal corporation to perform a contract, even though that refusal is expressed in an ordinance containing a direction that the other party to the contract perform some act which the contract does not require but imposing no penalty

¹⁵ *Mayor, etc., of Savannah v. Holst*, C. C. A., 132 Fed. 901; reversing 131 Fed. 931; *Louisville v. Cumberland Tel. & T. Co.*, C. C. A., 155 Fed. 725, 12 Ann. Cas. 500; *Seattle El. Co. v. Seattle, R. & S. Ry. Co.*, C. C. A., 185 Fed. 365; *City and County of San Francisco v. United Railroads of San Francisco*, C. C. A., 190 Fed. 507.

¹⁶ *Seattle El. Co. v. Seattle, R. & S. Ry. Co.*, C. C. A., 185 Fed. 365,

372. See, also, *Hamilton Gas Light Co. v. Hamilton City*, 146 U. S. 258, 265, 13 Sup. Ct. Rep. 90, 36 L. ed. 963; *Barney v. New York*, 193 U. S. 430, 24 Sup. Ct. 502, 48 L. ed. 737. *Contra*, *San Francisco Gas & El. Co. v. City and County of San Francisco*, 189 Fed. 943.

¹⁷ *Elkins v. Chicago*, 119 Fed. 957.

¹⁸ *Blair v. Chicago*, 201 U. S. 400, 405, 50 L. ed. 801.

for disobedience,¹⁹ does not present a case arising under the Constitution of the United States.²⁰ In an action to vacate the charter of a railroad company because a majority interest therein had been purchased by a competitor, the bill alleged that such purchase was *ultra vires* because the Georgia Constitution forbids the legislature to grant such powers to any corporation where its effect might be to lessen or destroy competition. The petition for removal contended that this impaired the obligation of the contract embodied in the company's charter, which was granted before this provision of the Constitution took effect. It was held, that this presented a Federal question, although the Supreme Court of Georgia had theretofore decided that the charter did not confer the right claimed.²¹ It was held: that in an action by stockholders of a corporation, to set aside a lease executed by it as inconsistent with its charter, illegal and void, no Federal question was involved within the meaning of the removal act, when complainant alleged that the action of the directors in making the lease without the consent of the stockholders was not due process of law, and the defendants relied upon an act of the legislature not mentioned in the bill, which they averred that the plaintiff claimed impaired the obligation of a contract.²² In an action in the nature of *quo warranto*, brought in the name of the State by her attorney general to prevent a railroad company from controlling certain lands, defendant petitioned for removal, alleging: that it acquired ownership in the land under an act of the legislature, and in accordance therewith exercised rights of ownership; that subsequently the act granting the land was repealed; and that such repealing act was a law impairing the obligation of contracts, and depriving persons of property without due process of law. It was held, that the petition showed a case arising under the Constitution of the United States, which was not eliminated by the attorney

¹⁹ St. Paul Gas Light Co. v. St. Paul, 181 U. S. 142, 45 L. ed. 788.

²⁰ St. Paul Gas Light Co. v. St. Paul, 181 U. S. 142, 45 L. ed. 788; Dawson v. Columbia Tr. Co., 197 U. S. 178, 49 L. ed. 713; Shawnee Sewerage & Drainage Co. v. Stearns, 220 U. S. 462, 55 L. ed. 544. See

Defiance Water Co. v. City of Defiance, 191 U. S. 184, 48 L. ed. 140.

²¹ South Carolina v. Port Royal & A. R. Co., 56 Fed. 333.

²² Central R. Co. of New Jersey v. Mills, 113 U. S. 249, 28 L. ed. 949; affirming Mills v. Central R. Co., 20 Fed. 449.

general's disclaimer of reliance on the repealing act.²³ It was held: where a railroad corporation set up as a defense that its charter was a grant by the State, giving to the railroad company, without any qualification, the right to prescribe upon what terms and at what rates freight should be transported on the road, that this grant was protected by the Constitution of the United States, and that a subsequent statute of the State upon the subject impaired the validity of such grant in violation of the Constitution; that such defense involved a question arising under the Constitution of the United States, and the case was removable.²⁴ In a suit in a Federal court raising the question whether the State was attempting to impair the obligation of a contract, a decision that this question was *res adjudicata* as against the State does not oust the Federal jurisdiction, on the theory that it makes the case turn on a question not Federal.²⁵ It was held: that jurisdiction in the Circuit Courts of the United States over cases where any person is sought to be deprived of his rights under the Constitution of the United States, did not authorize a writ of *certiorari* to a State court for the removal of proceedings by the State against a railroad company, under a State statute, entitled "An act to prevent extortion and unjust discrimination in the rates charged the passengers, etc., and to punish the same," where it was insisted by defendant that this act of the State legislature impaired the obligation of the contract which the State had made with the company by its charter.²⁶

A proceeding by a State to forfeit a franchise cannot be removed to the Federal courts, on the ground that it impairs the obligation of a contract; the prohibition of the Constitution being that "no State shall pass any law impairing the obligation of contracts."²⁷

The institution by the State of a proceeding in a court to

²³ *Illinois v. Illinois Cent. R. Co.*, 33 Fed. 721. But see § 24 over note 55, *supra*. *firming Bank of Kentucky v. Stone*, 88 Fed. 383.

²⁴ *Illinois v. Chicago, B. & Q. R. Co.*, 16 Fed. 706. But see *supra*, § 24 over notes 22-37. ²⁶ *Illinois v. Chicago & A. R. Co.*, Fed. Cas. No. 7,006 (6 Biss. 107).

²⁵ *Stone v. Bank of Kentucky*, 174 U. S. 799, 43 L. ed. 1187; af- ²⁷ *Kentucky v. Louisville Bridge Co.*, 42 Fed. 241; *Columbus Ry. Power & Light Co. v. City of Columbus*, 253 Fed. 499.

obtain a judgment which it is contended would cause a violation of its contract does not impair the violation of such contract.²⁸

Whenever the right or title of either party is grounded upon State legislation which undertakes to transfer to him property belonging to the other without due process of law, there is a controversy as to the operation and effect of the Constitution, to which the Federal jurisdiction attaches.²⁹ A suit to enjoin an action by or under a State authority within the jurisdiction conferred by a State statute, which action is alleged with some reasonable foundation for the position, to take the complainant's property without due process of law;³⁰ or to deny him the equal protection of the laws;³¹ or, when such action is legislative in its nature, to impair the obligation of a contract that plaintiff holds;³² arises under the Constitution of the United States. Such a suit, when there is no color for the contention that the defendants act under a statute of the State, does not;³³ unless perhaps when they act in a quasi-judicial capacity.³⁴

Trespasses on the property rights of an individual, committed by public officers or agents professedly acting under authority of a State law, but which are not only unauthorized by such law, but by any fair construction thereof are prohibited, cannot be im-

²⁸ *State of Georgia v. Southern Ry. Co.*, 255 Fed. 369.

²⁹ *Crystal Springs Land & Water Co. v. Los Angeles*, 76 Fed. 148.

³⁰ *Norwood v. Baker*, 172 U. S. 269, 43 L. ed. 443; *San Joaquin & King's River Canal & Irrigation Co. v. Stanislaus County*, 90 Fed. 516; *San Francisco Gas & El. Co. v. City and County of San Francisco*, 189 Fed. 943. See *Covington & L. Turnpike Road Co. v. Sandford*, 164 U. S. 578, 41 L. ed. 560.

³¹ *Southern Ry. Co. v. North Carolina Corp. Commission*, 97 Fed. 513; *St. Louis, I. M. & S. Ry. Co. v. Davis*, 132 Fed. 629; *Douglas Park Jockey Club v. Grainger*, 146 Fed. 414; *Michigan Railroad Tax Cases*, 138 Fed. 223; *Central R. Co. of New Jersey v. Jersey City*, 199 Fed. 237, 245. In the last two

cases, a charge was made of a discrimination against the complainants in assessments for taxation.

³² *Walla Walla City v. Walla Walla Water Co.*, 172 U. S. 1, 43 L. ed. 341; affirming 60 Fed. 957. And other authorities cited *supra*, note 11.

³³ *St. Joseph & G. I. R. Co. v. Steele*, 167 U. S. 659, 42 L. ed. 315; *Barney v. New York*, 193 U. S. 430, 48 L. ed. 737; *Huntington v. New York*, 193 U. S. 441, 48 L. ed. 741; affirming 118 Fed. 683; *Kiernan v. Multnomah County*, 95 Fed. 849; *Arbuckle v. Blackburn*, 65 L.R.A. 864, 113 Fed. 616, 51 C. C. A. 122; *St. Louis, I. M. & S. Ry. Co. v. Davis*, 132 Fed. 629.

³⁴ *Raymond v. Chicago Union Traction Co.*, 207 U. S. 20, 38, 52 L. ed. 78.

puted to the State, so as to bring them within the constitutional inhibition to deprive persons of property without due process of law, and therefore do not confer jurisdiction on a Federal court to grant relief.³⁵ Allegations that wrongful conduct by the defendant abridge plaintiff's rights, privileges, and immunities and take his property without due process of law in violation of the constitution of the United States, when not accompanied by statements of specific acts which tend to constitute such a violation, are insufficient to justify the Federal jurisdiction.³⁶ The provisions of the Fourteenth Amendment securing personal rights, are directed against the States and their agencies, and not against the acts of private individuals, and these give no right of action in the Federal courts on the ground that a constitutional question is involved.³⁷ A suit arises under the Constitution of the United States when brought to enjoin the enforcement of an order by a State, or county,³⁸ or municipal,³⁹ board, which reduces the charges of a corporation employed in a public service so low as to amount to a deprivation of its property without due process of law. A suit to collect excessive fares paid pending litigation to determine the validity of a State statute reducing them, the enforcement of which was restrained until a decision by the Supreme Court of the United States sustaining the legislation, does not arise under the Constitution and laws of the United States.⁴⁰ The averment, that, if a temporary injunction granted by an inferior State court, which because of the alleged invalidity of a contract between a municipality and a water company restrained the future payment of rentals accruing under the same, should ultimately be made perpetual, the company would thereby be deprived of its

³⁵ *Barney v. New York*, 193 U. S. 430, 48 L. ed. 737; *Huntington v. New York*, 118 Fed. 683; affirmed 193 U. S. 441, 48 L. ed. 741; *Martin v. Lankford*, 245 U. S. 547.

³⁶ *Phoenix Railway Co. v. Geary*, 239 U. S. 277.

³⁷ *Marten v. Holbrook*, 157 Fed. 716.

³⁸ *San Joaquin & K. R. Canal & Irr. Co. v. Stanislaus County*, 90 Fed. 516.

³⁹ *Wilmington City Ry. Co. v. Taylor*, 198 Fed. 159; *Portland Ry., Light & Power Co. v. City of Portland*, 210 Fed. 667; *Missouri v. Chicago & A.*, 216 Fed. 562; *Henry L. D. & Co. v. Toledo Rys. & Light Co.*, 254 Fed. 597.

⁴⁰ *State of Missouri v. Chicago & A. R. Co.*, 216 Fed. 562.

property without due process of law; does not justify a Federal District Court in assuming jurisdiction of a suit by the water company to restrain the municipality from attempting to annul the contract.⁴¹ A street railroad company which has acquired a franchise to construct its line has a property right therein of which it cannot be deprived without due process of law, and it has also contract rights which cannot be impaired by the State through subsequent legislation; but, before it can invoke the provisions of the Constitution of the United States for the protection of such rights by a suit in a Federal court, it must show that it has done all the things required under the law of the State to vest it with the contract and rights which it seeks to protect.⁴² It has been held: that a street railway company operating without a franchise can not be subjected to the imposition of a condition for the use of the streets which is so unreasonable as to deprive it of property without due process of law.⁴³

The Iowa Code provided, that any building where intoxicating liquors are manufactured, sold, or given away, contrary to law, shall be a nuisance, and may, along with the vessels and their contents, and fixtures, be abated by "an action in equity." The person proceeded against was also made liable to fine and imprisonment. Defendant, in a proceeding under this statute, removed the case to the Federal court on the grounds that, inasmuch as the Supreme Court of the State had declared the law to be valid, he was virtually deprived of his right to a trial by jury, and that he had, prior to the passage of the act, at a large expense established the place sought to be declared a nuisance, and that it was fit only for a saloon and brewery. It was held, that no Federal question was involved, and the case was remanded to the State court.⁴⁴ A suit by property owners to enjoin city officials from levying taxes and from exercising any jurisdiction over annexed territory, on the ground that the statute extending the corporate limits is void under the State Constitution, cannot be maintained in a Federal court, on the

⁴¹ *Defiance Water Co. v. Defiance*, 191 U. S. 184, 48 L. ed. 140. *Toledo Rys. & Light Co.*, 254 Fed. 597.

⁴² *Underground R. R. v. New York*, 116 Fed. 952. ⁴⁴ *Schmidt v. Cobb*, 119 U. S. 286, 30 L. ed. 321 (a divided court).

⁴³ *Henry L. Doherty & Co. v.*

theory that the assessment of taxes and other official acts by the defendants, being without warrant of any valid law, will be a taking of property without due process of law, and a denial of the equal protection of the laws. The real issue is whether the statute enlarging the corporate limits is invalid under the State Constitution, and no Federal question is involved.⁴⁵ A complaint which alleges that defendants entered into a conspiracy by unlawful means to deprive plaintiff of his liberty and property, and that they unlawfully, forcibly, and without due process of law caused his arrest and confinement in a State insane asylum, states a cause of action for false imprisonment, not involving any Federal question, and which it is the province of the State, and not the federal courts to redress.⁴⁶ It was held: that a bill filed by the State of Illinois in a State court against the Chicago Drainage District, a corporation created by an act of its legislature, to enjoin the defendant, in the prosecution of the work for which it was chartered, from the reduction of the level of the water in the Illinois and Michigan canal, and alleging as grounds for such relief that, by the acts of Congress authorizing the State to construct the canal and granting lands in aid thereof, the State was required forever to maintain such canal as a navigable waterway for the free passage of any property of the United States, and that under the terms of such acts the State could confer no power on the defendant to destroy the same; shows that a Federal question is involved in the suit, which renders it removable.⁴⁷

It was held: that a suit which raised questions concerning the validity and construction of State legislation, dividing its territory into congressional districts in pursuance of the apportionment made by Congress, did not arise under the Constitution and laws of the United States.⁴⁸ That the State courts have the right to pass upon the title to a State office and to expel the incumbent from the same, because he holds an office

⁴⁵ *McCain v. Des Moines*, 174 U. S. 168, 43 L. ed. 936; affirming 84 Fed. 726.

⁴⁶ *Marten v. Holbrook*, 157 Fed. 716.

⁴⁷ *People v. Sanitary Dist. of Chicago*, 98 Fed. 150.

⁴⁸ *Anthony v. Burrow*, 129 Fed. 783.

under the United States, in violation of the State Constitution.⁴⁹ That an action in the nature of *quo warranto*, to determine the title to the office of elector of President and Vice-President of the United States, brought in a State court, was not removable to a Circuit Court of the United States on the ground that the matters in dispute therein arose under the Constitution and laws of the United States.⁵⁰ Jurisdiction of an action to enjoin the taxation of a bridge by the local authorities as a toll bridge, it being taxed by the State as a part of complainant's railroad, is not conferred upon a Federal court, by an allegation that the bridge was built under authority of an act of Congress, where the right of the State to tax the bridge is conceded, the controversy being as to the method of taxation under the State laws.⁵¹

A suit arises under the Constitution of the United States when brought to enjoin State officers from assessing⁵² for taxation, complainant's property at a higher percentage of its value than that at which other property in the State is assessed, or from collecting⁵³ taxes so assessed, when the State officers act in obedience to a State statute;⁵⁴ and even, it has been held, when they do not, but the assessment is made or to be made by a State court of equalization as a *quasi* judicial body, although the State statutes and Constitution require uniformity.⁵⁵ Suits

⁴⁹ *Bishop v. State*, 149 Ind. 233, 48 N. E. 1038, 39 L.R.A. 278.

⁵⁰ *State v. Bowen* (South Carolina), 8 S. C. (8 Rich.) 382.

⁵¹ *St. Joseph & G. I. R. Co. v. Steele*, 167 U. S. 659, 42 L. ed. 315.

⁵² *W. U. Tel. Co. v. Poe*, 61 Fed. 449; *W. U. Tel. Co. v. Norman*, 77 Fed. 13; *Nashville, C. & St. L. Ry. v. Taylor*, 86 Fed. 168. See *C. C. A.*, 88 Fed. 350. See also *Greene v. Louis & Interurban R. R. Co.*, 244 U. S. 499.

⁵³ *Third Nat. Bank v. Mylin*, 76 Fed. 385. *Mayor, etc., of Jersey City v. Central R. Co. of N. J.*, C. C. A., 212 Fed. 76; *County of San Mateo v. Southern Pacific R. Co.*, 13 Fed. 145; where a removal of an

action to collect State and County taxes was allowed, because it appeared that, in accordance with the State Constitution, the amount of mortgages thereupon had not been deducted from the property of the defendant and other *quasi* public corporations when assessed; although in assessing for taxation other property, the amount of mortgages thereupon was first deducted.

⁵⁴ *County of San Mateo v. Southern Pacific R. Co.*, 13 Fed. 145.

⁵⁵ *Raymond v. Chicago Union Traction Co.*, 207 U. S. 20, 38, 52 L. ed. 78, 88; *Southern Ry. Co. v. North Carolina Corp. Commission*, 97 Fed. 513. *Contra*, *St. Louis Irr. & S. Ry. Co. v. Davis*, 132 Fed. 629.

arise under the Constitution of the United States, which are brought: to enjoin an assessment that plaintiff alleges was made in violation of his right to an exemption because of the ownership of United States bonds.⁵⁶ To enjoin the enforcement of a special assessment for a betterment, made under a rule or system which throws such an unjust burden upon the landowner as to deprive him of property without due process of law.⁵⁷ To enjoin the collection of taxes upon shares of stock in a national bank, which are taxed at a higher rate than other moneyed capital within the State, in violation of section 5319 of the Revised Statutes of the United States.⁵⁸ To enjoin the collection of taxes on the capital stock of a bank, when it is claimed that the statute under which they were levied impairs the obligation of the contract concerning taxation embodied in the bank's charter.⁵⁹ Where a bill to restrain the collection of a drainage tax alleged that a section of the State statute deprived complainants of their property without due process of law, it was held that the case arose under the Constitution of the United States.⁶⁰ It was held: that a suit did not, when brought for damages for injury to the plaintiff's land caused by the construction of a ditch for drainage, under a State statute which the bill averred was invalid under the Federal Constitution because there was no provision for notice to the plaintiff before the proceedings authorizing such construction.⁶¹ A mere protest against the payment of a license tax on the ground that the law seeking to impose the same is unconstitutional will not give a Federal court jurisdiction to try and determine the constitutionality of the law.⁶²

A suit brought in the State court to enjoin the threatened importation of armed men into a county where a strike existed, on the ground that this would amount to a public nuisance and would endanger the health, morals, peace and good order of

⁵⁶ *People's Sav. Bank v. Layman*, 134 Fed. 635.

⁵⁷ *Norwood v. Baker*, 172 U. S. 269, 43 L. ed. 443.

⁵⁸ *Third Nat. Bank v. Mylin*, 76 Fed. 385.

⁵⁹ *Union & Planters' Bank v. Memphis*, 111 Fed. 561, 49 C. C. A. 455.

⁶⁰ *Everglades Drainage League v. Napoleon B. Broward Drainage Dist.* 253 Fed. 246.

⁶¹ *Bronson v. Boards of Sup'rs*, 237 Fed. 212.

⁶² *Corbus v. Alaska Treadwell Gold-Min. Co.*, 99 Fed. 334.

the community, is not removable to a District Court of the United States as one arising under the Constitution and laws of the United States; since, even assuming that the bill shows upon its face that the relief sought would be inconsistent with the power to regulate commerce, or with regulations established by Congress, or with the Fourteenth Amendment, such an assumption only demonstrates that the bill cannot be maintained and not that the cause of action arose under the Constitution or laws of the United States.⁶³

A suit by the owner to enjoin the destruction of a telegraph line is not within the jurisdiction of the Federal Court, because such destruction would interfere with interstate commerce.⁶⁴

It has been held that a suit for an injunction⁶⁵ or a receiver⁶⁶ does not arise under the constitution of the United States because of a State statute forbidding such injunction or receivership which plaintiff contends to be a violation of the Federal Constitution.

An issue whether full force and effect has been given to the judgment of a State court has been held not to involve the construction of the Constitution of the United States.⁶⁷ The question whether a party to proceedings in a State court continued such after a certain judgment in his favor, and the estate represented by him as administrator became bound by proceedings subsequent to the judgment; is not dependent for solution upon any construction of the Constitution or laws of the United States, so as to give the right of removal to the Federal Court.⁶⁸ A mortgagee may sue in a court of the United States to prevent contracts pledged by the mortgagor from impairment by State legislation, irrespective of the citizenship of the mortgagor.⁶⁹

⁶³ *Arkansas v. Kansas & T. Coal Co.*, 183 U. S. 185, 46 L. ed. 144; reversing 96 Fed. 353.

⁶⁴ *Postal Tel. Cable Co. v. Nolan*, 240 Fed. 754.

⁶⁵ *Supreme Council of Royal Arcanum v. Hobart*, C. C. A., 244 Fed. 385.

⁶⁶ *Orr v. Allen*, C. C. A., 245 Fed. 486.

⁶⁷ *Chicago & A. R. Co. v. Wiggins' Ferry Co.*, 108 U. S. 18, 27

L. ed. 636; affirming order *Wiggins' Ferry Co. v. Chicago & A. R. Co.*, 11 Fed. 381, 3 McCrary, 609; *Merritt v. Am. Steel Barge Co.*, C. C. A., 75 Fed. 813.

⁶⁸ *Gibbs v. Crandall*, 120 U. S. 105, 30 L. ed. 590.

⁶⁹ *City and County of Denver v. New York Tr. Co.*, C. C. A., 187 Fed. 890; *City of Denver v. Mercantile Tr. Co.*, C. C. A., 201 Fed. 790; when it was held that the

Where the matter in dispute exceeds the jurisdictional amount and the requisite diversity of citizenship exists, the district court may enjoin an infringement of a State Constitution in a proper case.⁷⁰

§ 26. Suits arising under treaties of the United States.

A suit arises under a treaty of the United States when its decision depends upon a construction or the determination of the validity of the same.¹ It was held: that an action by a tribal Indian for false imprisonment under process of a State court, because of the violation of a State law from which he claimed exemption, arose under the laws and treaties of the United States.²

A suit to protect rights claimed under a treaty does not arise under the treaty when the validity of the latter is not disputed and its construction is not involved.³ It was held: that where both parties claimed under Mexican grants, confirmed and patented in accordance with a provision of a treaty, the plaintiff claiming certain water rights thereunder, which the defendant disputed; the suit did not arise under a treaty of the United States.⁴ Where a complaint in ejectment against private individuals alleged that plaintiff was ousted in violation of the provisions of the treaty with France, of October 21, 1808, for the protection of the inhabitants of the ceded territory in the enjoyment of their property, it was held: that it did not show a case arising under a treaty of the United States, there being no assertion of any right, title, privilege or immunity, derived from such treaty as against the defendants, and no charge that they took possession by direction of the Government of the United States.⁵ A suit was maintained in a District Court of the United States by the consul of Austria and Hungary, to

mortgagor was not an indispensable party and might be omitted when his joinder would oust the jurisdiction. See *Central Tr. Co. v. Wheeling & L. E. R. Co.*, 211 Fed. 515; *infra*, §§ 117-120.

⁷⁰ See *infra*, §§ 40-44.

§ 26. ¹ *Muse v. Arlington Hotel Co.*, 168 U. S. 430, 42 L. ed. 531. See *infra*, § 688.

² *Peters v. Malin*, 111 Fed. 244.

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³ *Borgmeyer v. Idler*, 159 U. S. 408, 40 L. ed. 199; *Muse v. Arlington Hotel Co.*, 168 U. S. 430, 42 L. ed. 531. See *Gill v. Oliver*, 11 How. (U. S.) 529, 545, 13 L. ed. 799, 806.

⁴ *Crystal Springs Land & Water Co. v. Los Angeles*, 177 U. S. 169, 44 L. ed. 720; affirming 82 Fed. 114.

⁵ *Filhiol v. Maurice*, 185 U. S. 108, 46 L. ed. 827.

restrain a beneficial association from using the name of the Emperor of Austria and Hungary, as a part of its corporate name, and the use of his portrait as a part of its advertising literature, in order fraudulently to induce his subjects, resident in the United States, to believe that the association was conducted under the customs of their own country, and that their Emperor was identified with the same and a patron thereof.⁶

§ 27. Suits where the parties are Federal corporations. In general. When either party is a corporation chartered by Congress, the case is one arising under the Constitution and laws of the United States; and except in the case of national banks,¹ the former rule was that a District Court of the United States might take jurisdiction of the same, either originally,² or by removal.³

The statutes now provide: "No court of the United States shall have jurisdiction of any action or suit by or against any railroad company upon the ground that said railroad company was incorporated under an Act of Congress."⁴

Some of the following decisions may still be of use to the practitioner. The court will take judicial notice that a party to the action is incorporated by an act of Congress, although the pleadings are silent upon the subject.⁵ It was not the domicile of a corporation created by an act of Congress which conferred jurisdiction on the Federal courts of suits to which it was a party, but

⁶ Von Thodorovich v. Franz Joseph Beneficial Ass'n, 154 Fed. 911.

¹ § 27. ¹ See *infra*, § 28.

² Osborn v. U. S. Bank, 9 Wheat. 738, 823, 6 L. ed. 204, 224; Male v. Atehison, etc., Ry., 240 U. S. 97; Northern Pac. R. Co. v. Amato, 144 U. S. 465, 36 L. ed. 506; U. S. Freehold Land & Emigration Co. v. Gallegos, 89 Fed. 769, 32 C. C. A. 470.

³ Pacific R. R. Removal Cases; Union Pac. R. Co. v. Myers, 115 U. S. 1, 29 L. ed. 319; reversing Myers v. Union Pac. Ry. Co., 16 Fed. 292, 3 McCrary, 578; Knights of Pythias v. Kalinski, 163 U. S. 289, 41 L. ed. 163, 16 Sup. Ct. Rep. 1047; Matter

of Dunn, 212 U. S. 374, 53 L. ed. 558; Cruikshank v. Fourth Nat. Bank, 16 Fed. 888, 21 Blatchf. 322; Allen v. Texas & P. R. Co., 25 Fed. 513; Supreme Lodge of Knights of Pythias of the World v. Hill, 76 Fed. 468, 22 C. C. A. 280; Union Pac. R. Co. v. McComb, 58 How. Prac. 478; Texas & P. Ry. Co. v. Watson, 43 S. W. 1060.

⁴ 38 St. at L. 583, Comp. St. Bankers Trust Co. v. Tex. & Pac. Ry., 241 U. S. 295.

⁵ Matter of Dunn, 212 U. S. 374, 53 L. ed. 558; Knights of Pythias v. England, 94 Fed. 369, 36 C. C. A. 298.

the fact that it was so created. It was held, that by the consolidation of a Federal with a State corporation, the former did not lose any of its rights or franchises as such, and was not estopped from removing suits brought against it in the State courts to those of the United States, notwithstanding that the laws of the State in question provided: "If any railroad company, organized under the laws of this State, shall consolidate by sale or otherwise with any railroad company organized under the laws of any other State or of the United States, the same shall not thereby become a foreign corporation, but the courts of this State shall retain jurisdiction in all matters which may arise as if said consolidation had not taken place."⁶ When a party is a corporation, which derives its charter from a Territorial statute, that fact does not make the case arise under the laws of the United States,⁷ although it was organized in pur-

⁶ *Allen v. Texas & P. R. Co.*, 25 Fed. 513.

⁷ *Adams Express Co. v. Denver & R. G. R. Co.*, 16 Fed. 712; *Maxwell v. Federal Gold & Copper Co.*, C. C. A., 155 Fed. 110. An act of Congress provides: that the Oregon Short Line Railway Company, a corporation of the Territory of Wyoming, "is hereby made a railway corporation in the Territories of Utah, Idaho and Wyoming," under the same limitations, and with the same rights that it previously had under its articles of incorporation in Wyoming, and with all the rights and privileges within these Territories secured to railway companies by a previous act of Congress granting to railroads the right of way through public lands. Another act of Congress provides: that the Utah & Northern Railway Company, a corporation organized under the laws of Utah, "is hereby made a railway corporation in the Territories of Utah, Idaho and Montana," under the same limitations, and with the same rights that it

then had under its articles of incorporation. It was *held* on a petition of the Oregon Short Line & Utah Northern Railroad Company, a corporation formed by a consolidation of these two companies: that the statute gave no powers or rights to be exercised outside of the Territories named therein, and therefore did not give such corporations a Federal character; and that petitioner and its several constituent companies were Territorial organizations, and not entitled to a removal to the Federal court of an action brought against it in the Supreme Court, as a suit arising under the laws of the United States. *Oregon Short Line & U. N. R. Co. v. Skottowe*, 162 U. S. 490, 40 L. ed. 1048; affirming *Skottowe v. Oregon Short Line & U. N. Ry. Co.*, 22 Or. 430, 30 Pac. 222, 16 L.R.A. 593; approving *Conlon v. Oregon Short Line & U. N. Ry. Co.*, 21 Or. 462, 28 Pac. 501. In an elaborate opinion, 32 Wash. Law Rep. 758, 761, Fred Dennet, Esq., of D. C. bar argued: that organizations in-

suance of the corporation laws of Arkansas under an act of Congress,⁸ which directed that they should be enforced in that Territory with the same effect as if enacted *in haec verba*.⁹ An action by a shipbuilding company against the Emergency Fleet Corporation organized under the laws of the United States founded upon an alleged breach of a contract for ship building could be removed to a Federal court.¹⁰ A corporation manufacturing munitions for the United States out of supplies furnished by the National Government was permitted to sue in the Federal courts to enjoin labor unions from interfering with its prosecution of work for the Government.¹¹

When the Federal corporation was actually interested in the controversy,¹² the joinder of another defendant, even if he was the receiver of the other, did not prevent the removal.¹³ It was held: that proceedings for the condemnation of a right of way could not be removed into a Federal court by a Federal corporation joined as a defendant, when it did not appear that such

corporated under the Code of the District of Columbia (Act of March 3, 1901, amended January 31 and June 30, 1902) have the right to remove suits brought against them. See *Lyons v. Bank of Discount*, 154 Fed. 391.

⁸ 31 St. at L. 794. See *Kansas P. R. Co. v. Atchison, T. & S. F. R. Co.*, 112 U. S. 414, 415, 28 L. ed. 794, 795, 5 Sup. Ct. 208.

⁹ *Shulthis v. McDougal*, 225 U. S. 561, 56 L. ed. 1205; *Boyd v. Great Western Coal & Coke Co.*, 189 Fed. 115. *Contra*, *Canary Oil Co. v. Standard Asphalt & Rubber Co.*, 182 Fed. 663. See *Daly v. National Life Ins. Co.*, 64 Ind. 1; *Knights of Pythias v. Kalinski*, 163 U. S. 289, 41 L. ed. 163; 16 Sup. Ct. 1047. See, also, *Harv. Law Review*, xxv., pp. 291, 292, 295.

¹⁰ *Union Timber Product Co. v. U. S. Shipping Board Emergency Fleet Corporation*, 252 Fed. 320.

¹¹ *Wagner Elec. Mfg. Co. v. Dis-*

trict Lodge No. 9, I. A. of M., 252 Fed. 597.

¹² *Washington & I. R. Co. v. Coeur D'Alene R. & Nav. Co.*, 160 U. S. 77, 40 L. ed. 346; affirming 60 Fed. 981, 9 C. C. A. 303, 15 U. S. App. 359.

¹³ *Washington & I. R. Co. v. Coeur D'Alene R. & Nav. Co.*, 160 U. S. 77; affirming 60 Fed. 981, 9 C. C. A. 303, 15 U. S. App. 359; *Matter of Dunn*, 212 U. S. 374, 53 L. ed. 558; *Lund v. Chicago, R. I. & P. Ry. Co.*, 78 Fed. 385; *Martin v. St. Louis Southwestern Ry. Co. of Texas*, 134 Fed. 134; *Texas & P. Ry. Co. v. Bloom*, 85 Tex. 279, 20 S. W. 133. See *Fisk v. Union Pac. R. Co.*, Fed. Cas. No. 4,827 (6 Blatchf. 362); s. c., Fed. Cas. No. 4,828 (8 Blatchf. 243). *Contra*, *Scott v. Choctaw, O. & G. R. Co.*, 112 Fed. 180; *Hazard v. Durant*, 9 R. I. 602; *Texas & P. Ry. Co. v. Huber (Texas)*, 75 S. W. 547. See also, *supra*, § 24, notes 46-50, and *infra*, § 35.

corporation was concerned in the litigation, for in such case the record did not show that the case was one arising under the Constitution and laws of the United States.¹⁴

§ 28. National banking associations. The Judicial Code provides concerning suits to which national banks are parties: that the District Courts of the United States shall have jurisdiction "of all cases commenced by the United States, or by direction of any officer thereof, against any national banking association, and cases for winding up the affairs of any such bank; and of all suits brought by any banking association established in the district for which the court is held, under the provisions of title 'National Banks,' Revised Statutes, to enjoin the Comptroller of the Currency, or any receiver acting under his direction, as provided by said title. And all national banking associations established under the laws of the United States shall, for the purposes of all other actions by or against them, real, personal, or mixed, and all suits in equity, be deemed citizens of the States in which they are respectively located."¹ This differs from the previous law, which specifically provided: "In such cases the Circuit and District Courts shall not have jurisdiction other than such that they would have in cases between individual citizens of the same State."² This omission does not extend the jurisdiction beyond that granted by the previous statute.³

Under the former law it was held as follows: This deprives the Federal courts of jurisdiction of a suit by a national bank located in the District of Columbia unless some other Federal question is involved.⁴ The Federal Court has no jurisdiction of a suit by a stockholder against the directors of a National Bank

¹⁴ *Seattle & M. R. Co. v. State*, 52 Fed. 594; distinguishing *Union Pac. R. Co. v. City of Kansas*, 115 U. S. 1, 29 L. ed. 319.

§ 28. 1 § 24, subd. 16, 36 St. at L. 1087.

² St. at L. 433, § 4. *Leather Manufacturers' Nat. Bank v. Cooper*, 120 U. S. 778, 30 L. ed. 816; affirming *Cooper v. Leather Manufacturers' Nat. Bank*, 29 Fed. 161; *Ex parte Jones*, 164 U. S. 691, 41 L. ed. 601; *Thomas v. National*

Bank of D. O. Mills, 106 Fed. 438, 45 C. C. A. 407. A State court can issue the writ of mandamus against the officers and directors in a proper case. *In re Tuttle*, 170 N. Y. 9. *In re Fisher's Estate* (Iowa 1905), 102 N. W. 797.

³ *Herrmann v. Edwards*, 238 U. S. 107, 117, 57 L. ed. 1224, 35 Sup. Ct. 839.

⁴ *Am. Nat. Bank v. Tappan*, 174 Fed. 431.

for the violation of their liability at common law when no express violation of a Federal statute is set forth in the plaintiff's pleading.⁵

A Federal Court has jurisdiction of such a suit: by a receiver appointed by the Comptroller of the Currency since it is brought in the course of winding up the affairs of the bank;⁶ Of a suit for the appointment of a receiver of a national bank;⁷ of suits against the agents appointed by the shareholders of national banks in pursuance of the statutes of the United States;⁸ of a suit to charge a national bank with liability as a stockholder in another corporation, where the power of the defendant to hold stock is disputed;⁹ of a suit by a national bank upon the bond of its cashier, conditioned upon the performance of his duties "according to the law and the by-laws" of the bank;¹⁰ of a suit against a national bank and its receiver to enforce a covenant in a lease to indemnify the lessor from loss of rent in case of re-entry because of a default in payment;¹¹ of a suit by stockholders against directors because of damage caused by their violation of a provision of the National Banking Laws;¹² of a suit by a national bank against officers to recover the amount of loans made in violation of the Revised Statutes of the United States;¹³ of a suit by a creditor to recover money loaned to a national bank, where it is alleged that plaintiff was deceived and defrauded by a violation of the acts of Congress;¹⁴ but

⁵ Ibid. *Herrmann v. Edwards*, 238 U. S. 107, 57 L. ed. 1224, 35 Sup. Ct. 839.

⁶ *Bates v. Dresser*, 229 Fed. 772.

⁷ *Snohomish County Bank v. Puget Sound Nat. Bank*, 81 Fed. 518; *Lake Nat. Bank v. Wolfenborough Sav. Bank*, C. C. A., 78 Fed. 517. For the jurisdiction of suits by or against such receivers, see *infra*, § 35.

⁸ *International Trust Co. v. Weeks*, 203 U. S. 364, 51 L. ed. 224; *Snohomish County v. Puget Sound Nat. Bank*, 81 Fed. 518; *Guarantee Co. of North Dakota v. Hanway*, 104 Fed. 369, 44 C. C. A. 312; *International Trust Co. v. Weeks*, 116

Fed. 898; *Weeks v. International Trust Co.*, 125 Fed. 370, 60 C. C. A. 236; reversing 116 Fed. 898.

⁹ *California Nat. Bank v. Kennedy*, 167 U. S. 362, 42 L. ed. 198.

¹⁰ *Walker v. Windsor Nat. Bank*, C. C. A., 56 Fed. 76.

¹¹ *Providence Bldg. Co. v. Atlantic Nat. Bank*, 228 Fed. 814.

¹² *Chesbrough v. Woodworth*, 244 U. S. 72; *Huff v. Union Nat. Bank*, 173 Fed. 333.

¹³ *National Bank of Commerce v. Wade*, 84 Fed. 10; *Abbott v. National Bank of Commerce*, 56 P. 376, 20 Wash. 552.

¹⁴ *Bailey v. Mosher*, 63 Fed. 488, 11 C. C. A. 304, 27 U. S. App. 339.

not, where his pleading makes no reference to such statutes;¹⁵ nor of a suit by a depositor, for false representations in advertisements, statements and reports;¹⁶ of a suit by a creditor of a national bank against a stockholder of the same to enforce a statutory liability created by U. S. R. S. § 5151;¹⁷ of a suit by a stockholder to prevent obedience by the bank to a statute which is obnoxious to the Federal Constitution;¹⁸ of a suit by a stockholder for an accounting by the directors for losses, caused through their disobedience of acts of Congress; of a suit in which there is a question as to the validity of a tax on a shareholder in a national bank.¹⁹ The Federal courts have jurisdiction of a suit by a national bank to assert a right protected by the Constitution of the United States,²⁰ or which it derives from an act of Congress,²¹ when the construction of the Constitution or statute is necessarily involved. Where all the parties on the other side of the controversy are citizens of a different State from that where the national bank is located, the District Court may have jurisdiction of the case if the residence and value of the subject-matter fulfill the statutory requirements.²²

§ 29. Patent and copyright cases. Where the bill prays an injunction against the infringement of a patent or copyright, the suit arises under the laws of the United States; although the defendant does not dispute the validity of the patent or copyright; but resists his defense upon a license or other contract giving him a right to use the same,¹ or upon the contention

¹⁵ *Stuart v. Bank of Staplehurst* (Nebraska), 78 N. W. 298.

¹⁶ *Prescott v. Haughey*, 65 Fed. 653.

¹⁷ *Wyman v. Wallace*, 201 U. S. 230, 50 L. ed. 738.

¹⁸ *Larabee v. Dolley*, 175 Fed. 365, 384.

¹⁹ *Richards v. Rock Rapids*, 72 Iowa, 77, 33 N. W. 372.

²⁰ *Larabee v. Dolley*, 175 Fed. 365, 384.

²¹ *Ibid.*

²² *Petri v. Commercial Nat. Bank*, 142 U. S. 644, 35 L. ed. 1144; *First Nat. Bank v. Forest*, 40 Fed. 705.

§ 29. ¹ *White v. Rankin*, 144 U. S. 628, 36 L. ed. 69; *Excelsior Wooden Pipe Co. v. Pacific Bridge Co.*, 185 U. S. 282, 46 L. ed. 910; reversing 109 Fed. 497, 48 C. C. A. 349; *The Fair v. Kohler Die Specialty Co.*, 228 U. S. 22, where plaintiff's bill stated that defendant had obtained but had forfeited a license; *Healy v. Sea Gull Specialty Co.*, 237 U. S. 479, where the plaintiff alleged this and also a stipulation in the license that in case of suit for infringement the measure of recovery should be the same as the royalty therein agreed

that the complainant, who is a licensee, has forfeited his rights under the license, and although other relief is prayed;² except when the complaint or defendant's answer clearly shows that the suit is in reality brought to enforce a contract, in which case the suit will be dismissed.³ So does a suit by the exclusive licensee of a patent against a patentee and another to whom the latter had granted a license when the bill prays an injunction against infringement by the second licensee.⁴ A suit for damages to business caused by a threat to sue for infringement and for false statements that articles sold by the plaintiff infringe the deferred patent does not arise under the patent laws of the United States,⁵ nor, it has been held, a suit for an injunc-

to; *Walter A. Wood H. Co. v. Minneapolis E. H. Co.*, 61 Fed. 256; *Elgin W. P. & P. Co. v. Nichols*, C. C. A., 65 Fed. 215; *Dunham v. Bent*, 72 Fed. 60; *Young R. L. N. Co. v. Young L. N. Co.*, 72 Fed. 62; *Atherton Mach. Co. v. Atwood-Morrison Co.*, C. C. A., 102 Fed. 949; reversing 99 Fed. 113, 43 C. C. A. 72; *Victor Talking Mach. Co. v. The Fair*, C. C. A., 123 Fed. 424; *Wooster v. Crane & Co.*, C. C. A., 147 Fed. 515. But see *Hartell v. Tilghman*, 99 U. S. 547, explained in *White v. Rankin*, 144 U. S. 628, 636-638; *Harper Bros. v. Klaw*, 232 Fed. 609, (a suit to enjoin licensees of a playwright from producing a photoplay with the same plot); *Silver v. Holt*, 84 Fed. 809; *McMullen v. Bowers*, 102 Fed. 494, 42 C. C. A. 470; *Holt v. Silver*, 169 Mass. 435, 48 N. E. 837.

² *Excelsior Wooden Pipe Co. v. Pacific Bridge Co.*, 185 U. S. 282, 46 L. ed. 910; *Harrington v. Atlantic & Pacific Tel. Co.*, 143 Fed. 329; *Heaton-Peninsular Button-Fastener Co. v. Eureka Specialty Co.*, C. C. A., 77 Fed. 288, 294, 25 C. C. A. 267, 35 L.R.A. 728; *Rupp & Wittgenfeld Co. v. Elliott*, C. C. A., 131 Fed. 730, 65 C. C. A. 544; *Indiana*

Mfg. Co. v. Nichols & Shepard Co., 190 Fed. 579. But see *Cortelyou v. Johnson & Co.*, 207 U. S. 196, 28 Sup. Ct. 105, 52 L. ed. 167; *Bobbs-Merrill Co. v. Straus*, 210 U. S. 339, 345, 28 Sup. Ct. 722, 52 L. ed. 1086; *Crown Cork & Seal Co. v. Brooklyn Bottle Stopper Co.*, C. C. A., Second Ct., 175 Fed. 1019, 99 C. C. A. 664; *Am. Graphophone Co. v. Victor Talking Mach. Co.*, C. C. A., 188 Fed. 428; s. c., 188 Fed. 431.

³ *Excelsior Wooden Pipe Co. v. Pacific Bridge Co.*, 185 U. S. 282, 287, 46 L. ed. 910, 913. See *Herzog v. Heyman*, 151 N. Y. 587, 56 Am. St. Rep. 646, 45 N. E. 1127; *New Marshall Engine Co. v. Marshall Engine Co.*, 223 U. S. 473, 56 L. ed. 513; *Briggs v. United Shoe Co.*, 239 U. S. 48; *American Well Works Co. v. Layne and Bowler Co.*, 241 U. S. 257; *American Graphophone Co. v. Boston Store of Chicago*, 225 Fed. 785; *Hiner v. C. G. Aldrich Co.*, 255 Fed. 785; *Chadeloid Chemical Co. v. Johnson*, C. C. A., 203 Fed. 993.

⁴ *Moyes v. Stirling Co.*, 71 Fed. 43; *Excelsior Wood & Pipe Co. v. Pac. Bridge Co.*, 185 U. S., 282 Fed. 910.

⁵ *Charroin v. Romort Mfg. Co.*, 236 Fed. 1011.

tion against the use and disclosure of a trade secret brought after the defendant has applied for a patent embodying the secret process.⁶

The statute vesting exclusive jurisdiction in the Federal courts of "cases" arising under the patent laws,⁷ does not deprive the State courts of power to determine questions arising under the patent laws; for there is a clear distinction between a case and a question, arising under those laws. The former arises when the plaintiff, in his opening pleading, sets up a right under the patent laws as a ground of recovery, and then the State courts have no jurisdiction. The latter may appear in the plea, answer, or testimony, and the State courts are authorized to decide them.⁸ It has been said: that a dispute as to the assignability of a license to use a patent arises under the laws of the United States.⁹ But suits to determine the title to a patent which are not founded upon Section 4915 of the Revised Statutes of the United States, do not arise under the laws of the United States.¹⁰ All suits which are founded upon Section 4915 of the Revised Statutes arise under the laws of the United States.¹¹ Suits to compel,¹² or to set aside,¹³ the assignment of a patent or copyright,¹⁴ to enforce by a judgment for royalties,¹⁵ or otherwise,^{15a} or to set aside a contract

⁶ *Aronson v. Orlov*, Mass., July 1917, 116 N. E. 951; *infra* § 148. *Contra*, *Moyes v. Stirling Co.*, 71 Fed. 43, a suit for an injunction against similar false statements.

⁷ Jud. Code, § 256, 36 St. at L. 1087.

⁸ *Pratt v. Paris Gaslight & Coke Co.*, 168 U. S. 255, 42 L. ed. 458; *Herzog v. Heyman*, 151 N. Y. 587, 56 Am. St. Rep. 646, 45 N. E. 1127.

⁹ *Walter A. Wood Co. v. Minneapolis E. H. Co.*, 61 Fed. 256.

¹⁰ *Montgomery P. S. C. Co. v. Street S. C. Line*, 43 Fed. 329.

¹¹ *Bernardin v. Northall*, 77 Fed. 849. See *infra*, § 147.

¹² *Pliable Shoe Co. v. Bryant*, 81 Fed. 521; *Merrill v. Miller*, 28 Mont. 134, 72 P. 423; *New Marshall En-*

gine Co. v. Marshall Engine Co., 223 U. S. 473, 56 L. ed. 513.

¹³ *Harrington v. Atlantic & Pacific Tel. Co.*, C. C. A., 185 Fed. 493.

¹⁴ *Hoyt v. Bates*, 81 Fed. 641.

¹⁵ *Albright v. Teass*, 106 U. S. 613, 27 L. ed. 295; *Dale Tile Mfg. Co. v. Hyatt*, 125 U. S. 46, 31 L. ed. 683; *Felix v. Scharnweber*, 125 U. S. 54, 31 L. ed. 687; *Briggs v. United Shoe Mach. Co.*, 239 U. S. 48 (where the bill also sought the annulment of patents for fraud, a relief which could only be granted at the suit of the United States); *Odell v. F. C. Farnsworth Co.*, 250 U. S. 501, affirming, 257 Fed. 101; *Rhodes v. Ashurst*, 176 Ill. 351, 52 N. E. 118; affirming 71 Ill. App.

for the use of a patent or copyright, such as a license,¹⁶ although an injunction against the manufacture of articles covered by the patent is prayed incidentally;¹⁷ do not arise under the laws of the United States, unless the validity of the patents and copyrights are disputed. On a bill in the State court by the equitable assignee of a patent right, under an agreement executed many months before the patent was applied for, against the subsequent assignee of the patent after it was issued, to compel an assignment to complainant, defendant obtained a removal on a petition averring that it was an assignee for a valuable consideration and without notice, and invoking for his protection U. S. R. S. § 4898; the complainant's agreement not having been recorded. It was held, on motion to remand, that Section 4898 was designed for the protection of *bona fide* purchasers, and that the question of the construction, application, and enforcement of this statute in their favor, as against a prior equitable assignee, was a Federal question; and the motion was denied.¹⁸

An action on a judgment obtained in a patent suit for damages and profits, does not arise under the laws of the United States,¹⁹ although the defendants are the directors of an insolvent corporation, who were not parties to the original suit.²⁰ The cases where jurisdiction will be maintained to grant other relief when the prayer for an injunction against the infringement of a patent or copyright is denied, are described in subsequent sections.²¹

242. But see *St. Paul v. Starling*, 127 U. S. 376, 32 L. ed. 251.

¹⁶ *Marsh v. Nichols* S. S. Co., 140 U. S. 344, 35 L. ed. 413. See *Pratt v. Paris Gaslight & Coke Co.*, 168 U. S. 255, 42 L. ed. 458; see *Indiana Mfg. Co. v. Nichols & Co.*, 190 Fed. 579; *Beavers v. Spinks* (Mississippi), 26 So., 930.

¹⁸ *Wilson v. Sandford*, 10 How. 99, 13 L. ed. 344; *Hartell v. Tilghman*, 99 U. S. 547, 25 L. ed. 357; *Wade v. Lawder*, 165 U. S. 624, 41 L. ed. 851; *Standard D. Mfg. Co. v. Nat. Tooth Co.*, 95 Fed. 291; *Kurtz v. Strauss*, 100 Fed. 800; *Mc-*

Mullen v. Bowers, C. C. A., 102 Fed. 494; *Kurtz v. Strauss*, 106 Fed. 414, 45 C. C. A. 366; *Cely v. Griffin*, 113 Fed. 981.

¹⁷ *New Marshall Engine Co. v. Marshall Engine Co.*, 223 U. S. 473, 56 L. ed. 513; *Lefkowitz v. Foster Hose Supporter Co.*, 161 Fed. 367.

¹⁸ *American Solid Leather Button Co. v. Empire State Nail Co.*, 47 Fed. 741.

¹⁹ *H. C. Cook Co. v. Beecher*, 217 U. S. 497, 54 L. ed. 855; affirming 172 Fed. 166.

²⁰ *Ibid*

²¹ *Infra*, §§ 146, 150.

§ 30. **Trademark cases.** A suit to enjoin the imitation of a trademark does not arise under the laws of the United States, unless the bill shows that the trademark is duly registered, and that it is used on goods intended to be transported to a foreign country or to be used in lawful trade with an Indian tribe,¹ or is used in trade among the several States.² Where the bill shows this, no difference of citizenship is essential to the jurisdiction.³ Where the requisite difference of citizenship exists, the District Court may take jurisdiction, either originally or upon removal, of a bill to enjoin the infringement of any trademark, whether registered or not.⁴ A suit to restrain unfair competition trade, where the complainant seeks no protection for a registered trademark, does not present a Federal question.⁵

The cases where, when relief for the infringement of a trademark is denied, jurisdiction will be retained to enjoin unfair competition in trade are described in a subsequent section.⁶

§ 31. **Land and mining cases.** Where the plaintiff's pleading shows that the decision of the case depends upon the construction of the land or mining laws, the suit arises under the laws of the United States; and if the matter in dispute exceeds the jurisdictional amount, a District Court of the United States may take jurisdiction of the same, either originally,¹ or upon

§ 30. ¹ Trademark Cases, 100 U. S. 82, 25 L. ed. 550; *Ryder v. Holt*, 128 U. S. 525, 32 L. ed. 529; *Hutchinson, Pierce & Co. v. Loewy*, 217 U. S. 457, 54 L. ed. 838; *Bernstein v. Danwitz*, 190 Fed. 604; *Allen B. Wrisley Co. v. George E. Rouse S. Co.*, C. C. A., 90 Fed. 5, dismissing appeal 87 Fed. 589; *Warner v. Searle & Hereth Co.*, 191 U. S. 195, 48 L. ed. 145. See §§ 148, 149, 279, *infra*.

² *Bernstein v. Danwitz*, 190 Fed. 604.

³ *Rossmann v. Garnier*, C. C. A., 211 Fed. 401.

⁴ *Edison v. Thomas A. Edison, Jr.*, Chemical Co., 128 Fed. 1013.

⁵ *Burt v. Smith*, C. C. A., 71 Fed. 161; *Allen B. Wrisley Co. v. George*

E. Rouse Soap Co., 90 Fed. 5, 32 C. C. A. 496; dismissing appeal 87 Fed. 589; *Illinois Watch Co. v. Elgin Nat. W. Co.*, C. C. A., 94 Fed. 667; s. c., 179 U. S. 665, 677, 45 L. ed. 365, 382; *A. Leschen & Sons Rope Co. v. Broderick & Bascom Rope Co.*, 134 Fed. 571, 67 C. C. A. 418.

⁶ *Infra*, § 148.

§ 31. ¹ *Florida Cent. & P. R. Co. v. Bell*, 176 U. S. 321, 44 L. ed. 486; *Northern Pac. Ry. Co. v. Sonderberg*, 188 U. S. 526, 47 L. ed. 575; affirming 104 Fed. 425, 43 C. C. A. 620; *Cheesman v. Shreve*, 37 Fed. 36; *Jones v. Florida, C. & P. R. Co.*, 41 Fed. 70; *Pierce v. Molliken*, 78 Fed. 196; *Evans v. Durango Land & Coal Co.*, 80 Fed. 433, 25

removal.² It seems: that this is always the case where the complaint shows that the validity of a land or mining patent is in dispute.³ An action of ejectment,⁴ or of trespass,⁵ or a bill to quiet title,⁶ where the plaintiff rests his title upon a land or mining patent of the United States, the validity of which defendant does not dispute; does not so arise, unless it involves the construction of the statute under which the patent was issued.⁷ Nor does a suit to set aside a land patent solely on account of fraud;⁸ nor a suit by a homestead entryman to secure his protection, while making the improvements required by the acts of Congress, from interference by parties who claim the land under the Town Site Act, but whose claims have been rejected by the Secretary of the Interior;⁹ nor a suit by any entryman to protect his improvements and claim from waste

C. C. A. 531; *Gillis v. Downey*, C. C. A., 85 Fed. 483; *Florida C. & P. R. Co. v. Bell*, C. C. A., 87 Fed. 369; *Linkswiler v. Schneider*, 95 Fed. 203; *Nevada Sierra Oil Co. v. Miller*, 97 Fed. 681; *Wallula Pac. Ry. Co. v. Portland & S. Ry. Co.*, 154 Fed. 902.

² *Mitchell v. Smale*, 140 U. S. 406, 35 L. ed. 442; *Spokane Falls & No. Ry. Co. v. Ziegler*, 167 U. S. 65, 42 L. ed. 79; *Miller v. Wattier*, 24 Fed. 49; *Dunton v. Muth*, 45 Fed. 390; *Walker v. Richards*, 55 Fed. 129; *Southern Pac. R. Co. v. Townsend*, 62 Fed. 161; *McCune v. Essig*, C. C. A., 122 Fed. 588; affirming 118 Fed. 273.

³ *Mitchell v. Smale*, 140 U. S. 406, 35 L. ed. 442; *Florida Cent. & P. R. Co. v. Bell*, 176 U. S. 321, 44 L. ed. 486; *Pierce v. Molliken*, 78 Fed. 196; *McCune v. Essig*, C. C. A., 122 Fed. 588; affirming 118 Fed. 273.

⁴ *Bonin v. Gulf Company*, 198 U. S. 115, 49 L. ed. 970; *Los Angeles Farming & Milling Co. v. Hoff*, 48 Fed. 340; *Washington v. Island Lime Co.*, 117 Fed. 777.

⁵ *In re Helena & L. Smelting & Reduction Co.*, 48 Fed. 609; *Argonaut Min. Co. v. Kennedy Mining & Milling Co.*, 84 Fed. 1; *Peabody Gold-Min. Co. v. Gold Hill Min. Co.*, 97 Fed. 657.

⁶ *Hoadley v. City and County of San Francisco*, 94 U. S. 4, 24 L. ed. 34.

⁷ *Hopkins v. Walker*, 244 U. S. 486; *Lancaster v. Kathleen Oil Co.*, 241 U. S. 551; *State Improvement-Development Co. v. Leininger*, 226 Fed. 884.

⁸ *Holland v. Hyde*, 41 Fed. 897. *Contra*, where the bill also alleged that the patent had been issued without a compliance with the statute as to notice or proofs, and without authority at law: *Cates v. Producers' & Consumers' Oil Co.*, 96 Fed. 7.

⁹ *Blackburn v. Portland G. M. Co.*, 175 U. S. 571, 44 L. ed. 276; *Shoshone M. Co. v. Rutter*, 177 U. S. 505, 44 L. ed. 864; *Butler v. Shafer*, 67 Fed. 161; *King v. Lawson*, 84 Fed. 209. But see *Jones v. Florida, C. & P. R. Co.*, 41 Fed. 70.

and trespass by a defendant, who claims no right under a statute of the United States.¹⁰ Nor a suit in support of an adverse claim to land or mining patent under U. S. R. S. § 2326; unless its decision turns upon a disputed construction of the Federal Constitution, a treaty, or a Federal statute.¹¹ Where prior decisions have so determined the rights of the parties that they are removed from controversy, it cannot be said that the construction of the statute is disputed.¹² The questions of fact: as to what is a "vein," "lode," or "ledge," and as to what is the top or apex of a vein or lode within the meaning of Sections 2320, 2322 and 2325 of the Revised Statutes of the United States;¹³ and as to what are the boundaries mentioned in a mining patent or land grant;¹⁴ or the boundaries of a State as prescribed by the act of Congress admitting it to the Union, when the construction of the statute is not in question;¹⁵ or, it has been held, as to the priority of the location;¹⁶ do not involve Federal questions. Questions as to what are the rights recognized by the local laws, rules, regulations, customs and decisions, which the statutes of the United States direct shall be enforced, do not, it has been held, arise under the Constitu-

¹⁰ *Blackburn v. Portland G. M. Co.*, 175 U. S. 571, 44 L. ed. 276; *Shoshone M. Co. v. Rutter*, 177 U. S. 505, 44 L. ed. 864; *Larned v. Jenkins*, 109 Fed. 100, 48 C. C. A. 252. These cases overruled a number of previous decisions of the Circuit Courts to the contrary.

¹¹ *McGivra v. Ross*, 215 U. S. 70, 54 L. ed. 95. See *Columbia Valley R. Co. v. Portland & S. Ry. Co.*, C. C. A., 162 Fed. 603, where the construction of a statute was involved.

¹² *Colorado Central Consol. Min. Co. v. Turck*, 150 U. S. 138, 37 L. ed. 1030; *Blackburn v. Portland Gold Min. Co.*, 175 U. S. 571, 585, 44 L. ed. 276, 282; *Blue Bird Min. Co. v. Largey*, 49 Fed. 289; *Montana Ore-Purchasing Co. v. Boston & M. C. C. & S. Min. Co.*, C. C. A., 85 Fed. 867.

¹³ *Colorado Central Consol. Min. Co. v. Turck*, 150 U. S. 138, 37 L. ed. 1030; *Blackburn v. Portland Gold Min. Co.*, 175 U. S. 571, 585, 44 L. ed. 276, 282; *Blue Bird Min. Co. v. Largey*, 49 Fed. 289.

¹⁴ *Robinson v. Anderson*, 121 U. S. 522; *Los Angeles Farming & Milling Co. v. Hoff*, 48 Fed. 340; *Joy v. St. Louis*, 122 Fed. 524. *Contra*, *Green v. Valley*, 101 Fed. 882.

¹⁵ *Joy v. St. Louis*, 201 U. S. 332, 50 L. ed. 776. But see *Moore v. McGuire*, 205 U. S. 214, 51 L. ed. 776.

¹⁶ *Wise v. Nixon*, 76 Fed. 3; *Dewey Min. Co. v. Miller*, 96 Fed. 1; *Peabody Gold Min. Co. v. Gold Hill Min. Co.*, 97 Fed. 657. *Contra*, *Nevada Sierra Oil Co. v. Miller*, 97 Fed. 681.

tion and laws of the United States.¹⁷ An allegation in a declaration of ejectment, that the plaintiff was ousted in violation of a specified treaty and of the Fifth Amendment to the Federal Constitution, is insufficient to support the jurisdiction.¹⁸ Where the complaint charged a continuing trespass, demanding a lump sum as damages, the plaintiff claiming under a series of titles to the same land, the adjudication of one of which alone involved a Federal question, it was held, that the whole case might be removed.¹⁹ Where the complaint showed that the controversy arose under the land laws of the United States, a Federal court of equity has entertained and determined all incidental questions between the respective parties arising out of their conflicting claims and granted an injunction and appoint a receiver.²⁰

§ 32. Cases arising under the laws relating to navigable waters. It has been held: that cases arise under the Constitution and laws of the United States, where the plaintiff by his complaint asserts a right under the Federal Constitution and certain acts of Congress, to maintain a dock on a navigable stream; ¹ where a suit is brought to enjoin an obstruction upon a navigable stream, such as a bridge,² or a log boom,³ and the plaintiff claims that the same is forbidden by an act of Congress,⁴ or by a Federal official acting under lawful authority,⁵

¹⁷ *Trafton v. Nougues*, Fed. Cas. No. 14,134 (4 Sawyer, 178); *Telluride Power-Transmission Co. v. Rio Grande W. Ry. Co.*, 175 U. S. 639, 44 L. ed. 305; dismissing appeal 51 Pac. 146, 16 Utah, 125.

¹⁸ *Filhiol v. Maurice*, 185 U. S. 108, 46 L. ed. 827.

¹⁹ *Evans v. Durango Land & Coal Co.*, 80 Fed. 433, 25 C. C. A. 531.

²⁰ *Nevada Sierra Oil Co. v. Miller*, 97 Fed. 681; *State Improvement-Development Co. v. Leininger*, 226 Fed. 884. Where the bill prayed an injunction to restrain an officer of the United States from recording the cancellation of land selections and a decree directing a State officer to issue to the plaintiff plaintiff's patents for such lands.

¹ *Cummings v. Chicago*, 188 U. S. 410, 47 L. ed. 525; *Calumet Grain & Elevator Co. v. Chicago*, 188 U. S. 431, 47 L. ed. 532; *Kenyon v. Squire*, 1 Wash. St. 9, 24 Pac. 28.

² *New Orleans M. & T. R. Co. v. Mississippi*, 102 U. S. 135, 26 L. ed. 96; *E. A. Chatfield Co. v. New Haven*, 110 Fed. 788.

³ *U. S. v. Bellingham Bay Boom Co.*, 176 U. S. 211, 44 L. ed. 437; reversing 81 Fed. 658, 26 C. C. A. 547.

⁴ *U. S. v. Bellingham Bay Boom Co.*, 176 U. S. 211, 44 L. ed. 437; reversing 81 Fed. 658, 26 C. C. A. 547; where the statute permitted such a suit, when the obstruction was not affirmatively authorized by

or where the court takes judicial notice of an act of Congress under which the defendant contends that the obstruction is authorized;⁶ where the plaintiff claims the right to accretions along a river front under letters patent of the United States, issued in pursuance of an act of Congress and the construction of the act under which the patent was issued is in question;⁷ but that the defendants cannot obtain a writ of error to review a judgment of a State court granting an injunction against their interference with the plaintiff's possession of lands claimed in the complaint under an act of Congress, when the defense is that they have acquired by priority of possession rights to the use of the water which have vested and accrued, are recognized and acknowledged by the local customs, laws and decisions as provided in § 2339 of the Revised Statutes of the United States.⁸

§ 32a. Cases arising under the Interstate Commerce Law.

The Interstate Commerce Law provides: "Any person or persons claiming to be damaged by any common carrier subject to the provisions of this act may either make complaint to the Commission as hereinafter provided for, or may bring suit in his or their own behalf for the recovery of the damages for which such common carrier may be liable under the provisions of this act, in any District or Circuit Court of the United States of competent jurisdiction; but such person or persons shall not have the right to pursue both of said remedies, and must in each case elect which one of the two methods of procedure herein provided for he or they will adopt."¹

The essential character of commerce, not the bill at the place where title passes, determines whether it is interstate or intrastate.²

It has been held: that a bill by one railroad company against

law, whether State or Federal, and the only question for consideration was whether the obstruction was authorized by a State statute.

⁵ *E. A. Chatfield Co. v. New Haven*, 110 Fed. 788.

⁶ *New Orleans, M. & T. R. Co. v. Mississippi*, 102 U. S. 135, 26 L. ed. 96.

⁷ *King v. St. Louis*, 98 Fed. 641.

⁸ *Telluride Power Transmission Co. v. Rio Grande W. Ry. Co.*, 175 U. S. 639, 44 L. ed. 305; dismissing appeal 51 Pac. 146, 16 Utah 125; *In re Helena & L. Smelting & Reduction Co.*, 48 Fed. 609.

§ 32a. 124 St. at L. 382, Comp. St. § 8573.

² *Pennsylvania R. R. Co. v. Clark Bros. Coal Min. Co.*, 238 U. S. 456.

another and its employee, to enforce the interstate commerce act, by enjoining the defendants from refusing to receive plaintiff's cars,³ and one to enjoin a common carrier from enforcing an unreasonable rate for transportation,⁴ in violation of the same statute; arose under the Constitution and laws of the United States. It has been held: that an application for a *mandamus*, to compel a railroad engaged in interstate commerce to run its trains to a certain station, in obedience to a State statute, involves a Federal question, since a judgment therein may impose a burden on interstate commerce.⁵ But, it has been said, that a constitutional question is not presented where the court has occasion to apply the rules of the common law regulating transportation charges, whether or not the carriage be interstate.⁶ Suits to enjoin combinations,⁷ and to cancel agreements,⁸ which are in restraint of commerce between States, or to prevent by trespass interference with the performance of a contract with the National Government⁹ arise under the laws of the United States.

The value of the matter in controversy is immaterial to the jurisdiction;¹⁰ except in the case of a removal where the statutes provide that: "No suit brought in any State court of competent jurisdiction against a railroad company, or other corporation, or person, engaged in and carrying on the business of a common carrier, to recover damages for delay, loss of, or injury to property received for transportation by such common carrier under sections of the Act to regulate commerce, approved February fourth, eighteen hundred and eighty-seven, as amended June

³ *Ex parte Lennon*, 166 U. S. 548, 41 L. ed. 1110.

⁴ *Macon Grocery Co. v. Atlantic Coast Line R. R. Co.*, 215 U. S. 501, 54 L. ed. 300, affirming *Atlantic Coast Line R. Co. v. Macon Grocery Co.*, C. C. A., 166 Fed. 206; *Tift v. Southern Ry. Co.*, 123 Fed. 789; *Kalispell Lumber Co. v. Great Northern Ry. Co.*, 157 Fed. 845; *Sunderland Bros. v. Chicago, R. I. & P. Ry. Co.*, 158 Fed. 877.

⁵ *Illinois v. Rock Island & P. R. Co.*, 71 Fed. 753.

⁶ *Murray v. Chicago & N. W. Ry.*

Co., 92 Fed. 868, 35 C. C. A. 62; affirming 62 Fed. 24.

⁷ *Mannington v. Hocking Valley Ry. Co.*, 183 Fed. 133.

⁸ *Chalmers Chemical Co. v. Chadoloid Chemical Co.*, 175 Fed. 995.

⁹ *Wagner Elec. Mfg. Co. v. District Lodge No. 9, I. A. of M.*, 252 Fed. 597. *Contra*, *Pickering Land & Timber Co. v. Wisby*, 242 Fed. 993.

¹⁰ *Jud. Code*, § 24, 30 St. at L. 416, 36 St. at L. 1094, *Comp. St.* 991.

twenty-ninth, nineteen hundred and eight, February twenty-fifth, nineteen hundred and nine, and June eighteenth, nineteen hundred and ten, shall be removed to any court of the United States where the matter in controversy does not exceed, exclusive of interest and costs, the sum or value of \$3,000.”¹¹ An action in a State court, to recover for personal injuries alleged to have been received by reason of the failure of defendant railroad company properly to equip its cars with safety appliances, is not removable merely because of an allegation in the complaint that defendant is engaged in interstate commerce, where it does not appear that there is any controversy as to the construction or effect of the Federal law relating to railroads engaged in such commerce, since the questions of fact whether defendant is engaged in interstate commerce, and, if so, whether it has complied with the law, are not Federal questions.¹²

The District Courts have jurisdiction of suits to set aside or restrain the enforcement of an order of the Interstate Commerce Commission.¹³ The cases in which such a review is proper are explained in a subsequent section.¹⁴

A District Court has jurisdiction of a suit to enjoin a railroad company from refusing to transport goods although the controversy has not been submitted to the commission; when no question concerning the charges for transportation is involved in the suit;¹⁵ but not when the refusal has been confined to a single carload.^{15a}

The District Courts have jurisdiction of actions to collect damages awarded by orders of reparation made by the Interstate Commerce Commission.¹⁶ Such an action may be brought

¹¹ 36 St. at L. 1094, Comp. St. 991; *E. H. Emery Co. v. Ame. Refrig. Tr. Co.*, 246 U. S. 634; *Southern Pac. Co. v. Stewart*, 245 U. S. 359; *Adams v. Chicago Great Western R. Co.*, 210 Fed. 362.

¹² *Myrtle v. Nevada C. & O. Ry. Co.*, 137 Fed. 193.

¹³ *Louisville & N. R. Co. v. United States*, 218 Fed. 914; *Chestnut Ridge Ry. Co. v. United States*, 248 Fed. 792; *Atchison, T. & S. F. Ry. Co. v. Spiller*, C. C. A., 246 Fed. 1.

¹⁴ *Infra*, § 151.

¹⁵ *Louisville & Nashville R. R. Co. v. F. W. Cook Brewing Co.*, 223 U. S. 70; *Royal Brewing Co. v. Missouri K. & T. Ry. Co.*, 217 Fed. 146.

^{15a} *Northern Pac. Ry. Co. v. Van Dusen Harrington Co.*, C. C. A., 245 Fed. 454.

¹⁶ *Lehigh Valley R. Co. v. Meeker*, C. C. A., 211 Fed. 785.

“If a carrier does not comply with an order for the payment of money within the time limit in such order, the complainant, or any person for whose benefit such order was

in a State or Federal Court.¹⁷ It has been held: that where any evidence is offered except the order and the finding of the commission which supports the same, there is a *prima facie* case in favor of the plaintiff's right to recover;¹⁸ and that where the evidence before the Commission is offered upon the

made, may file in the circuit court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the road of the carrier runs, or in any state court of general jurisdiction having jurisdiction of the parties, a petition setting forth briefly the causes for which he claims damages, and the order of the commission in the premises. Such suit in the circuit court of the United States shall proceed in all respects like other civil suits for damages, except that on the trial of such suit the findings and order of the commission shall be *prima facie* evidence of the facts therein stated, and except that the petitioner shall not be liable for costs in the circuit court nor for costs at any subsequent state of the proceedings unless they accrue upon his appeal. If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit. All complaints for the recovery of damages shall be filed with the commission within two years from the time the cause of action accrues, and not after, and the petition for the enforcement of an order for the payment of money shall be filed in the circuit court or state court within one year from the date of the order, and not after.

"In such suits all parties in whose favor the Commission may have made an award for damages by a

single order may be joined as plaintiffs, and all of the carriers parties to such order awarding such damages may be joined as defendants, and such suit may be maintained by such joint plaintiffs and against such joint defendants in any district where any one of such joint plaintiffs could maintain such a suit against any one of such joint defendants; and service of process against any one of such defendants as may not be found in the district where the suit is brought may be made in any district where such defendant carrier has its principal operating office. In case of such joint suit the recovery, if any, may be by judgment in favor of any one of such plaintiffs, against the defendant found to be liable to such plaintiff." 24 St. at L. 384, as amended 25 St. at L. 859, 34 St. at L. 590, 36 St. at L. 554, Comp. St. § 8584.

It has been held that the finding by the Commission that a given rate was unreasonable establishes the violation of the act but that its evidential value as to the liability for damages is for the determination of the court and jury who are not bound to give it even *prima facie* force. *Lehigh Valley R. Co. v. Meeker, C. C. A., 211 Fed. 785. Reversed, 136 U. S. 434, 439. Cf. infra, § 333h.*

¹⁷ *Pennsylvania R. R. Co. v. Clark Bros. Coal Min. Co., 238 U. S. 456.*

¹⁸ *St. Louis S. W. Ry. Co. v. S. Samuels & Co., C. C. A., 211 Fed.*

trial the court can inquire whether this is sufficient to justify the order and if not, should direct judgment for the defendant.¹⁹ Either party may offer additional evidence.²⁰ The plaintiff who has paid the unreasonable charges may recover although he has collected them from his vendors.²¹ The Commission and the jury may in a proper case include interest in the damages awarded.²²

When the transaction of which complaint is made took place in interstate commerce, the State Courts²³ and the Federal Courts, originally irrespective of the value of the matter in dispute²⁴ and upon removal when the matter in dispute exceeds the jurisdictional amount in ordinary cases, have jurisdiction of actions against railway companies²⁵ or other carriers for loss

588; *Clark Bros. Coal Min. Co. v. Pennsylvania R. Co.*, 238 Fed. 642.

¹⁹ *Michigan Cent. R. Co. v. Elliott*, C. C. A., 256 Fed. 78; *Pennsylvania R. R. Co. v. W. F. Jacobi & Co.*, 242 U. S. 89, where all the evidence before the commission was not before the court.

²⁰ *Missouri Pac. Ry. Co. v. C. E. Ferguson Sawmill Co.*, C. C. A., 235 Fed. 474.

²¹ *Southern Pac. Co. v. Carnell Taenzer Lumber Co.*, 245 U. S. 531. Where it appeared that the shipper had paid no part of the freight no recovery was allowed to his assignee, the consignee, there being no proof that the latter had made the payment. *Michigan Central R. Co. v. Elliott*, C. C. A., 256 Fed. 18. Where other carriers not parties to the proceeding before the commission had participated to a small extent in the transportation of the shipments on account of the payment for which the award was made was held not to invalidate the order. *Missouri Pac. Ry. Co. v. C. E. Ferguson Sawmill Co.*, C. C. A., 235 Fed. 474. Where after the time for payment fixed by the first order had

elapsed there was an amendment which did not affect the award and left the date unchanged; it was held that that did not effect the plaintiff's right to recover. *Missouri Pac. Ry. Co. v. C. E. Ferguson Sawmill Co.*, C. C. A., 235 Fed. 474.

²² *Minds v. Pennsylvania R. Co.*, 237 Fed. 267; *Mo. Pac. Ry. Co. v. C. E. Ferguson Sawmill Co.*, C. C. A., 235 Fed. 474.

²³ *N. Y. C. & H. R. R. Co. v. Beham*, 242 U. S. 148, sustaining an action brought in a State Court; *Pennsylvania R. R. Co. v. Puritan Coal Min. Co.*, 237 U. S. 121; *Pennsylvania R. Co. v. Sonman Shaft Coal Co.*, 242 U. S. 120.

²⁴ *Adams Express Co. v. Croninger*, 226 U. S. 491, 33 Sup. Ct. 148, 57 L. ed. 314, 44 L. R. A. N. S. 257; *St. Louis In. & So. Ry. Co. v. Starbird*, 243 U. S. 592, 37 Sup. Ct. 462, 61 L. ed. 917; *N. Y. Cent. R. Co. v. Mutual Orange Distributors*, C. C. A., 251 Fed. 230.

²⁵ 36 St. at L. 1094, quoted *supra*. *Hartford Fire Ins. Co. v. Kansas City, M. & O. Ry. Co. of Texas*, 251 Fed. 332.

or damage to passengers' baggage²⁶ or goods shipped over their lines;²⁷ to recover damages for the failure of a common carrier to furnish cars for freight within a reasonable time;²⁸ although there has been no order by the Interstate Commerce Commission in the premises. But not where the sole complaint or the failure of the carrier to supply cars fitted with inside doors or bulkheads or timber for the construction of such fittings.²⁹

The District Courts have jurisdiction of actions by carriers to recover freight charges upon interstate shipments,³⁰ including charges for disinfecting cattle cars although the defendant admits that the shipment was made in interstate commerce and the propriety of the charges depends on the sole ground that the carrier is estopped from the collection;³¹ but not it has been held of an action to collect the balance due for freight from the consignor which it has failed through error to collect the full amount from the consignee.³²

Where he has made no complaint to the Interstate Commerce Commission, a shipper may sue in a district court to recover unjust and unreasonable charges for freight which he has been

²⁶ *N. Y. C. & H. R. R. Co. v. Beham*, 242 U. S. 148, sustaining an action brought in a State Court; *Pennsylvania R. R. Co. v. Puritan Coal Min. Co.*, 237 U. S. 121; *Pennsylvania R. Co. v. Sonman Shaft Coal Co.*, 242 U. S. 120.

²⁷ *Adams Express Co. v. Croninger*, 226 U. S. 491, 33 Sup. Ct. 148, 57 L. ed. 314, 44 L. R. A. N. S. 257; *St. Louis In. & So. Ry. Co. v. Starbird*, 243 U. S. 592, 37 Sup. Ct. 462, 61 L. ed. 917; *N. Y. Cent. R. Co. v. Mutual Orange Distributors, C. C. A.*, 251 Fed. 230; *McGoon v. Northern Pac. Ry. Co.*, 204 Fed. 998; *Smith v. Atchison, T. & S. F. Ry. Co.*, 210 Fed. 988. As to the liability of initial carriers see 34 St. at L. 595, Comp. St. § 8604a.

²⁸ *Pennsylvania R. R. Co. v. Puritan Coal Min. Co.*, 237 U. S. 121;

Pennsylvania R. Co. v. Sonman Shaft Coal Co., 242 U. S. 120.

Where the distribution of the cars was in accordance with the carriers' rules it was held that there could be no recovery until the commission had determined whether the rules in this respect were reasonable. *Morrisdale Coal Co. v. Pennsylvania R. R. Co.*, 230 U. S. 304.

²⁹ *Loomis v. Lehigh Valley R. R. Co.*, 240 U. S. 43.

³⁰ *Atchison, T. & S. F. R. Co. v. Kinkade*, 203 Fed. 165; *Wells Fargo & Co. v. Canoe*, 241 Fed. 727; *Mobile & O. R. Co. v. Wash. & C. Ry. Co.*, 242 Fed. 531 (a suit by one carrier against another).

³¹ *Louisville & N. R. R. Co. v. Rice*, 247 U. S. 201.

³² *Yazoo & M. V. R. Co. v. Zermurray, C. C. A.*, 238 Fed. 789.

obliged to pay;³³ at least when the controversy involves only a construction of the tariff schedule and its application to the shipments in question;³⁴ or the construction of a federal statute such as that forbidding secret discriminations;³⁵ or when the Commission has decided the rates to be unreasonable in a proceeding instituted by another shipper similarly situated;³⁶ but not to recover damages in addition to those awarded by the Interstate Commerce Commission for the same grievance.³⁷

The Interstate Commerce Commission has the function of passing upon the validity of a contract between a railroad company and a wharf company for the transfer of goods from cars to vessels.³⁸ Consequently the Federal Courts, before a decision by the Commission upon the subject, will not take jurisdiction of a friendly suit by the latter against the former company to recover compensation under such a contract, when it appears that the suit is brought to obtain a judgment which might be pleaded against a disapproval by the Commission of the contract.³⁹

Suits to enjoin combinations,⁴⁰ and to cancel agreements,⁴¹ which are in restraint of commerce between States, arise under the laws of the United States and are within the jurisdiction of the Federal Courts if the value of the matter in dispute exceeds the jurisdictional amount. But it was held: that a suit by the receiver of a railroad company for an injunction against the execution of a conspiracy to injure his company by a diversion of traffic was not removable.⁴² A suit by the owner of a telegraph line to enjoin its destruction is not

³³ *National Coal Co. v. Chicago & N. W. Ry. Co.*, C. C. A., 211 Fed. 65.

³⁴ *Gimbel Bros. v. Barrett*, 215 Fed. 1004; *National Elevator Co. v. Chicago, M. & St. P. Ry. Co.*, C. C. A., 246 Fed. 588.

³⁵ *Langdon v. Pennsylvania R. Co.*, 194 Fed. 486; *A. J. Phillips Co. v. Grand Trunk Western Ry. Co.*, C. C. A., 195 Fed. 12; *California Adjustment Co. v. Southern Pac. Co.*, 226 Fed. 349.

³⁶ *National Pole Co. v. Chicago,*

& N. W. Ry. Co., C. C. A., 211 Fed. 65.

³⁷ *Louisville & Nashville R. R. Co. v. Ohio Valley Tie Co.*, 242 U. S. 288.

³⁸ *Southern Cotton Oil Co. v. Central of Georgia Ry. Co.*, 204 Fed. 476.

³⁹ *Ibid.*

⁴⁰ *Mannington v. Hocking Valley Ry. Co.*, 183 Fed. 133.

⁴¹ *Chalmers Chemical Co. v. Chadco Chemical Co.*, 175 Fed. 995.

⁴² *Smith v. Barnett*, 242 Fed. 83.

within the jurisdiction of the Federal Court, because the defendant's acts would interfere with interstate commerce.⁴³ A suit by a city to restrain the violation by a railway company of a contract fixing rates for transportation does not arise under the laws of the United States although the bill alleges in its charging part that the defendant relies upon an invalid order of the Interstate Commerce Commission authorizing an increase of the rates.⁴⁴

§ 33. Suits on judicial and official bonds. Actions upon bonds required by the orders of the Federal courts, such as *supersedeas* bonds,¹ injunction bonds,² or bonds in support of attachments by the Federal courts,³ receivers' bonds,⁴ and suits upon the bonds of deputy collectors,⁵ United States marshals,⁶ cashiers of national banks,⁷ clerks of Federal courts,⁸ and other Federal officers,⁹ arise under the laws of the United States.

⁴³ Postal Tel. Cable Co. v. Nolan, 240 Fed. 754; *supra*, § 25.

⁴⁴ City of Monroe v. Detroit, M. & T. S. L. Ry., 257 Fed. 782; *supra*, §§ 24 and 25; Interborough R. R. v. Boston & M. R. R., C. C. A., 239 Fed. 97. Headnote:

"A suit by a railroad company, which leased its line, to compel the lessee company to issue passes pursuant to the lease agreement, is not one over which the federal courts have jurisdiction under Act Aug. 13, 1888, c. 866, 25 Stat. 433, as a suit arising under the Constitution and laws of the United States, because the lessee's probable defense, based on the inhibition against the issuance of passes found in the acts to regulate commerce (Act June 29, 1906, c. 3591, 34 Stat. 584, and Act June 18, 1910, c. 309, 36 Stat. 539), was anticipated and attacked on the ground that such defense was unavailing under the Constitution."

§ 33. ¹ American Surety Co. v. Shulz, 237 U. S. 159, affirming 222 Fed. 280; Crane v. Buckley, 105 Fed. 401.

² Lamb v. Ewing, C. C. A., 54 Fed. 269; Leslie v. Brown, 90 Fed. 171, 32 C. C. A. 556.

³ Files v. Davis, 118 Fed. 465.

⁴ United States v. Douglas, 113 N. C. 190, 18 S. E. 202.

⁵ Crawford v. Johnson, Fed. Cas. No. 3,369 (Deady, 457); Orner v. Saunders, Fed. Cas. No. 10,584 (3 Dill 284).

⁶ Feibelman v. Packard, 109 U. S. 421, 27 L. ed. 984; Bachrack v. Norton, 132 U. S. 337, 33 L. ed. 377; Lawrence v. Norton, 13 Fed. 1, 4 Woods, 383; McKee v. Brooks, 64 Tex. 255. *Contra*, Phillips v. Edelstein, (Texas), 2 Willson, Civ. Cas Ct. App. § 449; where the suit was brought for the wrongful seizure of property under a writ of attachment.

⁷ Walker v. Windsor Nat. Bank, C. C. A., 56 Fed. 76.

⁸ Howard v. U. S., 184 U. S. 676, 46 L. ed. 754; affirming 102 Fed. 77, 42 C. C. A. 169.

⁹ U. S. v. Belknap, 73 Fed. 19; an Indian agent.

Suits by material men upon the bonds of contractors with the Federal government arise under the Constitution and laws of the United States.¹⁰ A suit on the bond of a clerk of a court of the United States which depends upon the scope and effect of the bond and the meaning of the statutes in conformity with which it was given, is a suit arising under the laws of the United States, of which a District Court has original jurisdiction without diversity of citizenship.¹¹ A District Court of the United States has jurisdiction of a suit brought by a trustee in bankruptcy, to enforce the bond of his predecessor.¹²

§ 34. Suits by and against officers of the United States. Suits brought by officers of the United States in the exercise of their official functions arise under the laws of the United States and may be brought in the District courts¹ or if previously brought in the State courts may be removed thereto.² It was held: that an action by a United States marshal against his deputy, to recover according to contract a part of fees collected, is not removable.³ Suits against officers of the United States for acts done by virtue, or under color, of their office, arise under the laws of the United States and may be removed.⁴ Thus, a suit against a marshal of the United States for an abuse of

¹⁰ U. S. Fidelity & Guaranty Co. v. U. S., 204 U. S. 349, 51 L. ed. 516; U. S. v. Churchyard, 132 Fed. 82; U. S. ex rel. Giant Powder Co. v. Axman, 152 Fed. 816. *Contra*, U. S. v. Henderlong, 102 Fed. 2, U. S. v. Sheridan, 119 Fed. 236; U. S. v. O'Brien, 120 Fed. 446, 448; U. S. v. Barrett, 135 Fed. 189; Burrell v. U. S., C. C. A., 147 Fed. 44, 46.

¹¹ Howard v. U. S., 184 U. S. 676, 46 L. ed. 754; affirming 102 Fed. 77, 42 C. C. A. 169.

¹² U. S. ex rel. Schauffer v. Union Surety & Guaranty Co., 118 Fed. 482.

¹ § 34. 1 U. S. R. R. Adm. v. Burch, 254 Fed. 140.

² Johnson v. Rankin (Texas), 95 S. W. 665.

³ Setzer v. Douglass, 91 N. C.

426; Hildebrand v. Douglass, 91 N. C. 430.

⁴ Cleveland, C. C. & I. R. Co. v. McClung, 119 U. S. 454, 30 L. ed. 465; affirming 15 Fed. 905; Bock v. Perkins, 139 U. S. 628, 35 L. ed. 314; Sonnentheil v. Christian Moerlein Brewing Co., 172 U. S. 401, 43 L. ed. 492; Auten v. U. S. Nat. Bank, 174 U. S. 125, 141, 43 L. ed. 920, 926; Van Zandt v. Maxwell, Fed. Cas. No. 16, 884 (2 Blatchf. 421); Warner v. Fowler, Fed. Cas. No. 17,182 (4 Blatchf. 311); Ellis v. Norton, 16 Fed. 4, 4 Woods, 399; Front St. Cable Ry. Co. v. Drake, 65 Fed. 539; Drake v. Paulhamus, C. C. A., 66 Fed. 895; Wood v. Drake, 70 Fed. 881; Galatin v. Sherman, 77 Fed. 337; Eighmy v. Poucher, 83 Fed. 855, Woods v. Root, C. C. A., 123 Fed. 402.

Federal process against the defendant to the writ,⁵ or for levying under a writ upon property claimed by a stranger to the suit, but which the marshal claims belongs to the defendant to the writ,⁶ arises under the laws of the United States, and is removable; at least when the plaintiff's initial pleading shows that the defendant's acts, of which complaint is made, were done in his official capacity.⁷ Where this did not appear in the plaintiff's pleading, it was held, that the action was not removable.⁸ But a suit against a marshal for a levy upon goods which he does not claim to be the property of the person named in the writ, is not removable.⁹ It was held: that an action by a deputy marshal against his principal, for fees due him, is not removable.¹⁰ The fact that a private individual is made a co-defendant with the marshal in the suit does not divest the court of jurisdiction.¹¹ It was held, that an action against private individuals, for wrongfully causing a United States marshal to levy execution on plaintiff's chattels, is a case arising under the laws of the United States and may be removed.¹² Suits against receivers of national banks and receivers appointed by the Federal courts are considered in the following sections. An action by or against the agent of the shareholders appointed to take charge of the assets of a national bank, arises under the laws of the United States.¹³

§ 35. Suits by and against receivers of national banks. A suit by the receiver of a national bank, appointed by the Comptroller of the Currency, at least when brought in the course of

⁵ *Front St. Cable Ry. Co. v. Drake*, 65 Fed. 539; *Wood v. Drake*, 70 Fed. 881.

⁶ *Bock v. Perkins*, 139 U. S. 628, 35 L. ed. 314; affirming 28 Fed. 123; *Sonnentheil v. Christian Moerlein Brewing Co.*, 172 U. S. 401, 43 L. ed. 492; *Ellis v. Norton*, 16 Fed. 4, 4 Woods 399; *Drake v. Paulhamus, C. C. A.*, 66 Fed. 895.

⁷ *Walker v. Coleman*, 55 Kan. 381, 40 Pac. 640, 49 Am. St. Rep. 254. *Contra*, *Ellis v. Norton*, 16 Fed. 4, 4 Woods 399; *Wood v. Drake*, 70 Fed. 881; *Howard v. Stewart*, 34 Neb. 765, 52 N. W. 714.

⁸ *Rothschild v. Matthews*, 22 Fed. 6.

⁹ *Buck v. Colbath*, 3 Wall. 334, 18 L. ed. 257; *Kelsey v. Dallan*, Fed. Cas. No. 7,678; *McKee v. Coffin*, 66 Tex. 304, 1 S. W. 276.

¹⁰ *Upham v. Scoville*, 40 Ark. 170.

¹¹ *Sonnentheil v. Christian Moerlein Brewing Co.*, 172 U. S. 401, 43 L. ed. 492; But see *Wardens, etc., of St. Luke's Church v. Sowles*, 51 Fed. 609; *Frank v. Leopold & Feron Co.*, 169 Fed. 922.

¹² *Hurst v. Cobb*, 61 Fed. 1.

¹³ *Barron v. McKinnon*, 179 Fed. 759.

winding up the affairs of the bank, arises under the laws of the United States, and may be removed by the defendant when it involves the jurisdictional amount.¹ A suit against a receiver of a national bank, similarly appointed, under similar circumstances, arises under the laws of the United States and may be removed;² but not unless the matter in dispute exceeds the statutory limit;³ nor, it has been said, when the receiver is not a necessary, although he is a proper, party to the action.⁴ A suit against a national bank and its receiver to enforce the bank's covenant to indemnify its lessor from any loss of rent in case of re-entry is within the jurisdiction of the Federal Court.⁵ The receiver of a national bank cannot intervene and remove a suit instituted against the bank before his appointment, unless the bank might have removed the case.⁶ A bill against such a receiver of a national bank and an executor to recover a legacy, where some of the decedent's assets were deposited in the bank, was dismissed as not arising under the laws of the United States.⁷

§ 36. Suits by and against receivers of Federal corporations.

Where either party to a suit is a receiver of a corporation created by an act of Congress, the suit arises under the laws of the

§ 35. 1 *Johnson v. Rankin* (Texas), 95 S. W. 665. See *Armstrong v. Ettlesohn*, 36 Fed. 209; *Armstrong v. Trautman*, 36 Fed. 275; *McConville v. Gilmour*, 1 L.R.A. 498, 36 Fed. 277; *Stephens v. Bernays*, 44 Fed. 642; *Yardley v. Dickson*, 47 Fed. 835; *Fisher v. Yoder*, 53 Fed. 565; *Short v. Hepburn*, 75 Fed. 113, 21 C. C. A. 252; *Thompson v. German Ins. Co.*, 76 Fed. 892; *McCartney v. Earle*, C. C. A., 115 Fed. 462.

² *Hot Springs Independent School Dist. No. 10 of Fall River County v. First Nat. Bank*, 61 Fed. 417; *Auburn Sav. Bank v. Hayes*, 61 Fed. 911; *Gilbert v. McNulta*, 96 Fed. 83. See *Merrill v. Nat. Bank of Jacksonville*, 173 U. S. 131, 43 L. ed. 640; *Auten v. U. S. Nat. Bank*, 174 U. S. 125, 43 L. ed. 920; *Wit- ters v. Sowles*, 42 Fed. 701; *Bart-*

ley v. Hayden, 74 Fed. 913; *McDonald v. State of Nebraska*, 101 Fed. 171, 41 C. C. A. 278. *Contra*, *Bird v. Cockrem*, Fed. Cas. No. 1,429 (2 Woods 32); *Tehan v. First Nat. Bank*, 39 Fed. 577.

³ *Follett v. Tillinghast*, 82 Fed. 241.

⁴ *Speckert v. German Nat. Bank*, 98 Fed. 151, 38 C. C. A. 682.

⁵ *Providence Bldg. Co. v. Atlantic Nat. Bank*, 228 Fed. 814.

⁶ *Wichita Nat. Bank v. Smith*, 72 Fed. 568, 19 C. C. A. 42, 36 U. S. App. 530; writ of error dismissed. *Smith v. Wichita Nat. Bank*, 42 L. ed. 1214; *Speckert v. German Nat. Bank*, C. C. A., 98 Fed. 151; reversing 85 Fed. 12.

⁷ *Wardens, etc., St. Luke's Church v. Sowles*, 51 Fed. 609. But see *supra* § 34.

United States.¹ It has been held: that the same rule applies to receivers, appointed by the Comptroller of the Currency, of the assets of banking or trust companies organized under the laws of any of the United States, which have an office or banking house for the receipt of deposits or savings within the District of Columbia.²

§ 37. Suits by and against receivers of Federal courts. A suit by a receiver appointed by a Federal court, which is brought to enforce a cause of action vested before his appointment in the corporation which he represents, does not ordinarily arise under the laws of the United States; and consequently, it cannot be removed where the requisite difference of citizenship does not exist.¹ Such a suit may, however, be begun in a District Court of the United States originally, because it is ancillary to that in which the receiver was appointed.² Where, however, the validity of the order or decree of a Federal court appointing a receiver, or the construction of such an order or decree, is in question, the suit arises under the laws of the United States, whether the receiver is a plaintiff,³ or defendant.⁴

An action by an employee of such a receiver for injuries in the course of his employment may be brought against the latter in a District court of the United States;⁵ but when brought

§ 36. ¹ *Texas & Pac. Ry. Co. v. Cox*, 145 U. S. 593, 36 L. ed. 829.

² *Lyons v. Bank of Discount*, 154 Fed. 391. See 34 St. at L. 458.

§ 37. ¹ *Pope v. Louisville, N. A. & C. Ry. Co.*, 173 U. S. 573, 43 L. ed. 814; *Pepper v. Rogers*, 128 Fed. 987.

² *White v. Ewing*, 159 U. S. 36, 40 L. ed. 67; *Pope v. Louisville, N. A. & C. Ry. Co.*, 173 U. S. 573, 43 L. ed. 814; *Bowman v. Harris*, 95 Fed. 917; *Connor v. Alligator L. Co.*, 98 Fed. 155; *Alexander v. So. Home Bldg. & L. Ass'n*, 120 Fed. 963; *Hampton Roads Ry. & El. Co. v. Newport News & O. P. Ry. & El. Co.*, 131 Fed. 534; *Gunby v. Armstrong*, C. C. A., 133 Fed. 417; *Kirkland v. Knox*, C. C. A., 230 Fed.

806; *Vallery v. Denver & R. G. R. Co.*, C. C. A., 236 Fed. 176; *Glenwood Irr. Co. v. Vallery*, C. C. A., 248 Fed. 483. So when he is an ancillary receiver. *Brookfield v. Hecker*, 118 Fed. 942.

³ *Pope v. Louisville, N. A. & C. Ry. Co.*, 173 U. S. 573, 581, 43 L. ed. 814, 818.

⁴ *Board of Com'rs v. Peirce*, 90 Fed. 764; for an injunction; *Shinney v. North Am. Savings, L. & Bldg. Co.*, 97 Fed. 9; to determine the right to assets claimed by a receiver; *State v. Frost*, 113 Wis. 623, 89 N. W. 915; for an injunction.

⁵ *Betts v. Bisher*, C. C. A. 213 Fed. 581; *Cobb v. Sertic*, C. C. A., 218 Fed. 320; *St. Bernard v. Shane*, C. C. A., 220 Fed. 853.

in a State court, it cannot be removed.⁶ Such suits cannot be removed when brought in a State court: to recover damages for malicious conduct in carrying on the business of the receivership.⁷ For the cancellation of notes and bonds which the plaintiff had executed to the receivers under duress and fraud and for an injunction against the negotiation of the same, praying in the alternative, a recovery of damages and the impression of a trust upon the property in the receivers' hands.⁸ Or for a vacation of the franchise of the corporation over whose property the receiver was appointed.⁹

It has been held: that the court will take judicial notice of the fact that a defendant is a receiver; although there is no allegation to that effect in the plaintiff's pleading;¹⁰ and that the joinder of other defendants with a receiver will not deprive him of a right of removal to which he would have been entitled had he been sued alone.¹¹

§ 38. Suits by and against trustees in bankruptcy. The bankruptcy law provides: that the District Courts of the United States "shall have jurisdiction of all controversies at law and in equity, as distinguished from proceedings in bankruptcy, between trustees as such and adverse claimants concerning the property acquired or claimed by the trustees, in the same manner and to the same extent only as though bankruptcy proceedings had not been instituted and such controversies had been between the bankrupts and such adverse claimants."¹ The construction of this is subsequently discussed.² It has been held: that in a suit between the trustees of a bankrupt and another, when the requisite difference of citizenship exists be-

⁶ Jud. Code, § 28, 36 St. at L. 1094, Comp. St. § 1010 see *infra*.
⁷ § 537, 538; Gableman v. Peoria P. D. & E. Ry. Co., 179 U. S. 335, 45 L. ed. 220; Cobb v. Sertie, C. C. A., 218 Fed. 320.

⁸ Home Telephone Co. v. Powers, 176 Fed. 986.

⁹ Wrightsville Hardware Co. v. Hardware & Woodenware Mfg. Co., 180 Fed. 586.

¹⁰ People v. Bleeker St. & F. F.

R. Co., 178 Fed. 156. See also, Dale v. Smith, 182 Fed. 360; Vanderbilt v. Kerr, 188 Fed. 537.

¹¹ Pitkin v. Cowen, 91 Fed. 599.

¹ Landers v. Felton, 73 Fed. 311. *Contra*. Shearing v. Trumbull, 75 Fed. 33; Marrs v. Felton, 102 Fed. 775; Rupp v. Wheeling & L. E. R. Co., 121 Fed. 825, 58 C. C. A. 161.

² § 38. 130 St. at L. § 23, p. 552.

³ *Infra* § 610.

moved by the defendant, whether the suit is brought by,³ or against, the trustee.⁴

§ 39. Suits arising out of litigation in the Federal courts.

It has been held: that the following cases, arising out of litigation in the Federal courts arise under the Constitution and laws of the United States, and may be removed when the matter in dispute exceeds the jurisdictional amount: a suit where the plaintiff's pleading shows that he contests the validity of a writ, order, judgment, or decree of a Federal court;¹ a suit for malicious prosecution, or false imprisonment, upon a charge of a violation of a law of the United States;² and a suit where there is a dispute as to how far a State statute, concerning liens upon land, applies to a judgment of a court of the United States.³ It has been held: that the purchaser at a Federal foreclosure sale, which had assumed as part of the price all liabilities incurred by the receivers, was not entitled to remove a suit to enforce such liability.⁴ It has been said: that the construction of orders and decrees of a Federal court, according to their true meaning, does not involve a Federal question.⁵ It has been held: that the following cases do not arise under the laws of the United States: a suit upon a judgment recovered in a court of the United States;⁶ a suit in which either party claims title under a sale

³ Corbitt v. President, etc., of Farmers' Bank of Delaware, 113 Fed. 417.

⁴ Bush v. Elliott, 202 U. S. 477, 50 L. ed. 1114.

§ 39. ¹ Connor v. Scott, Fed. Cas. No. 3,119, ⁴ Dillon, 242, to enforce a vendor's lien, where it appeared that the defendant claimed the land through the deed of an assignee in bankruptcy, the validity of which plaintiff disputed, First Nat. Bank v. Society for Savings, 80 Fed. 581, 25 C. C. A. 466, for an injunction against a tax levy ordered by the mandamus of a Federal court. South Dakota Cent. Ry. Co. v. Continental & Commercial Trust & Savings Bank, C. C. A., 255 Fed. 941. See

Houser v. Clayton, Fed. Cas. No. 6,739 (3 Woods, 273); Johnson v. New Orleans Nat. Banking Ass'n (Louisiana), 33 La. Ann. 479.

² Ma-ka-ta-wah-qua-twa v. Rebok, 111 Fed. 12.

³ Cooke v. Avery, 147 U. S. 375, 37 L. ed. 209; Sowles v. Witters, 46 Fed. 497.

⁴ Reed v. Northern Pac. Ry Co., 86 Fed. 817. But see Wabash Railroad Co. v. Adelbert College, 208 U. S. 38, 53, 52 L. ed. 379, 385; and *infra*, § 51.

⁵ United States v. Douglas, 113 N. C. 190, 18 S. E. 202.

⁶ Provident Savings Society v. Ford, 114 U. S. 635, 29 L. ed. 261; Metcalf v. Watertown, 128 U. S. 586, 32 L. ed. 543.

made under the order, judgment, or decree of a Federal court, when the validity and construction of that order, judgment or decree is not in question;⁷ a bill by a discharged bankrupt, to enjoin a levy under a judgment previous to his discharge, upon land which the court has set apart to him as exempt under the State homestead laws;⁸ an action by an attorney for damages caused by his disbarment by a State court, because of language spoken in a court of the United States.⁹ It has been further held: that a case does not arise under the laws of the United States simply because a Federal court has decided in another suit the questions of law which were involved;¹⁰ and that an issue, whether full force and effect had been given to the judgment of a State court, does not involve the construction of the Constitution of the United States.¹¹ It was held: that a suit arises under the laws of the United States, when brought against a private person for wrongfully causing a marshal to levy a Federal execution upon the plaintiff's property, which the defendant claimed to belong to the judgment debtor.¹² The District Courts of the United States have also ancillary jurisdiction over many cases connected with litigation previously brought there. This subject is considered later.¹³

§ 40. Controversies between citizens of different States. In general. A controversy between citizens of different States is one in which every party upon one side is a citizen of a different State from every party upon the other.¹ The citizenship of formal parties, with no real interest in the controversy, does not affect the jurisdiction.² In certain cases, the joinder of improper

⁷ *Carson v. Dunham*, 121 U. S. 421, 30 L. ed. 992; *Gay v. Lyons*, Fed. Cas. No. 5,281, 3 Woods, 56.

⁸ *King v. Neill*, 26 Fed. 721.

⁹ *Green v. Rogers*, 56 Fed. 220; *Green v. Elbert*, 63 Fed. 308.

¹⁰ *Leather Manufacturers' Nat. Bank v. Cooper*, 120 U. S. 778, 30 L. ed. 816; affirming order *Cooper v. Leather Manufacturers' Nat. Bank*, 29 Fed. 161; *Berger v. Douglas County Com'rs*, 5 Fed. 23, 2 McCrary, 483.

¹¹ *Merritt v. Am. Steel Barge Co.*, C. C. A., 75 Fed. 813.

¹² *Hurst v. Cobb*, 61 Fed. 1.

¹³ *Infra*, § 51.

§ 40. ¹ *Blake v. McKim*, 103 U. S. 336, 26 L. ed. 563; *Hastings v. Hoog*, 234 Fed. 103.

² *Removal Cases*, 100 U. S. 457, 25 L. ed. 593; *Barney v. Latham*, 103 U. S. 205, 26 L. ed. 514; *Harter v. Kernochan*, 103 U. S. 562, 26 L. ed. 411; *Maryland v. Baldwin*, 112 U. S. 490, L. ed. 822; *Wormley v. Wormley*, 8 Wheat. 421, 5 L. ed. 651; *Taylor v. Holmes*, 14 Fed. 499; *New Chester Water Co. v. Holly Mfg. Co.*, C. C. A., 53 Fed. 19, 26;

parties, plaintiff or defendant, will not prevent a removal.³ In determining between whom the controversy exists, the court is not bound by the title of the case or the form of the proceedings; but should examine the record, ascertain the matter in dispute and arrange the parties on opposite sides of the same according to the facts, no matter what their technical place as plaintiffs or defendants may be.⁴ A controversy exists whenever there is a justiciable demand, although the defendant does not resist the relief sought; and, at least, in the absence of fraud, even if he has requested the plaintiff to institute the suit.⁵

There is no jurisdiction, because of difference of citizenship, when any one of the necessary, and not formal, parties is a citizen of the District of Columbia,⁶ or a citizen of a Territory;⁷ even if other parties to the controversy, on the same side as such citizen of the district or Territory, are citizens of different States from that of the plaintiff;⁸ but formerly a resident of the District of Columbia might, in a proper case, maintain a crossbill in a suit where the jurisdiction was founded upon there being a controversy between citizens of different States.⁹

It has been said that a person who changes his permanent residence to a foreign country, although he still remains a citi-

infra, § 118; see Chapter XXXII on Removal of Causes. But see *Blackburn v. Portland G. M. Co.*, 175 U. S. 571, 44 L. ed. 276; *Pittsburg, C. & St. L. Ry. Co. v. B. & O. R. Co.*, C. C. A., 61 Fed. 705. *Infra*, § 42.

³ See *infra*, §§ 539, 540.

⁴ Removal Cases, 100 U. S. 457, 468, 25 L. ed. 593, 597; *Pacific R. Co. v. Ketchum*, 101 U. S. 289, 25 L. ed. 932; *Barney v. Latham*, 103 U. S. 205, 26 L. ed. 514; *Carson v. Hyatt*, 118 U. S. 279, 286, 30 L. ed. 167, 169; *Blacklock v. Small*, 127 U. S. 96, 32 L. ed. 70; *Anderson v. Bowers*, 40 Fed. 708; *Brown v. Murray Nelson & Co.*, 43 Fed. 614; *Mangels v. Donau Br. Co.*, 53 Fed. 513; *Cilley v. Patten*, 62 Fed. 498; *Board of Trustees, v. Blair*, 70 Fed. 414;

infra, § 43. But see *Reavis v. Reavis*, 98 Fed. 145.

⁵ *Re Metropolitan Railway Receivership*, 208 U. S. 90, 52 L. ed. 403, in which the author was counsel.

⁶ *Hepburn v. Ellzey*, 2 Cranch, 445, 2 L. ed. 332; *Westcott v. Fairfield*, Pet. C. C. 45; *Barney v. Baltimore*, 1 Hughes, 118; *Cameron v. Hodges*, 127 U. S. 322, 32 L. ed. 132; *Hooe v. Jamieson*, 166 U. S. 395, 41 L. ed. 1049.

⁷ *New Orleans v. Winter*, 1 Wheaton, 91, 4 L. ed. 44; *Cameron v. Hodges*, 127 U. S. 322, 32 L. ed. 132; *Snead v. Sellers*, C. C. A., 66 Fed. 371; *McClelland v. McKane*, 154 Fed. 164.

⁸ *Watson v. Bonfils*, C. C. A., 116 Fed. 157.

⁹ *Ulman v. Jaeger's Adm'r*, 155 Fed. 1011.

zen of the United States, ceases to be a citizen of a State who can be sued in a Federal Court, where the jurisdiction is founded upon a difference of citizenship;¹⁰ but a better statement of the rule seems to be that she cannot then be sued there upon that ground, when served in the State of her former domicile.

A change of citizenship after the jurisdiction has once attached will not divest it,¹¹ even, it was held, in case of a change of citizenship made before an amended bill was filed.¹² The subsequent consolidation of a foreign with a domestic corporation will not defeat the jurisdiction.¹³ When at the time a bill is filed the court has no jurisdiction, jurisdiction cannot subsequently be conferred by an amendment striking out a party plaintiff who was properly and necessarily made such at the commencement of the suit;¹⁴ but in one case the court retained jurisdiction by allowing an amendment which made one of the original plaintiffs a defendant.¹⁵ When an indispensable party is omitted at the beginning of the suit, his citizenship if subsequently joined as defendant may defeat the jurisdiction.¹⁶ The same ruling was made, when after an additional defendant was joined, the plaintiff amended his pleadings so as to set forth a cause of action to which such new defendant was an indispensable party.¹⁷ When they are not indispensable parties, jurisdiction may be retained upon a discontinuance or dismissal as regards defendants who are citizens of the same State as

¹⁰ Hammerstein v. Lyne, 200 Fed. 165, 172. See *infra*, § 46.

¹¹ Morgan's Heirs v. Morgan, 2 Wheat. 290, 4 L. ed. 242; Mollan v. Torrance, 9 Wheat. 537, 6 L. ed. 154; Clarke v. Mathewson, 12 Pet. 164, 9 L. ed. 1041; Anderson v. Watt, 138 U. S. 694, 34 L. ed. 1078; Tug River Coal & Salt Co. v. Brigel, C. C. A., 86 Fed. 818; Haracovic v. Standard Oil Co., 105 Fed. 785; Collins v. Ashland, 112 Fed. 175. But see Weaver v. Kelly, 92 Fed. 417; Mangels v. Donau B. Co., 53 Fed. 513.

¹² Tug River C. & S. Co. v. Brigel, 86 Fed. 818.

¹³ Louisville, N. A. & C. Ry. Co. v. Louisville Trust Co., 174 U. S. 552, 43 L. ed. 1081, C. C. A., 75 Fed. 433, 22 C. C. A. 378; Chicago, I. & N. P. R. Co. v. Minnesota & N. W. R. Co., 29 Fed. 337.

¹⁴ Anderson v. Watt, 138 U. S. 694, 34 L. ed. 1078. But see Hicklin v. Marco, C. C. A., 56 Fed. 549; Whittle v. Artis, 55 Fed. 919.

¹⁵ Conolly v. Taylor, 2 Peters, 556, 7 L. ed. 518.

¹⁶ Patterson v. Delaware & Hudson Co., C. C. A., 251 Fed. 255.

¹⁷ Devost v. Twin State Gas & Elec. Co., C. C. A., 250 Fed. 349.

the plaintiff; after,¹⁸ as well as before,¹⁹ they have appeared; and even, it was held, where they were restored a few days later upon their petition for intervention;²⁰ but the resignation after suit brought of a defendant trustee,²¹ and the filing of a disclaimer by a defendant,²² who were citizens of the complainant's State, were held not to save the jurisdiction. Such a discontinuance did not save the jurisdiction in an action at law against two makers of a promissory note.²³ Jurisdiction is not lost because a defendant ceases to resist the plaintiff's demand;²⁴ nor by the addition of new parties, whose citizenship would have prevented their original joinder in the suit, and who come in by amendment,²⁵ or by intervention,²⁶ even, it was held, when at the time he filed his bill plaintiff expected

¹⁸ *Beebe v. Louisville, N. O. & T. R. Co.*, 39 Fed. 481, 484; *Morse v. South*, 80 Fed. R. 206, 207; *Clairborne v. Waddel*, 50 Fed. 368; *Hicklin v. Marco*, C. C. A., 56 Fed. 549; *Horn v. Lockhart*, 17 Wall. 570, 21 L. ed. 657; *Bane v. Keefer*, 66 Fed. 610; *Mason v. Dullingham*, 82 Fed. 689; *Grove v. Grove*, 93 Fed. 865; *Sioux City T. R. & W. Co. v. Trust Co. of N. Am.*, C. C. A., 82 Fed. 124; *Oxley Stave Co. v. Coopers' Union*, 72 Fed. 695; s. c. as *Hopkins v. Oxley Stave Co.*, C. C. A., 83 Fed. 912; *Smith v. Consumers' C. O. Co.*, 86 Fed. 359; *Tug. R. C. & S. Co. v. Brigel*, C. C. A., 86 Fed. 818; *Columbia Digger Co. v. Rector*, 215 Fed. 618; see Chapter XXXII, on Removal of Causes.

¹⁹ *A. R. Barnes & Co. et al. v. Berry et al.*, 156 Fed. 72.

²⁰ *Sioux City T. & W. Co. v. Trust Co. of N. Am.*, C. C. A., 82 Fed. 124; s. c. 173 U. S. 99, 43 L. ed. 628.

²¹ *Ruohs v. Jarvis-Conklin Mt. Tr. Co.*, 84 Fed. 513.

²² *Wetherby v. Swason*, C. C. A., 62 Fed. 193. But see *Frazer Lubricator Co. v. Frazer*, 23 Fed. 305;

Wirgman v. Persons, 126 Fed. 449, 451.

²³ *Chase v. Lathrope*, 254 Fed. 715.

²⁴ *Park v. N. Y., L. E. & W. R. Co.*, 70 Fed. 641.

²⁵ *Ober v. Gallagher*, 93 U. S. 199, 206, 23 L. ed. 829, 831; *Stewart v. Dunham*, 115 U. S. 61, 64, 29 L. ed. 329, 330; *Phelps v. Oakes*, 117 U. S. 236, 29 L. ed. 888; *Hardenbergh v. Ray*, 151 U. S. 112, 38 L. ed. 93. But see *Mangels v. Donau Br. Co.*, 53 Fed. 513; *Weaver v. Kelly*, 92 Fed. 417; *Fraser v. Cole*, C. C. A., 214 Fed. 556.

²⁶ *Osborne & Co. v. Barge*, 30 Fed. 805; *Belmont Nail Co. v. Col. I. & S. Co.*, 46 Fed. 336; *Henderson v. Goode*, 49 Fed. 887; *United El. S. Co. v. La. El. Co.*, 68 Fed. 673; *Society v. Shakers v. Watson*, C. C. A., 68 Fed. 730; *Park v. N. Y., L. E. & W. R. Co.*, 70 Fed. 641; *Cole v. Philadelphia & E. Ry. Co.*, 140 Fed. 944; *Monmouth Inv. Co. v. Means*, C. C. A., 151 Fed. 159; *infra*, § 258. *Contra*, *Forest Oil Co. v. Crawford*, C. C. A., 101 Fed. 849; *Clauss v. Palmer Oil Co.*, C. C. A., 222 Fed. 870 where the new parties intervened as plaintiffs. See also

that they would intervene,²⁷ by succession through an assignment of the plaintiff's interest,²⁸ or by operation of law;²⁹ nor by the filing of counterclaims or cross bills between defendants who are citizens of the same State.³⁰ It has been said that when an amendment which is not compulsory brings in new parties the defense of citizenship must be determined from the bill as amended.³¹

Where in a bill between two parties for an accounting it appears that the partnership assets alleged in the bill are worthless, the Court has jurisdiction to enter decrees against the partners in favor of the intervening creditors irrespective of the citizenship of the latter.³² Jurisdiction was taken of a creditor's bill to enforce a State judgment against the interest of a surviving partner although the result might be to compel defendants who were both residents of the same State to litigate their mutual demands.³³ Where the court, because of diversity of citizenship, originally had jurisdiction its right to consider a counterclaim which might be the subject of an independent suit and does not affect matters alleged in the original bill depends upon the citizenship of the parties to the counterclaim.³⁴

It has been held that there is a controversy between citizens of different States when one of them has a justiciable claim against the other, although the latter consents to the jurisdiction and to the appointment of a receiver before the complainants had obtained judgment in an action at common-law;³⁵ and in the case of a suit by a stockholder to procure the appointment

Clyde v. Richmond & D. R. Co., 65 Fed. 336.

²⁷ *Fraser v. Cole*, C. C. A., 214 Fed. 556.

²⁸ *Sioux City Tr. R. & W. Co. v. Trust Co. of North America*, C. C. A., 82 Fed. 124; s. c. 173 U. S. 99, 43 L. ed. 628; *Monmouth Inv. Co. v. Means*, C. C. A., 151 Fed. 159. *Contra*, *Pittsburgh, S. & N. R. Co. v. Fiske*, C. C. A., 178 Fed. 66.

²⁹ *Glover v. Shepperd*, 21 Fed. 481; *Jarboe v. Templer*, 38 Fed. 213. *Contra*, *Adams Exp. Co. v. Denver & R. G. Ry Co.*, 16 Fed. 712.

³⁰ *Portland Wood Pipe Co. v. Slick Brox. Const. Co.*, 222 Fed. 528.

³¹ *Patterson v. D. L. & Hudson Co.*, C. C. A., 251 Fed. 255.

³² *Lackner v. McKechney*, C. C. A., 252 Fed. 403.

³³ *Feidler v. Bartleson*, C. C. A., 161 Fed. 30.

³⁴ *Cleveland Eng. Co. v. Gallion, D. M. Truck Co.*, 243 Fed. 405.

³⁵ *Re Metropolitan Railway Receivership*, 208 U. S. 90, 52 L. ed. 403.

of a receiver because of insolvency, when his shares have been assigned to him for the purpose of the commencement of the suit.³⁶

§ 41. Parties to the controversy. A controversy between citizens of different States is one in which every party upon one side is a citizen of a different State from that of every party upon the other.¹ In determining between whom the controversy exists, the court is not bound by the title of the cause or the form of the pleadings; but should examine the record, ascertain the matter in dispute and arrange the parties on opposite sides of the same, according to the facts, no matter what their technical place as plaintiffs or defendants may be.²

³⁶ *Re Cleland*, 218 U. S. 120, 54 L. ed. 962.

§ 41. ¹ *Strawbridge v. Curtiss*, 3 Cranch, 267, 2 L. ed. 435; *Corporation of New Orleans v. Winter*, 1 Wheaton, 91, 4 L. ed. 44; *Conolly v. Taylor*, 2 Peters, 556; *Louisville, C. & C. R. Co. v. Letson*, 2 How. (U. S.), 497, 11 L. ed. 353; *Ohio & M. R. Co. v. Wheeler*, 1 Black. 286, 17 L. ed. 130; *Susquehanna & W. V. Railroad & Coal Co. v. Blatchford*, 11 Wall. 172, 20 L. ed. 179; *Avers v. City of Chicago*, 101 U. S. 184, 25 L. ed. 838; *Blake v. McKim*, 103 U. S. 336, 26 L. ed. 563; *Shainwald v. Lewis*, 108 U. S. 158, 27 L. ed. 691; affirming order 5 Fed. 510, 6 Sawyer, 585; *Bissell v. Horton*, Fed. Cas. No. 1,448; *Ketchum v. Farmers' Loan & Trust Co.*, Fed. Cas. No. 7,736 (4 McLean, 1); *Hubbard v. Northern R. R. Co.*, Fed. Cas. No. 6,818 (3 Blatchf. 84); *Tuckerman v. Bigelow*, Fed. Cas. No. 14,228; *Lovejoy v. Washburne*, Fed. Cas. No. 8,550 (1 Biss. 416); *Petterson v. Chapman*, Fed. Cas. No. 11,042 (13 Blatchf. 395); *Teal v. Walker*, Fed. Cas. No. 13,812; *Dormitzer v. Illinois & St. L. Bridge Co.*, 6 Fed. 217; *Walsh v. Memphis, C & N.*

W. R. Co., 6 Fed. 797; *Karns v. Atlantic & O. R. Co.*, 10 Fed. 309; *Mitchell v. Tillotson*, 12 Fed. 737; *Onachita & M. R. Packet Co. v. Aiken*, 16 Fed. 890; *Holland v. Ryan*, 17 Fed. 1; *Walser v. Memphis, C. & N. W. Ry. Co.*, 19 Fed. 152; *Hazard v. Robinson*, 21 Fed. 193; *Saginaw Gaslight Co. v. City of Saginaw*, 28 Fed. 529; *Covert v. Waldron*, 33 Fed. 311; *Oxley Stave Co. v. Coopers' International Union of North America*, 72 Fed. 695; *Consolidated Water Co. v. Babcock*, 76 Fed. 243; *Ludlow's Heirs v. Kidd's Heirs*, 3 Ohio (3 Ham.), 48; *Miller v. Lynde* (Connecticut), 2 Root, 444, 1 Am. Dec. 86; *Tesson v. Gusman* (Louisiana), 26 La. Ann. 248; *New Orleans v. Seixas* (Louisiana), 35 La. Ann. 36; *Florence Sewing Mach. Co. v. Grover & Baker Sewing Mach. Co.*, 110 Mass. 70, 14 Am. Rep. 579; *North River Steamboat Company v. Hoffman* (New York), 5 Johns. Ch. 300; *Fairchild v. Durand* (New York), 8 Abb. Prac. 305; *Fisk v. Chicago, R. I. & P. R. Co.* (New York), 53 Barb. 472. *Contra*, *Bradley, J.*, in *Girardey v. Moore*, Fed. Cas. No. 5,462 (3 Woods, 397).

² *Removal Cases*, 100 U. S. 457,

By making defendants those who are necessary parties plaintiff, jurisdiction is not conferred upon a Federal Court, where, if they had been made plaintiffs, the necessary diversity of citizenship would not have existed.³

It has been held: that a party whose claim is adverse to the complainant is on the opposite side of the controversy to him, although their relations are not hostile,⁴ and that the jurisdiction is not defeated because the complainant seeks to compel defendants, who are citizens of the same State, to litigate a dispute between them in the Federal Court, when the plaintiff has a cause of action against them both.⁵

The jurisdiction must appear on the face of the record.⁶ Where one of the parties is made a defendant merely because he has refused to join as a party plaintiff, he is considered to be on the same side of the controversy as the plaintiff, when the jurisdiction is determined;⁷ unless there is a substantial

468, 25 L. ed. 593; *Pacific R. Co. v. Ketchum*, 101 U. S. 289, 25 L. ed. 932; *Barney v. Latham*, 103 U. S. 205, 26 L. ed. 514; *Carson v. Hyatt*, 118 U. S. 279, 286, 30 L. ed. 167, 169; *Blacklock v. Small*, 127 U. S. 96, 32 L. ed. 70; *Evers v. Watson*, 156 U. S. 527, 39 L. ed. 520; *Girardey v. Moore*, Fed. Cas. No. 5,462 (3 Woods, 397); *Dodge v. Perkins*, Fed. Cas. No. 3,954 (4 Mason, 435); *Burke v. Flood*, 1 Fed. 541, 6 Sawyer, 220; *Marvin v. Ellis*, 9 Fed. 367; *Sayer v. La Salle & P. Gaslight & Coke Co.*, 14 Fed. 69, 9 Biss. 372; *Anderson v. Bowers*, 40 Fed. 708; *Brown v. Murray Nelson & Co.*, 43 Fed. 614; *Mangels v. Donau Br. Co.*, 53 Fed. 513; *Pittsburg, C. & St. L. R. Co. v. Baltimore & O. Ry. Co.*, 61 Fed. 705, 10 C. C. A. 20, 22 U. S. App. 359; *Cilley v. Patten*, 62 Fed. 498; *Oberlin College v. Blair*, 70 Fed. 414; *Hutton v. Joseph Bancroft & Sons' Co.*, 77 Fed. 481; *Reese v. Zinn*, 103 Fed. 97; *Boatmen's Bank v. Fritz-*

len, C. C. A., 135 Fed. 650; *Mirabile Corp. v. Purvis*, 143 Fed. 920; *Miller v. Lynde*, 2 Root, 444, 1 Am. Dec. 86; *Kelly v. Dolan*, 218 Fed. 966.

³ *Lindauer v. Compania Palomas*, etc., C. C. A., 247 Fed. 428.

⁴ *Federal Mining & Smelting Co. v. Bunker Hill & Sullivan Mining & Concentrating Co.*, 187 Fed. 474.

⁵ *Feidler v. Bartleson*, C. C. A., 161 Fed. 30. But see *First Nat. Bank v. Bridgeport Tr. Co.*, 117 Fed. 969; cited *infra*, § 42.

⁶ *Bell v. Ohio Life Ins. Co.*, Fed. Cas. No. 1,261.

⁷ *Edgerton v. Gilpin*, Fed. Cas. No. 4,280 (3 Woods, 277); *Missouri v. Alt*, 73 Fed. 302; *Johnson v. Ford*, 109 Fed. 501; *Einstein v. Georgia, S. & F. Ry. Co.*, 120 Fed. 1008; *Joseph Dry Goods Co. v. Hecht*, C. C. A., 120 Fed. 760; *Menefee v. Frost*, 123 Fed. 633. See also *Bland v. Fleeman*, 29 Fed. 669; *Woodrum v. Clay*, 33 Fed. 897; *Megibben's Adm'rs v. Perin*, 49

dispute between him and the plaintiff as to the division of the proceeds, or some other question involved in the suit; in which case it has been held, that he is on the side of the controversy opposite to such plaintiff.⁸ It was said: that if the jurisdiction of the court would be ousted by making complainants all interested in obtaining the relief prayed, those who are citizens of the same State with the real defendants may refuse to join in the suit, and may be made defendants.⁹ In an action by two of three trustees against a corporation residing in another State, it was held, that the fact that one of the trustees, who refused to join as plaintiff in the suit, and was made a defendant, was a citizen of the same State as the corporation, did not deprive the Federal court of jurisdiction, on the ground that the trustee residing in the same State with defendant was a necessary party plaintiff, since that trustee was made such in order that the rights of all interested parties might be determined in one proceeding.¹⁰

In a suit by taxpayers against county officers and bondholders, to enjoin payment of the bonds, the defendant officers were presumed to be on the same side of the controversy as the taxpayers.¹¹ Complainant, a citizen of Iowa, filed a bill charging that a judgment had been fraudulently obtained against a city of Iowa, in favor of defendant, citizen of another State, by means of a combination between him and others not made parties to the bill. The relief sought was to have the judgment declared void. The mayor, treasurer, and recorder of the city were made defendants, that they might be restrained from paying the judgment *pendente lite*, but there was no charge that they had participated in the fraud, or that they had any interest adverse to complainant. It was held: that, though there was no separate controversy between complainant and the defendant charged with the fraud, the other defendants were only nominal parties, their interest being in fact adverse to the latter; and their

Fed. 183; approved as to this point upon reversal. *Perin v. Megibben*, C. C. A., 53 Fed. 86, 91.

⁸ *Everett v. Independent School Dist. of Rock Rapids*, 109 Fed. 697; *Wood v. Deskins*, C. C. A., 141 Fed. 500.

⁹ *Wisner v. Ogden*, Fed. Cas. No. 17,914 (4 Wash. 631).

¹⁰ *Einstein v. Georgia Southern & F. Ry. Co.*, 120 Fed. 1008. See *Monmouth Inv. Co. v. Means*, C. C. A., 151 Fed. 159; *Georgia S. & F. Ry. Co. v. Einstein*, C. C. A., 218 Fed. 55.

¹¹ *Harter v. Kernochan*, 103 U. S. 562, 26 L. ed. 411; *Anderson v. Bowers*, 40 Fed. 708.

joinder as defendants could not affect his right to have the cause removed.¹² A State granted to a county for school purposes swamp lands located in the county, which had been donated to the State by Congress. A bill was filed in a State court by the State, on behalf of the county school board, against the county and certain citizens of other States, to set aside conveyances of such lands. Defendants other than the county sought to remove the cause to the Federal court on the ground of diverse citizenship. It was held: that the county was a necessary party, and, it and complainant being fellow citizens, the suit could not be removed.¹³ Where the validity of a mortgage is in question, the mortgagor is presumed to be on the same side of the controversy as the other parties who attack the mortgage.¹⁴ It has been held: that in an action by a mortgagee to cancel certain mortgages and to foreclose a subsequent trust deed to the same property, although the *cestuis que trustent* have a common interest with plaintiff in showing the discharge of these mortgages, they are nevertheless his adversaries as to the other matters in controversy, and will not be rearranged as parties plaintiff, so as to show diversity of citizenship.¹⁵ It has been held: that in a suit for a partition, where all the defendants were citizens of different States from that of the plaintiffs' citizenship, there should be no re-alignment of parties to defeat the jurisdiction because there were disputed questions in the case between the plaintiffs, which did not appear in the bill, although they might subsequently arise and be determined in the suit.¹⁶ Where one tenant in common brought a suit against his co-tenant and others for partition of the land held in common, and to quiet the title as against claims of the defendant other than his co-tenant, but did not press it as a bill for partition: it was held that it might be sustained as a bill to quiet the title of the complainant's undivided interest, notwithstanding there was a want of diverse citizenship between him and

¹² May v. St. John, 38 Fed. 770.

¹³ Missouri v. New Madrid County, 73 Fed. 304.

¹⁴ Removal Cases, 100 U. S. 457, 469, 25 L. ed. 593; Wolcott v. Sprague, 55 Fed. 545; Boatman's Bank v. Fritzlen, C. C. A., 135 Fed.

650, 658, 660, reversing 128 Fed. 608; United States Mortg. Co. v. McClure, 70 Pac. 543; 42 Or. 190.

¹⁵ Springer v. Sheets, 115 N. C. 370, 20 S. E. 469.

¹⁶ German Sav. & Loan Soc. v. Tull, C. C. A., 136 Fed. 1, 16

one defendant, his co-tenant.¹⁷ In a suit to set aside part of a will and for a partition of the property thereby devised a defendant who would share in the partition but who was a legatee under the will was considered as upon the side of the controversy opposite to that of plaintiffs.¹⁸ Complainants filed a bill in a Circuit Court of the United States in California against defendants, who were citizens of that State alleging that complainants were heirs at law of a decedent from whom, prior to his death, one of the defendants, who was also a brother and one of his heirs, had procured a conveyance of all his property without consideration, which was invalid by reason of the decedent's insanity; that subsequently such defendant, who was insolvent, had conveyed such property to his co-defendant in payment of an antecedent indebtedness. The prayer of the bill was that the conveyances be set aside as to such shares of the property as would have been inherited by complainants. It was held, that the court could not determine from such allegations and prayer that the interest of the defendant, who was a co-heir with complainants, would be best served by their success, so as to require such an arrangement of parties as would make him a complainant, and defeat the court's jurisdiction; there being no proof of fraud or collusion by him and complainants.¹⁹

In a suit to set aside a marriage and for a partition of the dead husband's land where the sole defendant was his wife, a citizen of West Virginia, who had qualified as administratrix of his estate, it was held that since all the heirs were citizens of Pennsylvania there could be no jurisdiction unless they filed a disclaimer of all right to attack the validity of the marriage.²⁰ In a suit by a wife's administrator to set aside a deed given by her and her husband and a second deed by such grantee to another it was held that her husband although made a defendant was on the same side of the controversy as the plaintiff.²¹ In a suit by heirs against the executor to secure a construction of the will, contending that it gave the executor the residuary estate

¹⁷ *Morse v. South*, 80 Fed. 206.

But see *German Savings & Loan Soc. v. Tull, C. C. A.*, 136 Fed. 1.

¹⁸ *Sutton v. English*, 246 U. S. 199.

¹⁹ *Reavis v. Reavis*, 98 Fed. 145.

²⁰ *Hastings v. Douglass*, 249 Fed. 378.

²¹ *Grigsby v. Miller*, 231 Fed. 521.

in trust for them and another heir whose administrator was joined as defendant; it was held that such administrator was on the plaintiff's side of the controversy.²³

In a garnishee proceeding after judgment, it was held, that the judgment debtor was on the same side of the controversy as the judgment creditor.²³ In a suit by contractors against their bondsman, the person who had employed them and claimants against the balance due them; it was held that the bondsman was on the plaintiff's side of the controversy.²⁴ In an action on a bond secured by a mortgage, brought by citizens of one State against the citizens of another, one of the defendants, by her answer, prayed that the mortgage and bond be declared valid and foreclosed for her benefit and that of plaintiffs. The bond and mortgage were not divisible. All the defendants, including the one praying for relief, were citizens of the same State. It was held, that the Federal Court had no jurisdiction as it was substantially an action between citizens of the same State.²⁵

An Ohio corporation filed a bill in a Federal Court in West Virginia against B., as trustee and individually, M., A., P., K., and the personal representative and heirs of G., all of whom were citizens of West Virginia, and a Pennsylvania corporation, alleging: that land owned by plaintiff and by K. and G. was conveyed to B., as trustee, to sell, and pay the proceeds to plaintiff, K., and G.; that B. conspired with M., P. and A., who, on G.'s death qualified as his personal representative, and pursuant thereto, the value of the land having greatly increased, sold it to M. for much less, fraudulently concealing from plaintiff the fact of the increase; that the consent of K. to the sale was obtained by permitting him to retain a one-fifth interest in the land, the other four-fifths being held by A., who joined the conspiracy to defraud G.'s heirs, M., P. and B.; and that after title was conveyed by B. to M. the land was leased to the P. Co. for a bonus much larger than the price accounted for by B., with a royalty on oil taken from the land and other rentals and payments. Complainant prayed that M., B., A., P., and

²³ Thomas v. Anderson, C. C. A.,
223 Fed. 41.

²⁴ Baker v. Duwamish Mill Co.,
149 Fed. 612.

²⁴ John W. Hod & Co. v. Board
of School Directors, 210 Fed. 384.

²⁵ Blacklock v. Small, 127 U. S.
96, 32 L. ed. 70.

K. be decreed to account for and pay over to plaintiff K., and the heirs of G., moneys received from the Pennsylvania Company, and that the latter be required to attorn to such beneficiaries. It was held: that the real controversy was as to the fraud alleged to have been committed by B., A., M., P. and K.; that plaintiff and the heirs of G. were, on the one side, opposed to the other parties; that such heirs were indispensable parties, and, being citizens of the same State as part of the other defendants, the court was without jurisdiction.²⁶ In an action against the trustee of a deed of trust and his *cestui que trust*, brought by the assignee in insolvency of the grantor to prevent a sale of the property and for an accounting between the grantor and the beneficiary, the trustee is an indispensable party adverse in interest to the plaintiff, and, if a resident of the same State as the plaintiffs, the District Court of the United States has no jurisdiction of the action as a controversy between citizens of different States, although the *cestui que trust* is a citizen of a different State.²⁷

In a suit by a judgment creditor to set aside a fraudulent conveyance by his debtor it was held that the latter's trustee in bankruptcy was on the plaintiff's side of the controversy.²⁸ In a suit by an attaching creditor to set aside a judgment obtained against the debtor by confession, it was held, that other attaching creditors, whom he had joined as defendants, were on the same side of the controversy as the plaintiff.²⁹

In a suit by the trustee of a mortgage, to enforce a right of action held by the mortgagor,³⁰ or to protect the mortgaged property from injury,³¹ the mortgagor will be considered to be

²⁶ Trustees of Oberlin College v. Blair, 70 Fed. 414.

²⁷ Peper v. Fordyce, 119 U. S. 469, 30 L. ed. 435.

²⁸ Casey v. Baker, 212 Fed. 247.

²⁹ Pollok v. Louchheim, 19 Fed. 465.

³⁰ Dawson v. Columbia Trust Co., 197 U. S. 178, 49 L. ed. 713; Williams v. City Bank & Tr. Co., C. C. A., 186 Fed. 419; Mahon v. Guaranty Trust & Safe Deposit Co., C. C. A., 239 Fed. 266. See Adams

v. City of Woburn, 174 Fed. 192. But see City of Denver v. Mercantile Trust Co., C. C. A., 201 Fed. 790, *supra*, § 25, *infra*, § 43.

³¹ Consol. Water Co. v. Babcock, 76 Fed. 243; Boston S. D. & Tr. Co. v. Racine, 97 Fed. 817; Old Colony Tr. Co. v. Atlanta Ry. Co., 100 Fed. 798. Cf. Mercantile Tr. & D. Co. v. Collins P. & B. R. Co., 99 Fed. 812. But see Knickerbocker Tr. Co. v. City of Kalamazoo, 182 Fed. 865.

on the same side of the controversy as the complainant, unless it clearly appears that he is actively opposed to the relief prayed.³² But in a suit to enjoin striking employees of a contractor with complainant, from intimidating the contractor, it was held, that such contractor, although he did not oppose the relief sought could not be aligned on the same side of the controversy as the plaintiff so as to defeat the jurisdiction.³³

In a suit by a bondholder or other *cestui que trust*, to enforce a right after his trustee has refused to sue upon the same, the defendant trustee is considered to be upon the same side of the controversy as the plaintiff;³⁴ unless the latter seeks some relief antagonistic to the other beneficiaries of the trust,³⁵ or when the plaintiff claims some substantial relief against the trustee.³⁶ In a suit by the beneficiary of a trust to remove the trustee it was held that the trustor was not on the plaintiff's side of the controversy.³⁷

In a suit by the creditors of an insolvent corporation, citizens of another State from the corporation, and its assignees, charg-

³² Dawson v. Columbia Trust Co., 197 U. S. 178, 180, 49 L. ed. 713, 215.

³³ Carroll v. Cheas. & O. Coal Agency Co., C. C. A., 124 Fed. 305; s. c., as Cheas. & O. Coal Co. v. Fire, Creek C. & C. Co., 119 Fed. 942; Niles Bement-Pond Co. v. Iron Molders' Union, Local No. 68, 246 Fed. 851; Iron Molders' Union v. Niles-Bement-Pond Co., C. C. A., 258 Fed. 408, reversing 246 Fed. 801.

³⁴ Pacific R. Co. v. Ketchum, 101 U. S. 289, 25 L. ed. 932; Blacklock v. Small, 127 U. S. 96, 32 L. ed. 70; Barry v. Mo. K. & T. Ry. Co., 27 Fed. 1; Needham v. Wilson, 47 Fed. 97; Reinach v. Atlantic & G. W. R. Co., 58 Fed. 33; Shipp v. Williams, C. C. A., 62 Fed. 4; Bowdoin College v. Meritt, 63 Fed. 213; Kildare Lumber Co. v. National Bank, C. C. A., 69 Fed. 2; First Nat. Bank v. Radford Tr. Co., C. C. A., 80 Fed. 569, 573; Dunn v. Waggoner,

11 Tenn. (3 Yerg.) 59; Swann v. Myers, 79 N. C. 101. But see Hack v. Chicago & G. S. Ry. Co., 23 Fed. 356. But see Einstein v. Georgia, So. & F. Ry. Co., 120 Fed. 1008; Hamer v. New York Railways Co., 244 U. S. 266; Sharp v. Bonham, 213 Fed. 660; Georgia Coast & P. R. Co. v. Lowenthal, C. C. A., 238 Fed. 795; Brown v. Denver Omnibus & Cab Co., C. C. A., 254 C. A. 560.

³⁵ Rust v. Brittle Silver Co., C. C. A., 58 Fed. 611; Kildare Lumber Co. v. National Bank, C. C. A., 69 Fed. 2; First Nat. Bank v. Radford Tr. Co., 80 Fed. 569, 571, 573. See Mommonth Inv. Co. v. Means, C. C. A., 151 Fed. 159.

³⁶ Fitz Gerald v. Thompson, 222 U. S. 555, 56 L. ed. 314.

³⁷ Hidden v. Washington-Oregon Corporation, 217 Fed. 303; General Electric Co. v. Richardson, C. C. A., 233 Fed. 84.

ing improper conduct on the part of the assignees and praying for a receiver, it was objected to the jurisdiction of the Federal Court that the action was really one by the corporation against the assignees, and that the suit was brought by the creditors for the purpose of bringing the suit in the Federal Courts. It was held, that as the creditors had the right to sue, this objection was not tenable.³⁸

In a stockholder's suit, the corporation if it is not alleged to be under the control of the defendants or to resist the relief sought should be aligned as a complainant for the purpose of determining the jurisdiction.³⁹ In a stockholder's suit to enforce a right of his corporation, where it is shown that the corporation is under the control of the other defendants, it will be treated as upon the same side of the controversy that they are, for the purpose of determining the jurisdiction.⁴⁰ In one to prevent the majority of the stockholders from causing the corporation to act in fraud of the minority, the corporation is to be aligned on the same side as the majority stockholders.⁴¹ It has been held: that in a stockholder's suit, where the plaintiff has failed to comply with the equity rules by showing efforts to secure action by the other

³⁸ *Bell v. Ohio Life Ins. Co.*, Fed. Cas. No. 1,261.

³⁹ *Iron Molders' Union v. Niles-Bement-Pond Co.*, C. C. A., 258 Fed. 408, reversing 246 Fed. 851.

⁴⁰ *Doctor v. Harrington*, 196 U. S. 579, 49 L. ed. 606; overruling a number of decisions of the lower courts to the contrary. *Hyams v. Calumet & Hecla Mining Co.*, 221 Fed. 529; *Whitaker v. Whitaker Iron Co.*, 238 Fed. 980; *Cutting v. Woodward et al.*, C. C. A., 255 Fed. 633. See *Woolsey v. Dodge*, Fed. Cas. No. 18,032, 6 McLean, 142; *s. c.*, as *Dodge v. Woolsey*, 18 How. 331, 15 L. ed. 401; *DeNeufville v. New York & N. R. Co.*, C. C. A., 81 Fed. 10; *MacGinniss v. Boston & M. Consol. Copper & Silver Min. Co.*, 119 Fed. 96, 55 C. C. A. 648; *Redfield v. Baltimore & O. R. Co.*,

124 Fed. 929; *Mills v. City of Chicago*, 127 Fed. 731; *Groel v. United Electric Co. of New Jersey*, 132 Fed. 252; *Howard v. Nat. Telephone Co.*, 182 Fed. 215; *Crawford v. Seattle, R. & S. Ry. Co.*, 198 Fed. 920. Before the decision of *Doctor v. Harrington*, 196 U. S. 579, 49 L. ed. 606, it was held, that where a stockholder's bill did not conform to the requirement of the equity rules, by showing efforts made to secure action by the stockholders, or an excuse for such failure, the corporation must be aligned with the complainants. *Waller v. Coler*, 125 Fed. 821.

⁴¹ *De'Neufville v. New York & N. Ry. Co.*, C. C. A., 81 Fed. 10; *Redfield v. Baltimore & O. R. Co.*, 124 Fed. 929; *Elkins v. Chicago*, 119 Fed. 957.

stockholders on an excuse for such failure, the corporation is to be treated as upon the same side of the controversy as the complainant.⁴³ Where the controversy for the control of the corporation transcends the rivalry of those claiming to be members of its board of control and the corporation itself is a mere instrumentality or holder of the title, it is properly made a party defendant and should not be aligned as a plaintiff merely because the plaintiffs belong to the faction that claims the power to appoint the members of the board.⁴³ In such a case, it has been held that trustees of the corporation, although in sympathy with the complainant, should be aligned with the defendants.⁴⁴ In a stockholders' suit to recover assets of a corporation it was held that a statutory receiver who had been made a defendant was on the plaintiff's side of the controversy.⁴⁵

In an action for damages under the Kansas statute, because the plaintiff's cattle caught Texas fever from cattle driven into the State in violation of the law, where the importer of the Texan cattle and those to whom he had sold the same under a contract, whereby they assumed his liability to the plaintiff, were joined as defendants; it was held, that the importer's interest was not so adverse to that of his vendees as to justify his classification as a plaintiff, and thereby give such vendees a right of removal on the ground of diverse citizenship.⁴⁶

§ 42. Formal parties to the controversy. The citizenship of formal parties, with no real interest in the controversy, does not affect the jurisdiction.¹

⁴³ *Waller v. Coler*, 125 Fed. 821; *Groal v. United El. Co.*, 132 Fed. 252. These cases were decided before *Doctor v. Harrington*, 196 U. S. 579, 49 L. ed. 606. A similar ruling has been made since this decision. *Gage v. Riverside Trust Co.*, 156 Fed. 1002, 1007.

⁴⁴ *Helm v. Zarecor*, 222 U. S. 32, 56 L. ed. 77. But see *Stephens v. Smartt*, 172 Fed. 466.

⁴⁵ *Kelly v. Dolan*, 218 Fed. 966.

⁴⁶ *Sharpe v. Bonham*, 224 U. S. 241, 16 L. ed. 747.

⁴⁶ *Woodrum v. Clay*, 33 Fed. 897.

§ 42. 1 *Wormley v. Wormley*, 8 Wheaton, 421, 5 L. ed. 651; *Wood v. Davis*, 18 How. 467, 15 L. ed. 460; *Removal Cases*, 100 U. S. 457, 25 L. ed. 593; *Barney v. Latham*, 103 U. S. 205, 26 L. ed. 514; *Harter v. Kernochan*, 103 U. S. 562, 26 L. ed. 411; *Corbin v. Van Brunt*, 105 U. S. 576, 26 L. ed. 1176; *Maryland v. Baldwin*, 112 U. S. 490, 28 L. ed. 822; *Hervey v. Illinois Midland Ry. Co.*, Fed. Cas. No. 6,434 (7 Biss. 103); *Girardey v. Moore*, Fed. Cas. No. 5,462 (3 Woods, 397); *Edgerton v. Gilpin*, Fed. Cas. No. 4,280

Such are parties holding the naked legal title, with no actual interest or control over the subject-matter of the litigation, when all the equitable interests are therein represented.² Plaintiff and another contracted as partners to do certain work in the construction of a railroad as subcontractors. By a contract between themselves, previously made and known to the principal contractor, it was agreed: that plaintiff should furnish the materials and do the work and receive and disburse the money received therefor, accounting to his associate only for a share of the net profits of the contract after the completion of the work. Plaintiff brought suit in a Federal court to enforce a mechanic's lien, filed in the name of the partnership, for the balance due under the contract, alleging such facts in his bill and that no net profits were earned under the contract. It was held: that it was competent for plaintiff to allege, for jurisdictional purposes, the contract between him and his nominal partner; and that under such agreement the citizenship of such partner did not affect the jurisdiction of the court, since he had no interest in the recovery and was neither an indis-

(3 Woods, 277); *Taylor v. Rockefeller*, Fed. Cas. No. 13,802; *Chicago, St. L. & N. O. R. Co. v. McComb*, Fed. Cas. No. 2,670 (17 Blatchf. 371); *Foss v. First Nat. Bank*, 3 Fed. 185, 1 *McCrary*, 474; *Deford v. Mehaffy*, 14 Fed. 181; *Taylor v. Holmes*, 14 Fed. 498; *Bates v. New Orleans, B. R. & V. R. Co.*, 16 Fed. 294; *Gudger v. Western N. C. R. Co.*, 21 Fed. 81; *Sioux City & D. M. Ry. Co. v. Chicago, M. & St. P. Ry. Co.*, 27 Fed. 770; *New Chester Water Co. v. Holly Mfg. Co.*, C. C. A., 53 Fed. 19, 26; *Carver v. Jarvis-Conklin Mortgage Trust Co.*, 73 Fed. 9; *Garrard v. Silver Peak Mines*, 76; Fed. 1; *Title Guarantee & Trust Co. v. Studebaker*, 100 Fed. 358; *Wirgman v. Persons*, C. C. A., 126 Fed. 449; affirming decree *Persons v. Beling*, 116 Fed. 877; *Steiner v. Mathewson*, 77 Ga. 657; *Withers v. John Hopkins Place Sav. Bank*

Georgia, 30 S. E. 766; *Harper v. Gaitheman (Kentucky)*, 1 Ky. Law. Rep. 419; *Danvers Sav. Bank v. Thompson*, 133 Mass. 182; *Calloway v. Ore Knob Copper Co.*, 74 N. C. 200; *Hadley v. Dunlap*, 10 Ohio St. 1; *Smith v. Baltimore & O. R. Co.*, 7 Ohio Dec. 542.

² *Boon v. Chiles*, 8 Pet. 532, 8 L. ed. 1034; *Banigan v. City of Worcester*, 30 Fed. 392; *Lawrence v. Southern Pac. Co.*, 165 Fed. 241; *Atchison, T. & S. F. Ry. Co. v. Phillips*, C. C. A., 176 Fed. 663, holding that in an action by a widow under the California statute to recover damages for the death of her husband, the other heirs of the deceased, who are not entitled to share in the recovery, are necessary, but merely formal, parties. But see *Dunn v. Waggoner*, 11 Tenn. (3 Yerg.), 59.

pensable nor a necessary party.³ The husband of a married woman when made a party to a suit affecting her separate estate is such a formal party.⁴ In a suit in which it appears by the record that a party sues for the use of another, such plaintiff is a nominal party.⁵ It has been held, that the following plaintiffs are formal parties, whose citizenship will not affect the jurisdiction, the status of the person interested in the recovery being alone considered: a State officer who sues to collect a penalty for the benefit of the State;⁶ the nominal payee of a bond suing for the use of another, who is entitled to the benefit of the same, such as the United States in a suit upon the bond of a receiver;⁷ the State in a suit upon the bond of a public officer,⁸ or of an administrator;⁹ or upon the bond of an attaching creditor;¹⁰ the governor of a State in a suit upon a sheriff's bond,¹¹ or a forthcoming bond;¹² a marshal in a suit upon an attachment bond;¹³ and, it has been said, a State in any suit brought in its name on the relation of another;¹⁴

³ *Ban v. Columbia Southern Ry. Co.*, 117 Fed. 21, 54 C. C. A. 407; reversing 109 Fed. 499.

⁴ *Wormley v. Wormley*, 8 Wheat. 421, 5 L. ed. 651; *First Nat. Bank v. Bridgeport Tr. Co.*, 117 Fed. 969.

⁵ *Browne v. Strode*, 5 Cranch, 303, 3 L. ed. 108; *Dimmock v. Doolittle*, 29 Fed. 545; *New Chester Water Co. v. Holly Mfg. Co.*, 53 Fed. 19, 3 C. C. A. 399, 3 U. S. App. 264; affirming 48 Fed. 879. And cases cited *infra*.

⁶ *Ferguson v. Ross*, 3 L.R.A. 322, 38 Fed. 161. As to when the State may be a formal party see *Ex parte Nebraska*, 209 U. S. 436, 52 L. ed. 876. Certain State statutes required railroads to post on blackboards erected in telegraph passenger stations the time of the arrival of passenger trains, stating whether the same were late, and, if so how much; and provided a penalty for a violation of this requirement, to be recovered in the name of the State by the prosecuting attorney

for the benefit of himself and the county school fund. It was held: that an action by the State, under such action, was not removable to the Federal court for diversity of citizenship, on the ground that the prosecuting attorney and the county receiving the penalty, if recovered, were the real parties in interest. *Southern Ry. Co. v. State (Indiana)*, 72 N. E. 174.

⁷ *U. S. v. Douglas*, 113 S. C. 190, 18 S. E. 202.

⁸ *Indiana ex rel. Stanton v. Glover*, 155 U. S. 513, 39 L. ed. 243.

⁹ *Maryland v. Baldwin*, 112 U. S. 490, 28 L. ed. 822.

¹⁰ *Missouri ex rel. Rauch v. Bowles Milling Co.*, 80 Fed. 161.

¹¹ *McNutt v. Bland*, 2 How. 9, 11 L. ed. 159.

¹² *Wade v. Wortsman*, 29 Fed. 754; *Wortsman v. Wade*, 77 Ga. 651, 4 Am. St. Rep. 102.

¹³ *Huff v. Hutchinson*, 14 How. 586, 14 L. ed. 553.

¹⁴ *Jack v. Williams*, 113 Fed.

but not, it has been held, the United States in a suit brought for the benefit of a material man upon a contractor's bond.¹⁵ So, it has been held, are: an agent,¹⁶ or attorney,¹⁷ or officer,¹⁸ or director,¹⁹ of a corporation, when made defendant in a suit against it seeking no relief against him even when in the con-

823, 824. See *Missouri v. Alt*, 73 Fed. 302. *Contra*, *State of Ohio v. Columbus & Xenia R. Co.*, 48 Fed. 626, an application for a mandamus; *Title Guaranty & Surety Co. v. State of Idaho for the use of Allen*, 240 U. S. 136.

¹⁵ U. S. *Fidelity & G'y Co. v. U. S. for the benefit of Kenyon*, 204 U. S. 349, 51 L. ed. 516; affirming *U. S. v. Churchyard*, 132 Fed. 82; *U. S. v. Henderlong*, 102 Fed. 2; *U. S. v. Sheridan*, 119 Fed. 236; *U. S. v. O'Brien*, 120 Fed. 446, 448; *U. S. v. Barrett*, 135 Fed. 189; *Burrell v. U. S., C. C. A.*, 147 Fed. 44, 46.

In a suit by three heirs, who were citizens of Tennessee, against the executor, who was a citizen of Missouri, in which the administrator of a deceased heir, who was also a citizen of Missouri, was joined as defendant to secure a construction of the will, the plaintiffs claiming either that it did not dispose of the residuary estate, or that the executor was given such estate in trust for the heirs, and the executor claiming that the residuary estate was given to him absolutely; the administrator must be classed as a plaintiff in aligning the parties for the purpose of determining jurisdiction, and therefore one of the parties plaintiff was a citizen of the same state as the defendant, and the District Court was without jurisdiction.

Though the interest of the administrator was like that of the other plaintiffs, so that he was a proper party, his interest was severable

from theirs, and he was not a necessary party, and therefore need not have been joined under equity rule 39 providing that where a proper, but not necessary, party could not be brought in without ousting the jurisdiction of the trial court, that court may in its discretion proceed in his absence, the decree to be without prejudice to his rights, which rule was merely declaratory of the prior practice. *Thomas v. Anderson*.

¹⁶ *Wood v. Davis*, 18 Howe, 467, 15 L. ed. 460; *City of New York v. New Jersey Steamboat Transp. Co.*, 24 Fed. 817; *Brown v. Murray Nelson & Co.*, 43 Fed. 614; *Overman Wheel Co. v. Pope Mfg. Co.*, 46 Fed. 577; *Sidway v. Missouri Land & Live Stock Co.*, 116 Fed. 381; *Carothers v. McKinley Mining & Smelting Co.*, 122 Fed. 305.

¹⁷ *Brown v. Murray Nelson & Co.*, 43 Fed. 614.

¹⁸ *Hatch v. Chicago R. I. & P. R. Co.*, Fed. Cas. No. 6,204 (6 Blatchf. 105); *Pond v. Sibley*, 7 Fed. 129, 19 Blatchf. 189; *National Bank of Lyndon v. Wells River Mfg. Co.*, 7 Fed. 750; *City of New York v. New Jersey Steamboat Transp. Co.*, 24 Fed. 817; *Lamm v. Parrott Silver & Copper Co.*, 111 Fed. 241.

¹⁹ *Geer v. Mathieson Alkali Works*, 190 U. S. 428, 47 L. ed. 1122; *Pond v. Sibley*, 7 Fed. 129, 19 Blatchf. 189; *Politz v. Wabash R. Co.*, 153 Fed. 941.

troversy they sympathize with the complainant,²⁰ public officers against whom no relief is sought, except an injunction against their official action in aid of an act of another defendant, which the bill also seeks to enjoin.²¹ Where one, acting as agent only, made insurance in his own name, and for all others concerned, although he and the underwriter were citizens of the same State; it was held, that the underwriter might be sued in those courts by the principal, who was a citizen of a different State.²² But when the insured had been paid part of the loss and joined with the insurer to recover damage for negligence which caused the fire, it was held that the insurer was not a formal party and that its citizenship must be considered in determining the jurisdiction.²³

The directors are not nominal parties to a suit against them and their corporation, to cancel stock subscriptions and to compel them, individually, as well as the corporation, to refund the amounts already paid by the subscribers;²⁴ nor where they are charged with actual participation in a fraud.²⁵

It was held that the following are formal parties: State and county officers in a suit to enjoin them from levying, collecting and disbursing the taxes required to pay certain bonds, when the bill also sought the declaration that the bonds be declared void and their collection enjoined, making bondholders parties defendant;²⁶ a register of deeds in a suit to set aside certain land contracts with a prayer for an injunction against his recording the same;²⁷ an officer appointed to sell land under a decree, when made defendant in a suit to set aside that decree

²⁰ *Sharpe v. Bonham*, 224 U. S. 241, 56 L. ed. 747; overruling *Stewart v. Mitchell*, 172 Fed. 905; *Stephens v. Smartt*, 172 Fed. 466. See *Helm v. Zarecor*, 222 U. S. 32, 56 L. ed. 77.

²¹ So held, of a sheriff and commissioners of appraisal, who were made defendants to a suit to enjoin a corporation from prosecuting condemnation proceedings. *Sioux City & D. M. Ry. Co. v. Chi-*

cago, M. & St. P. Ry. Co., 27 Fed. 770.

²² *Ruan v. Gardner*, Fed. Cas. No. 12,100 (1 Wash. C. C. 145).

²³ *Turk v. Illinois Cent. R. Co.*, C. C. A., 218 Fed. 315.

²⁴ *Seddon v. Virginia, T. & G. S. & I. Co.*, 36 Fed. 6, 1 L.R.A. 108.

²⁵ *Fox v. Mackay*, 60 Fed. 4.

²⁶ *Aroma Tp. v. Auditor of Public Accounts*, 2 Fed. 33.

²⁷ *Hyde v. Victoria Land Co.*, 125 Fed. 970.

for fraud.²⁸ An assignee for the benefit of creditors, a citizen of the State of Rhode Island, filed a bill in equity in the State court, against a Massachusetts creditor of his assignor, who had obtained a State execution, and the officer charged with the service thereof, who was a citizen of Rhode Island, to establish a trust, and to enjoin the sale of the trust property levied upon by the execution. Upon a petition by the execution creditor to remove the bill into the Circuit Court of the United States for the Rhode Island district; it was held, that the officer was not a formal, or unnecessary party to the bill, that his presence could not be disregarded by the court in considering whether the applicant was entitled to the jurisdiction which he invoked; and that the petition must be dismissed.²⁹ Citizens of Tennessee, holding policies of life insurance in a foreign corporation, filed their bill in the Chancery Court against this and other foreign corporations for collection of their claims and to subject to the satisfaction thereof the property of such company, including certain State bonds deposited by it with the treasurer of the State "as security for risks taken by citizens of this State," and, for this purpose, made the treasurer, a citizen of Tennessee, a party defendant. It was held, that the treasurer was a material party defendant, and the court refused, on the application of the foreign corporations, to accept their petition and bond and to authorize a removal.³⁰

Where the holder of the equitable title is a party to the suit, a dry trustee, or passive trustee, or one who merely holds the legal title without any power over the property in question is generally considered to be a formal party.³¹ Where the trust is active and the trustee has a power over the property, he is usually considered to be a necessary party to the suit, whose citizenship must be considered in determining the jurisdiction.³²

²⁸ *Carver v. Jarvis-Conklin Mortgage Trust Co.*, 73 Fed. 9.

²⁹ *Nye v. Nightingale*, 6 R. I. 439.

³⁰ *Smith v. St. Louis Mut. Life Ins. Co.*, 2 Tenn. Ch. 656.

³¹ *Boon v. Chiles*, 8 Pet. 532, 8 L. ed. 1034; *Banian v. City of Worcester*, 30 Fed. 392. See *Lawrence v. Southern Pac. Co.*, 165 Fed. 241; *Atchison, T. & S. F. Ry. Co. v.*

Phillips, C. C. A., 176 Fed. 663. But see *Dunn v. Waggoner*, 11 Tenn. (3 Yerg.), 59.

³² So held, of a trustee of land conveyed to him, to secure the payment of a loan in a suit to cancel the conveyances or to enjoin a sale thereunder. *Thayer v. Life Association of America*, 112 U. S. 717, 28 L. ed. 864; *Peper v. Fordyse*, 119

Where two citizens of one State, trustees for bondholders under a mortgage of a railroad owned by a corporation of another State, foreclosed the mortgage, bought in the road in trust for the bondholders, and leased it to a citizen of the State to which they themselves belonged; and then a majority of the bondholders, citizens of the State where the original company was, in pursuance of a statute there, formed themselves into a new corporation, to which the statute gave ownership and control of the road, and suit was brought in a State court against the lessee of the road by the trustees who had made the lease; it was held: that defendant could not remove the suit from the State court to the Federal court on the ground, that it was wholly between the new corporation and the lessee, and that the trustees were nominal parties; they, the trustees, not having been discharged from, nor in any way incapacitated from executing, their trust, and there having been, in fact, unpaid bondholders who had not joined in the creation of the new corporation, and who had yet a right to call on the trustees to provide for the payment of their bonds.³³ It has been held: that trustees are formal parties to a controversy concerning a claim for the cancellation of bonds secured by the deed of trust, although an injunction against a foreclosure is prayed.³⁴ In a suit to set aside a deed of trust made for the benefit of creditors, it appeared that plaintiff and the trustee were citizens of the same State, but that the beneficiaries under the deed, other than plaintiff, were citizens of another State. It was held, that the trustee was an indispensable party to the suit, and that the Federal court, therefore, had no jurisdiction.³⁵ It was held: that the jurisdiction of the Circuit Court of the United States was not defeated by the fact that with the principal defendant were joined, as nominal parties, the ex-

U. S. 469, 30 L. ed. 435; reversing decree *Fordyce v. Peper*, 16 Fed. 516, 5 *McCrary*, 221; *Teal v. Walker*, Fed. Cas. No. 13,812. *Contra*, *Chester v. Wellford*, Fed. Cas. No. 2,662 (2 *Flip*. 347). So held of trustees of a mortgage in a foreclosure suit brought by the beneficiary, after they had refused to

sue. *Allen-West Commission Co. v. Brashear*, 176 Fed. 119.

³³ *Knapp v. Railroad Co.*, 87 U. S. (20 Wall.), 117, 22 L. ed. 328.

³⁴ *Lake St. El. R. Co. v. Ziegler*, 99 Fed. 114, 39 C. C. A. 431.

³⁵ *Rust v. Brittle Silver Co.*, 58 Fed. 611, 7 C. C. A. 389, 19 U. S. App. 237.

ecutors of a deceased trustee, citizens of the same State as the complainant, in order that such executors might perform the ministerial act of conveying title, in case the power to do so was vested in them by the laws of the State.³⁶ It has been held: that in a controversy as to the priority of different liens upon mortgaged land, the mortgagor is a formal party, when the validity of neither of the liens is disputed;³⁷ and that so is the lessor of a railroad when the lease is for more than ninety years and the lessee has assumed all the lessor's obligations;³⁸ and that so is the owner of the fee as well as the lessee railway company, in a proceeding to condemn a right of way in the possession of the lessee holding a term of ninety years.³⁹

Defendants sued by fictitious names are always treated as formal parties, whose presence on the record does not affect the right of removal.⁴⁰

A garnishee is not considered to be a party to the suit, when determining the right of removal.⁴¹ Where the essential parties on the adverse sides of a controversy were citizens of different States; it was held, that the fact that the executors of the deceased father of the principal defendant, who had been made defendants in order to reach his interest in his father's estate, were citizens of the same State as plaintiffs, would not affect the right of removal.⁴²

It has been held, that the following persons are not mere formal parties, and that their citizenship must be considered when the jurisdiction is determined: a party against whom a decree

³⁶ *Walden v. Skinner*, 101 U. S. 577, 25 L. ed. 963.

³⁷ *Removal Cases*, 100 U. S. 457, 469, 25 L. ed. 593. But see *Thompson v. Dixon*, 28 Fed. 5; *Tug River Coal & Salt Co. v. Brigel*, C. C. A., 67 Fed. 625.

³⁸ *Seaboard Air Line Ry. v. North Carolina R. Co.*, 123 Fed. 629; *Olanta Coal Min. Co. v. Beech Creek R. Co.*, 144 Fed. 150; *Chase v. Beech Creek R. Co.*, 144 Fed. 571. *Contra*, *Bellaire v. Baltimore & Ohio R. R. Co.*, 146 U. S. 117, 36

L. ed. 910; *Washington v. Columbus & C. M. R. Co.*, 53 Fed. 673.

³⁹ *Seaboard Air Line Ry. Co. v. North Carolina R. Co.*, 123 Fed. 629.

⁴⁰ *Parkinson v. Barr*, 105 Fed. 81; *Loop v. Winters' Estate*, 115 Fed. 362. *Contra*, *Grosso v. Butte Electricity Ry. Co.*, 217 Fed. 422.

⁴¹ *Cook v. Whitney*, Fed. Cas. No. 3,166 (3 Woods, 715); *Corbitt v. President, etc., of Farmers' Bank of Delaware*, 113 Fed. 417.

⁴² *Bacon v. Rives*, 106 U. S. 99, 27 L. ed. 69.

is essential to the relief sought by the suit;⁴⁸ a stakeholder in the possession of property, to recover which the suit is brought;⁴⁹ an administrator with the will annexed in a suit for a construction of the will;⁵⁰ the personal representative of a deceased in an action to recover damages for his death, although the proceeds are for the exclusive benefit of the members of the dead man's family;⁵¹ a tenant in common with a leasehold interest and an equity for improvements, when joined with the landlord in a suit for ejectment;⁵² a corporation in a stockholder's suit, to cancel a contract which it has made;⁵³ a corporation in a suit by its mortgagee, to cancel a contract made by it with another, although it was alleged that its assets were insufficient to pay the mortgage;⁵⁴ a corporation in a suit to compel the transfer of stock, the certificates for which were held or claimed by another defendant.⁵⁵ Where the stakeholder brought a suit of interpleader; it was held, that a difference of citizenship between the defendants justified a removal.⁵⁶ Under the Illinois statute, which gives the right of appeal to any one aggrieved by the order of a probate court allowing a claim, as construed by the Supreme Court of the State, any person appeal-

⁴⁸ *Wormley v. Wormley*, 21 U. S. (8 Wheat.), 421, 5 L. ed. 651; *Carneal v. Banks*, 23 U. S. (10 Wheat.), 181, 6 L. ed. 297; *Ward v. Arredondo*, Fed. Cas. No. 17,148 (1 Paine, 410); *Post v. Buckley*, 119 Fed. 249.

⁴⁹ *Wilson v. Oswego Tp.*, 151 U. S. 56, 38 L. ed. 70; *Massachusetts & S. Constr. Co. v. Cane Creek Tp.*, 155 U. S. 283, 39 L. ed. 152; *Scoutt v. Keck*, 73 Fed. 900, 20 C. C. A. 103. But see *Pacific R. Co. v. Ketchum*, 101 U. S. 289, 298, 25 L. ed. 932; *Bacon v. Rives*, 106 U. S. 99, 27 L. ed. 69; *Reeves v. Corning*, 51 Fed. 774, 778; *N. Y. Constr. Co. v. Simon*, 53 Fed. 1; and cases cited.

⁵⁰ *Security Co. v. Pratt*, 64 Fed. 405.

⁵¹ *Laubscher v. Fay*, 197 Fed. 879.

⁵² *Beardsley v. Torrey*, Fed. Cas. No. 1,190 (4 Wash. C. C. 286);

Cleveland v. Cleveland, C. C. & St. L. Ry. Co., C. C. A., 146 Fed. 171. *Contra*, *Gwynne v. Roe*, 4 Ohio (4 Ham.), 435; *Texas v. Lewis*, 12 Fed. 1; brought in Texas for trespass to try title to land, and the tenant disclaimed title.

⁵³ *East Tennessee, V. & G. R. Co. v. Grayson*, 119 U. S. 240, 30 L. ed. 382.

⁵⁴ *Consol. Water Co. v. Babcock*, 76 Fed. 243. See *Dawson v. Columbia Trust Co.*, 197 U. S. 178, 49 L. ed. 713; cited *supra*.

⁵⁵ *Crump v. Thurber*, 115 U. S. 56, 29 L. ed. 328; *Rogers v. Van Nortwick*, 45 Fed. 513; *Patterson v. Farmington Street Ry. Co.*, 111 Fed. 262.

⁵⁶ *First Nat. Bank v. Bridgeport Tr. Co.*, 117 Fed. 969; *Feidler v. Bartleson*, C. C. A., 161 Fed. 30, cited *supra*, § 41.

ing, other than the administrator, might prosecute the appeal in his own name. It was held, that where the claimant was the administrator, and a temporary administrator was appointed by the probate court to represent the estate, but the claim was actually contested by an heir of the decedent, who appealed from an order allowing the claim, the question of diversity of citizenship between the parties was to be determined upon the citizenship of such appellant, and not upon that of the temporary administrator.⁵² In an ejectment instituted in a State court of Pennsylvania by a citizen of Pennsylvania, against the tenant in possession, also a citizen of that State, his lessor, a citizen of Maryland, after a judgment by default against the tenant, was, upon his petition admitted as a defendant to the suit. The new defendant then removed the cause; but the Circuit Court remanded the same for want of jurisdiction; since the remover was a co-defendant with the tenant in possession, a citizen of plaintiff's State.⁵³ Where a stockholder in a corporation sued to enjoin the use by another corporation of stock in the former, upon the ground that the latter had no corporate power to acquire the same; it was held, that the former company was not a necessary party, and that its joinder could not prevent a removal.⁵⁴ It was held: that a corporation, which had sold all its property and franchises except the mere right to exist, and which had no officers or place of business, was only a nominal party in a suit against a stockholder to make him liable for his unpaid subscription; notwithstanding the fact that the corporation had still the power to reorganize and collect the stockholders' dues.⁵⁵ But upon a bill for the specific performance of a contract between two individuals for the sale of certain shares of stock issued by a corporation, and to recover damages for the breach of such contract, which bill did not allege the insolvency of the other party to the contract, nor that he was about to dispose of the stock; it was held that no cause of action was stated against the corporation, and that, if joined, it was merely a formal party, which could not affect the jurisdiction.⁵⁶

⁵² *Schneider v. Eldredge*, 125 Fed. 638.

⁵³ *Beardsley v. Torrey*, Fed. Cas. No. 1,190 (4 Wash. C. C. 286).

⁵⁴ *Higgins v. Baltimore & O. R. Co.*, 99 Fed. 640.

⁵⁵ *Wellman v. Howland Coal & Iron Works*, 19 Fed. 51.

⁵⁶ *Lukas v. Milliken*, 139 Fed. 816.

It has been held: that a corporation is a mere formal, and not a necessary, party to a suit to enjoin the use or transfer of certificates of stock which it has issued.⁵⁷ In an action against a principal and a surety, the surety cannot be considered as a merely formal party.⁵⁸ In a suit in support of an adverse claim to a land patent, the original applicant is not a formal party, although he has assigned his claim to another person joined in the suit.⁵⁹

A defendant, who has disclaimed an interest in the controversy,⁶⁰ or, who has made a default in appearance or pleading,⁶¹ is not considered as a formal party, and his citizenship may prevent a removal. The fact that a defendant is pecuniarily irresponsible, so that a judgment against him would be of no value, does not make him a formal party.⁶²

⁵⁷ *County Court v. Baltimore & O. R. Co.*, 35 Fed. 161.

⁵⁸ *Mutual Reserve Fund Life Ass'n v. Farmer*, C. C. A., 77 Fed. 929.

⁵⁹ *Blackburn v. Portland Gold Min. Co.*, 175 U. S. 571, 44 L. ed. 276.

⁶⁰ *New Jersey Zinc Co. v. Trotter*, Fed. Cas. No. 10,167; *Hax v. Caspar*, 31 Fed. 499; *Dow v. Bradstreet Co.*, 46 Fed. 824; *Goodnow v. Litchfield*, 47 Fed. 753. See *Wetherby v. Stinson*, C. C. A., 62 Fed. 173; *supra*. Held *contra* (as to original jurisdiction), *Frazer Lubricator Co. v. Frazer*, 23 Fed. 305; (as to right to removal) *Wurgman v. Persons*, C. C. A., 126 Fed. 449, 451; *Willin v. Reagan*, 171 Fed. 758. In the former case at least, the disclaiming defendant was not a necessary party. *Contra*, *Day v. Oatis* (Mississippi), 37 So. 559; *Reed v. Hardeman County*, 77 Tex. 165; 13 S. W. 1024; (removal denied). See *Cooper v. Preston*, 105 Fed. 403; *Davies v. Wells*, 134 Fed. 139.

⁶¹ *Putnam v. Ingraham*, 114 U. S. 57, 29 L. ed. 65; *Brooks v. Clark*,

119 U. S. 502, 30 L. ed. 482; *Park v. N. Y., L. E. & W. R. Co.*, 70 Fed. 641; *Lederer v. Sire*, 105 Fed. 529. *Contra*, *Judah v. Iowa Barb-Wire Co.*, 32 Fed. 561. *Steele v. Culver*, 211 U. S. 26, 53 L. ed. 74.

⁶² *Deere, Wells & Co. v. Chicago, M. & St. P. Ry. Co.*, 85 Fed. 876.

Insurance companies which have paid policies on property destroyed by fire caused by the negligence of a third person and have by equitable principles or by the terms of the policies been subrogated to the right of action of the owner against such person may maintain an action thereon in their own name under the laws of Washington, which require actions to be brought in the name of the real party in interest and permit the assignment of such causes of action; and where they join with the owner as plaintiffs, they are parties in interest, and not merely nominal parties for the purpose of determining the removability of the cause. *Webb v. Southern Ry. Co.*, C. C. A., 248 Fed. 618; *Palmer et al. v. Oregon-Washington R. & Nav. Co.* (District Court, W.

§ 43. **Unnecessary parties to the controversy.** In certain cases it has been held: that the citizenship of defendants, who are proper but *not necessary* nor indispensable parties to the controversy may be disregarded when no decree is entered against them.¹ Such it has been held are: different tort feorsors in an action for damages,² or ordinarily in a suit for an injunction against them;³ a leaseholder who has attorned to the plaintiff in a suit to enjoin his lessor from exercising any control over the property;⁴ the mortgagor in a suit to determine the ownership of the bond and mortgage;⁵ the beneficiary of a trust in a suit by his trustee for a foreclosure.⁶ The mortgagor in a suit by the mortgagees to enjoin a public board from reducing charges for public service;⁷ a person for whose benefit a corporation was organized in a suit to enjoin such corporation from operating a ferry;⁸ defendants who have been made parties to a suit merely because they are alleged to be indebted to the principal defendant;⁹ in a suit for an accounting of lands sold by a corporation, the stockholders and incorporators of the same, who have procured the conveyance to it of the lands, in which the plaintiffs claimed an interest;¹⁰ the administrator of one of the heirs in a suit by the survivors for a decree that the executor holds the residuary estate in trust for all the heirs;¹¹ the debtor in a suit by a creditor to set aside a judgment against him, alleged to have been obtained by fraud;¹² the agent for another

D. Washington, S. D., October 22, 1913), No. 1,367, 208 Fed. 666.

§ 43. ¹Barney v. Latham, 103 U. S. 205, 215, 26 L. ed. 514, 518; Ruckman v. Ruckman, 1 Fed. 587; Deford v. Mehaffy, 14 Fed. 181; Corbin v. Boies, 18 Fed. 3; Cella, Adler & Tilles v. Brown, 136 Fed. 439. See *infra*, § 119.

²Coggey v. Bird, C. C. A., 209 Fed. 803, action for conspiracy.

³Puget Sound Traction, Light & Power Co. v. Lawrey, 202 Fed. 263; Wieland State Engineers v. Pioneer Irr. Co., 238 Fed. 519, C. C. A., but see *infra*, § 120.

⁴Port of Seattle v. Oregon & U. R. Co., 242 Fed. 986.

⁵Ruckman v. Ruckman, 1 Fed. 587.

⁶Smith v. Bell, C. C. A., 217 Fed. 243.

⁷De Pauw University v. Pub. Service Co., of Oregon, 247 Fed. 183; but see Mahon v. Guaranty Tr. & S. D. Co., C. C. A., 239 Fed. 266.

⁸New York v. New Jersey Steamboat Transp. Co., 24 Fed. 817.

⁹Deford v. Mehaffy, 14 Fed. 181.

¹⁰Barney v. Latham, 103 U. S. 205, 215, 26 L. ed. 514, 518.

¹¹Mahon v. Guaranty Trust & Safe Deposit Company, C. C. A., 239 Fed. 266.

¹²Corbin v. Boies, 18 Fed. 3.

defendant in a suit for the specific performance of a contract made by the latter with the complainant, and for the delivery of securities in pursuance of the same, although such agent claimed an interest in such securities;¹³ in a stockholder's suit to enjoin the exchange by his corporation of debentures for new mortgage bonds with a stock bonus, the individual directors, the registrar of the stock, the depository of the debentures, the trustees of the mortgage, and a committee representing the debenture holders in the transaction.¹⁴ It has been held, that the following persons are *necessary* parties to the respective controversies between their co-defendants and the plaintiff, and that the suits in which such controversies are litigated are not removable for difference of citizenship if they are citizens of the same State as their opponent: a lessor corporation in a suit by its stockholders to set aside a lease which it had made;¹⁵ a lessee in a suit to set aside his lessor's title;¹⁶ the mortgagor who has transferred the mortgaged land in a suit to foreclose the mortgage, where it is sought to charge him with a deficiency;¹⁷ the mortgagor in a suit by the mortgagees to enjoin its employees from trespass upon the property.¹⁸ To a bill filed by trustees on behalf of the creditors of a partnership against a corporation of which one of the partners was president, for an accounting and the appointment of a receiver, upon allegations that the president so managed the affairs of the corporation and the partnership as to defraud the latter, and to divert its funds for the benefit of himself and the corporation; the president of the cor-

¹³ *Cella, Adler & Tilles v. Brown*, 136 Fed. 439.

¹⁴ *Politz v. Wabash R. Co.*, 153 Fed. 941.

¹⁵ *Central R. Co. of New Jersey v. Mills*, 113 U. S. 249, 28 L. ed. 949; affirming *Mills v. Central R. Co. of New Jersey*, 20 Fed. 449.

¹⁶ *Miller v. Sharp*, 37 Fed. 161.

¹⁷ Under Act Conn. 1878, providing that the foreclosure of a mortgage shall be a bar to any further suit on the debt unless the persons liable therefor are made parties; where the mortgagor and mortgagee are citizens of that State,

and the mortgagor has conveyed the premises to a citizen of New York, the mortgagor is a necessary party to foreclosure proceedings against the latter, if it is sought to charge him with any deficiency of the appraised value of the land to pay the mortgage debt, and the case is not a controversy wholly between citizens of different States, and is not removable. *Coney v. Winchell*, 116 U. S. 227, 29 L. ed. 610; affirming order *Winchell v. Carll*, 24 Fed. 865.

¹⁸ *Mahon v. Guaranty Tr. & S. D. Co.*, C. C. A., 239 Fed. 266.

poration, his partner in the firm and the firm itself.¹⁹ In a suit to cancel a judgment the judgment creditor although he has transferred orders by the debtor for the payment of the same to him.²⁰ A party who has acquired the right to redeem certain securities pledged by another, in a suit to foreclose the right of redemption thereof;²¹ in a suit to recover a deposit, a savings bank after it has brought in another claimant to the deposit as an additional party defendant, when the money has not yet been paid into court;²² and, it has been said, any person whose interest is so bound up with the others, that his legal presence as a party is an absolute necessity.²³ In an action for the assignment of dower brought by a citizen of Illinois, it appeared that, of the defendants in possession of the property, one, a citizen of Illinois. It did not appear that the trustee was authorized to represent his interests in the property for the purposes of this suit. It was held: that, as the beneficiary was a necessary party, and a citizen of the same State as plaintiff, the case could not be removed.²⁴ One who appears by the proceedings in the land office to be the applicant for a patent to a mining claim, and to be asserting his compliance with the statute, is a proper and necessary party defendant in a suit in support of an adverse claim under R. S. §§ 2325, 2326, not merely a nominal party, and he cannot be disregarded in determining the question of the jurisdiction of a Federal court on the ground of diverse citizenship.²⁵

§ 44. Trustees and other representatives. Where a party sues or is sued as a trustee,¹ receiver,² executor or administra-

¹⁹ *Cabaniss v. Reco Min. Co., C. C. A.*, 116 Fed. 318.

²⁰ *Independent District of Rock Rapids v. Bank of Rock Rapids*, 48 Fed. 2.

²¹ *Danvers Sav. Bank v. Thompson*, 130 Mass. 490.

²² *Bailey v. New York Sav. Bank*, 2 Fed. 14, 18 Blatchf. 77.

²³ *City of New Orleans v. Seixas* (Louisiana), 35 La. Ann. 36. See *First Nat. Bank v. Smith*, 6 Fed. 215; *Watson v. Evers*, 13 Fed. 194; *Nulton v. Isaacs* (Virginia), 30 Grat. 726.

²⁴ *Rand v. Walker*, 117 U. S. 340, 29 L. ed. 907.

²⁵ *Blackburn v. Portland Gold-Min. Co.*, 175 U. S. 571, 44 L. ed. 276.

§ 44. 1 *Chappedelaine v. Dechenaux*, 4 Cranch, 306, 2 L. ed. 629; *Bonnafee v. Williams*, 3 How. 574, 11 L. ed. 732; *Susquehanna & W. V. Railroad & Coal Co. v. Blatchford*, 11 Wall. 172, 20 L. ed. 179; *Dodge v. Tulleys*, 144 U. S. 451, 36 L. ed. 501; *Glenn v. Walker*, 27 Fed. 577; *Earp v. Coleman*, 28 Fed. 340; *Morris v. Lindauer*, C. C.

tor,³ or as the representative of a class,⁴ and none of the persons whom he represents is named in the title of the cause,⁵ nor appears to have an interest hostile to such representative;⁶ his citizenship, not that of his beneficiaries, nor of those whom he represents, nor the location of the trust estate,⁷ is to be considered. Where a State sues upon a bond for the benefit of an individual interested, for the purposes of jurisdiction, the suit is treated as if brought by that individual alone.⁸ Where a widow

A., 54 Fed. 23, 4 C. C. A. 162, 6 U. S. App. 510; Gill v. Stebbins, Fed. Cas. No. 5,431 (2 Paine, 417); Adams v. White, Fed. Cas. No. 68; Goodnow v. Oakley, 68 Iowa, 25, 25 N. W. 912. But see Mead v. Walker, 15 Wis. 499. It has been said that the rule does not apply to a mere agent or trustee for another's use, whose agency is not coupled with an interest, but is revocable at any time. Bogue v. Chicago, B. & Q. R. Co., 193 Fed. 728, 734.

² Farlow v. Lea, Fed. Cas. No. 4,649, 2 Cinn. Law Bull. 329; Davies v. Lathrop, 12 Fed. 353; Brinden v. Chamberlain, 53 Fed. 307; Snead v. Sellers, C. C. A., 66 Fed. 371; Pepper v. Rogers, 128 Fed. 987.

³ Childress v. Emory, 8 Wheaton, 642, 5 L. ed. 705; Bonnafée v. Williams, 3 How. 574, 11 L. ed. 732; Rice v. Houston, 13 Wall. 66, 20 L. ed. 484; Blake v. McKim, 103 U. S. 336, 26 L. ed. 563; Continental L. Ins. Co. v. Rhoads, 119 U. S. 237, 30 L. ed. 380; McElmurray v. Loomis, 31 Fed. 395; Harper v. Norfolk & W. R. Co., 36 Fed. 102; Banks v. Loveridge, 60 Fed. 963; Popp v. Cincinnati, H. & D. Ry. Co., 96 Fed. 465; Cincinnati, H. & D. R. Co. v. Thiebaud, 114 Fed. 918, 52 C. C. A. 538; Bishop v. Boston & M. R. R., 117 Fed. 771; Laubscher v.

Fay, 197 Fed. 879; Memphis St. Ry. Co. v. Bobo, 233 Fed. 708; Anheuser-Busch Brewing Ass'n v. Kleman, C. C. A., 219 Fed. 522; Browne, Fed. Cas. No. 2,035 (1 Wash. 429); Dodge v. Perkins, Fed. Cas. No. 3,954 (4 Mason, 435); Carter v. Treadwell, Fed. Cas. No. 2,480 (3 Story, 25); Hill v. Henderson, 14 Miss. (6 Smedes & M.), 351; Miller v. Sunde, 1 N. D. 1, 44 N. W. 301; Geyer v. John Hancock Mut. Life Ins. Co., 50 N. H. 224, 9 Am. Rep. 185; Middleton's Ex'rs v. Middleton (Pennsylvania), 7 Wkly. Notes Cas. 144.

⁴ Omaha Hotel Co. v. Wade, 97 U. S. 13; Jackson & Sharp Co. v. Burlington & L. R. Co., 29 Fed. 474; Putnam v. Timothy Dry-Goods & Carpet Co., 79 Fed. 454; International Trust Co. v. T. B. Townsend Brick & Contracting Co., 95 Fed. 850; Alsop v. Conway, C. C. A., 188 Fed. 568.

⁵ U. S. v. Myers, Fed. Cas. No. 15,844 (2 Brock. 516); Keever v. Phila. & R. C. & I. Co., 234 Fed. 814; Anheuser Busch Brewing Ass'n v. Kleman, C. C. A., 219 Fed. 522.

⁶ See *supra*, § 41.

⁷ Shirk v. City of La Fayette, 52 Fed. 857.

⁸ Indiana ex rel. Stanton v. Glover, 155 U. S. 513, 39 L. ed. 243; Maryland v. Baldwin, 112 U. S. 490, 28 L. ed. 822. *Contra*, State of

is authorized to sue to recover damages for herself and her children because of the death of her husband, the citizenship of the widow is alone to be considered.⁹ The citizenship of the next friend or guardian *ad litem* of an infant,¹⁰ of a lunatic,¹¹ or of a married woman,¹² is disregarded. But where the guardian of an infant,¹³ or the curator or committee of a lunatic,¹⁴ sues in his own name under the authority of a State statute, his citizenship, not that of his ward, is the test of the right of removal. Notwithstanding a State statute providing that a non-resident could not act as administrator; it was held, that an administrator there appointed was not estopped from showing, upon an application for a removal, that he was a citizen of another State.¹⁵ When a mortgage bondholder sued for a foreclosure, in behalf of himself and all the other bondholders, only 120 bonds having been issued; and the latter, who had not been made parties, the complaint alleging that some, but not all, were unknown to the plaintiff, intervened and prayed the same relief; it was held, that all such bondholders were indispensable parties, and in determining the jurisdiction of the court, must be considered to be upon the same side as the plaintiff, thus compelling a dismissal of the suit.¹⁶ In an action for the assignment of dower, brought in a State court by a citizen of Illinois, it appeared that of two defendants who were in possession of the property, one, who was a citizen of New York, held the legal title as trustee for his co-defendant, a citizen of Illinois, though it did not appear that he was author-

Ohio v. Columbus & Xenia R. Co., 48 Fed. 626; an application for a mandamus. See Missouri v. Alt, 73 Fed. 302; Missouri ex rel. Rauch v. Bowles Milling Co., 80 Fed. 161; Jack v. Williams, 113 Fed. 823, 824. But see Title Guaranty & Surety Co. v. Idaho, 240 U. S. 136.

⁹ Kever v. Phila. & R. C. & I. Co., 234 Fed. 814.

¹⁰ Williams v. Ritchey, Fed. Cas. No. 17,734 (3 Dill. 406); Woolridge v. McKenna, 8 Fed. 650; Dodd v. Ghiselin, 27 Fed. 405; Voss v. Neineber, 68 Fed. 947. *Contra*, In re McClean's Estate, 26 Fed. 49.

¹¹ Wiggins v. Bethune, 29 Fed.

51; Wilcozen v. Chicago, B. & Q. R. Co., 116 Fed. 444.

¹² Ruckman v. Palisade Land Co., 1 Fed. 367; Meade v. Walker, 15 Wis. 499.

¹³ Mexican Cent. R. Co. v. Eckman, 187 U. S. 429, 47 L. ed. 245.

¹⁴ Wiggins v. Bethune, 29 Fed. 51; Stout v. Rigney, 107 Fed. 545, 46 C. C. A. 459.

¹⁵ McDuffie v. Montgomery, 128 Fed. 105; Memphis St. Ry. Co. v. Bobo, 233 Fed. 708.

¹⁶ Mangels v. Donau Brewing Co., 53 Fed. 513; distinguishing Stewart v. Dunham, 115 U. S. 61, 29 L. ed. 329.

ized to represent his interests in the property for the purposes of the suit. It was held, that the beneficiary was a necessary party, and, being a citizen of the same State as plaintiff, was not entitled to a removal; and that, the controversy not being separable, the trustee, although a citizen of another State could not sustain a petition for removal.¹⁷

§ 45. Controversies to which aliens are parties. The Judicial Code gives the District Courts original jurisdiction of all suits of a civil nature, at common-law or inequity, where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of three thousand dollars and "is between citizens of a State and foreign States, citizens, or subjects."¹

A District Court of the United States has original jurisdiction of an action by an alien against a citizen and resident of the State where the suit is brought;² but not, except perhaps in patent, copyright and trade-mark cases,³ and under special statutes⁴ of an action by an alien against a citizen of another State who does not reside within the district.⁵ A citizen of the United States cannot without his consent be sued by an alien in any district which he does not inhabit.⁶ An action by an alien against a citizen of a State who is or at the time the alleged action accrued was a civil officer of the United States, when the latter is a non-resident of the State where the suit was brought, may be removed.⁷ A corporation chartered by or under the laws of any of the United States cannot without its consent be sued by an alien in any district out of the State where it is

¹⁷ *Rand v. Walker*, 117 U. S. 340, 29 L. ed. 907.

¹ § 45. 1 § 24, 36 St. at L. 1087.

² *Von Thodorovich v. Franz Josef Beneficial Ass'n*, (E. D. Pa.) 154 Fed. 911; *Suravitz v. Pristasz*, C. C. A., 201 Fed. 335.

³ See *infra*, § 62.

⁴ *Ibid.*

⁵ *Galveston, H. & S. A. Ry. Co. v. Gonzales*, 151 U. S. 496, 507, 38 L. ed. 248, 252; *Fribourg v. Pullman Co.* (E. D. N. C.), 176 Fed. 981; *McAulay v. Moody* (D. Or.), 185 Fed. 144; *Colosmo v. Pitts-*

burgh & L. E. R. Co., 210 Fed. 550; *infra*, § 61.

⁶ *Ibid.*

⁷ *Ibid.* Code § 34. See *Jackson v. William Kenefick Co.*, 233 Fed. 130; *Colosmo v. Pittsburgh & L. E. R. Co.*, 210 Fed. 550.

An alien can maintain a suit in the federal courts against a citizen only in the district of his residence, unless defendant waives his personal privilege to be sued only in such district. *Lehigh Valley Coal Co. v. Washko*, C. C. A., 2nd Ct., 231 Fed. 42.

incorporated⁸ even if it operates a railroad in the district where it is sued.⁹ The fact that the alien is a resident of the district where the suit is brought does not give the court jurisdiction of such a case.¹⁰ Where no Federal question was involved, it was held that, when the defendants are citizens of different districts, they cannot be sued by an alien in any one of them.¹¹

This rule does not apply to an action to recover the penalty for the importation of contract labor under the Immigration Act of February 20, 1907.¹² Such a suit may be brought in the district where the alien was to perform the labor.¹³

An alien who has no residence within the United States may be sued by a citizen of one of the United States in the Federal court in any district where he can be served with process.¹⁴ So it has been held in suits to enjoin the infringement of patents,¹⁵ as well as in other cases; and even when the defendant is an alien corporation, over which the State statute deprives its court of jurisdiction;¹⁶ provided that it transacts business within the State, but not otherwise;¹⁷ and also when the plaintiff is a citizen and resident of a different State from that where the suit is brought.¹⁸

A non-resident alien defendant may remove a suit involving the jurisdictional amount, when all the parties on the opposite

⁸ *Adzenoska v. Erie R. Co.*, 210 Fed. 571; *Lehigh Valley Coal Co. v. Washko*, C. C. A., 231 Fed. 42; *Yanuszauckas v. Mallory S. S. Co.*, C. C. A., 232 Fed. 132; *Vitkus v. Clyde S. S. Co.*, 232 Fed. 288; *Lucksinger v. Phila. & Reading Coal & Iron Co.*, 232 Fed. 292; *Best v. Great Northern Ry. Co.*, 243 Fed. 789; *Budris v. Consolidation Coal Co.*, 251 Fed. 673.

⁹ *Adzenoska v. Erie R. Co.*, 210 Fed. 571.

¹⁰ *Miller v. N. Y. Cent. & H. R. R. Co.* (D. Mass.), 147 Fed. 771.

¹¹ *McAulay v. Moody* (D. Or.), 185 Fed. 144.

¹² 34 St. at L. 900, Comp. St. § 4250.

¹³ *Tomkins v. Paterson*, 238 Fed. 879.

¹⁴ *Re Hohorst*, 150 U. S. 653, 37 L. ed. 1211; *Barrow S. S. Co. v. Kane*, 170 U. S. 100, 42 L. ed. 964; *Carp v. Queen Ins. Co.*, 168 Fed. 782; *Vestal v. Ducktown Sulphur & Iron Co.*, 210 Fed. 375; *H. G. Baker & Bro. v. Pinkham et al.*, 211 Fed. 728. *Contra*, *Meyer v. Herrera* (W. D. Texas, San Antonio Division), 41 Fed. 65.

¹⁵ *United Shoe Mach. Co. v. Duplessis Independent Shoe Mach. Co.* (D. Mass.), 133 Fed. 930.

¹⁶ *Barrow S. S. Co. v. Kane*, 170 U. S. 100, 42 L. ed. 964.

¹⁷ *Tierney v. Helvetia Swiss Fire Ins. Co.*, 163 Fed. 82.

¹⁸ *Barrow S. S. Co. v. Kane*, 170 U. S. 100, 42 L. ed. 964; *Jarowski v. Hamburg-American Packet Co.*, C. C. A., 182 Fed. 320.

side of the controversy are citizens and residents of the same State of the United States and when the plaintiffs reside in the district where the suit is brought;¹⁹ and it has been held when they reside elsewhere.²⁰ A resident alien cannot when no Federal question is involved.²¹ It has been held, that when a non-resident alien is joined as a defendant with a non-resident citizen of a different State from that of a resident plaintiff, they may jointly remove the case if the jurisdictional amount is involved;²² but this cannot be done when the plaintiff is not a resident of the State where the suit is brought.²³ A suit by a State in its own court against an alien cannot be removed.²⁴ The authorities are in conflict as to whether a defendant, who is a citizen and resident of a different State from that where the suit is instituted, can remove an action brought by an alien in the State court. The preponderance of the more recent authorities holds that he cannot, whether the alien is a resident,²⁵ or non-

¹⁹ *Cooley v. McArthur*, 35 Fed. 372.

²⁰ *Wind River Lumber Co. v. Frankfort Marine, Accident & Plate Glass Ins. Co.*, C. C. A., 196 Fed. 340.

²¹ *Johnson v. Monell*, Fed. Cas. No. 7,399 (1 Woolw. 390); *Sands v. Smith*, Fed. Cas. No. 12,305 (1 Abb. U. S. 368, 1 Dill. 290); *Cudahy v. McGeoch*, 37 Fed. 1; *Walker v. O'Neill*, 38 Fed. 374; *Eddy v. Casas*, 118 Fed. 363; *Miller v. New York Cent. & H. R. R. Co.*, 147 Fed. 771; *Rooker v. Crinkley*, 113 N. C. 73, 18 S. E. 56. *Contra*, *Best v. Great Northern Ry. Co.*, 243 Fed. 789.

²² *Ballin v. Lehr*, 24 Fed. 193; where the report does not show whether the alien was a resident or a nonresident; *Roberts v. Pac. & A. Ry. & Nav. Co.*, C. C. A., 121 Fed. 785, 58 C. C. A. 61, affirming 104 Fed. 577; *Ladew v. Tennessee Copper Co.*, 179 Fed. 245. See, also, *Rateau v. Bernard*, 3 Blatchf. 244, Fed. Cas. No. 11,579. *Contra*, *Tracy*

v. Morel (D. Nebraska), 88 Fed. 801; *Best v. Great Northern Ry. Co.*, 243 Fed. 789 (where the alien lived in the state where the suit was brought).

²³ *Carp v. Queen Ins. Co.* (W. D. Mo.) 168 Fed. 782. *Contra*, *Ladew v. Tennessee Copper Co.* (S. D. Tenn.), 179 Fed. 245, 256.

²⁴ *O'Connor v. Texas*, 202 U. S. 501.

²⁵ *Kamenicky v. Catterall Printing Co.* (S. D. N. Y.), 188 Fed. 400 (in which the author was counsel); *Odhner v. Northern Pac. Ry. Co.* (S. D. New York) 188 Fed. 507; *Sagara v. Chicago, R. I. & P. Ry. Co.* (D. Col.) 189 Fed. 220. These cases follow the analogy of *Ex parte Wsner*, 203 U. S. 449, 51 L. ed. 264. See, also, *Petrocokino v. Stuart*, Fed. Cas. No. 11,041; *Matter of Tobin*, 214 U. S. 506, 53 L. ed. 1061. *Contra*, *Uhle v. Burnham*, (S. D. N. Y.) 42 Fed. 1 (residence not shown); *Stalker v. Pullman's Palace Car Co.*, (S. D. Cal.) 81 Fed. 989 (residence not shown);

resident,²⁶ of the State where the suit is brought.

Where an alien is a party to a suit in a District Court of the United States, an objection to the jurisdiction founded upon residence may be waived.²⁷ Where the suit is originally brought in the Federal court, the plaintiff by suing makes such a waiver and the defendant is the only person who can object to the jurisdiction on this ground.²⁸ Where the suit is originally brought in the State court, the defendant by the removal consents to the jurisdiction of the court of the United States and the plaintiff alone can make such an objection.²⁹

A District Court of the United States, where no Federal question is involved, has no jurisdiction of an action brought by an alien to enforce a chose in action that has been assigned to him, unless his assignor could have maintained the suit upon the ground of a difference of citizenship.³⁰

The District Courts of the United States can obtain no jurisdiction, either originally or by removal, by reason of a diversity of citizenship, when the controversy is between two aliens;³¹

Smellie v. Southern Pac. Co., (N. D. Cal.) 197 Fed. 641 (residence not shown); *Keating v. Pennsylvania Co.*, 245 Fed. 155.

²⁶ *Harold v. Iron Silver Min. Co.*, (D. Col.) 33 Fed. 529; *Mahopoulus v. Chicago, R. I. & Pac. Ry. Co.*, (W. D. Mo.) 167 Fed. 165; *Bagenas v. Southern Pac. Co.*, (N. D. Cal.) 180 Fed. 887; *Hall v. Great Northern Ry. Co.*, (D. Montana) 197 Fed. 488. *Contra*, *Sherwood v. Newport News & M. Val. Co.*, (W. D. Tenn.) 55 Fed. 1; *Creagh v. Eq. Life Assur. Soc.*, (D. Wash.) 83 Fed. 849; *Morris v. Clark Constr. Co.*, (D. S. C.) 140 Fed. 756; *Iowa Lillooet Gold Min. Co. v. Bliss*, (N. D. Ia.) 144 Fed. 446; *Barlow v. Chicago & N. W. Ry. Co.*, (N. D. Ia.) 172 Fed. 513; *H. J. Decker Jr. & Co. v. Southern Ry. Co.*, (N. D. Ala.) 189 Fed. 224; *Wind River Lumber Co. v. Frankfort Marine, Accident*

& Plate Glass Ins. Co., C. C. A., 196 Fed. 340.

²⁷ *Infra*, § 62a.

²⁸ *H. J. Decker Jr. & Co. v. Southern Ry. Co.*, 189 Fed. 224. See *infra*, § 62a.

²⁹ *H. J. Decker Jr. & Co. v. Southern Ry. Co.*, 189 Fed. 224. See *infra*, § 62a.

³⁰ *Tierney v. Helvetia Swiss Fire Ins. Co.*, (E. D. N. Y.) 163 Fed. 82. See *infra*, § 63.

³¹ *Mossman v. Higginson*, 4 Dallas, 12, 1 L. ed. 720; *Montalet v. Murray*, 4 Cranch, 46, 2 L. ed. 545; *King v. Cornell*, 106 U. S. 395, 27 L. ed. 60; *Walton v. McNeil*, Fed. Cas. No. 17,134; *Prentiss v. Brennan*, Fed. Cas. No. 11,385 (2 Blatchf. 162); *Rateau v. Bernard*, Fed. Cas. No. 11,579 (3 Blatchf. 244); *Hinckley v. Byrne*, Fed. Cas. No. 6,510 (1 Deady, 224); *Petrocokino v. Stuart*, Fed. Cas. No.

nor when a citizen of the same State as that of the opposite party is on the same side of the controversy as an alien;³² even if the controversy is separable;³³ nor can they obtain jurisdiction when a State and an alien are parties.³⁴

§ 46. Determination of citizenship of natural persons. A citizen of the United States is a citizen of the State in which he permanently resides and has his domicile.¹ A man may be a citizen of the United States without being a citizen of any State and consequently have no right to invoke the jurisdiction of the Federal Courts because of difference of citizenship.² It has been so held when he changes his residence to a foreign country³ or when he becomes a nomad.⁴ The exercise of the right of suffrage by a citizen of the United States is conclusive evidence of his citizenship.⁵

It has been held, that voting in a party primary, and membership in a local political committee, are not conclusive evidence of citizenship.⁶ The acts of town officers in registering a man as a voter and assessing a poll tax against him are evidence of

11,041; *Pooley v. Luco*, 72 Fed. 561; *Orosco v. Gagliardo*, 22 Cal. 83; *Barrowcliffe v. La Caisse Generale* (New York), 58 How. Prac. 131. *Contra*, *Liverpool, B. & R. P. Nav. Co. v. Agar*, 14 Fed. 615.

³² *Hervey v. Illinois Midland Ry. Co.*, Fed. Cas. No. 6,434 (7 Biss. 103); *Watson v. Evers*, 13 Fed. 194; *People v. Hager*, 20 Cal. 167; *Davis v. Cook*, 9 Nev. 134. But see *Bell v. Ohio Life Ins. Co.*, Fed. Cas. No. 1,261.

³³ *King v. Cornell*, 106 U. S. 395, 27 L. ed. 60.

³⁴ *O'Connor v. Texas*, 202 U. S. 501, 50 L. ed. 1120; affirming *State v. O'Connor*, 73 S. S. 1041, 96 Tex. 484; *New Jersey v. Babcock*, Fed. Cas. No. 10,103 (4 Wash. 344).

¹ *Shelton v. Tiffin*, 6 How. ard, 163, 12 L. ed. 387; *Reynolds v. Adden*, 136 U. S. 348, 34 L. ed. 360; *Kemna v. Brockhaus*, 5 Fed. 762; *Winn v. Gilmer*, 27 Fed. 817;

McDonald v. Salem Capital Flour Mills Co., 31 Fed. 577, 12 Sawyer, 492; *Cooper v. Galbraith*, 3 Wash. 546; *Lessee of Butler v. Farnsworth*, 4 Wash. 101, Abb. (U. S.) 211; *Burnham v. Rangeley*, 1 Woodb. & M. 7.

² *Hammerstein v. Lyne*, 200 Fed. 165, 172; *Hough v. Societe Electrique Westinghouse de Russie et al.*, 231 Fed. 341; *Stein v. Fleischmann Co.*, 237 Fed. 679. See *supra*, § 40.

³ *Ibid.*

⁴ *Pannill v. Roanoke Times Co.*, 252 Fed. 910.

⁵ *Rabaud v. D'Wolf*, 1 Paine, 580; *Sanger v. Seymour*, 25 Fed. 289; *State Sav. Ass'n v. Howard*, 31 Fed. 433; *McDonald v. Salem C. F. Mills Co.* 31 Fed. 577; *Caldwell v. Firth*, C. C. A., 91 Fed. 177; *Laws v. Fleming*, 177 Fed. 450; *Thompson v. Ward*, 199 Fed. 861.

⁶ *Gaddie v. Mann*, 147 Fed. 955.

his domicile but not conclusive.⁷ Voting is not indispensable to establish citizenship.⁸

Domicile within a State by a citizen of the United States is usually considered to be conclusive evidence of his citizenship thereof.⁹ It has been held, that residence alone, which is not shown to be permanent, is not conclusive of citizenship,¹⁰ but

⁷ *Re Sedgwick*, 223 Fed. 655.

⁸ *Shelton v. Tiffin*, 6 Howard, 163, 185, 12 L. ed. 387, 397; *Marks v. Marks*, 75 Fed. 321.

⁹ *Gilbert v. David*, 235 U. S. 561; *Harding v. Standard Oil Co.*, C. C. A., 182 Fed. 421; *Delaware, L. & W. R. Co. v. Petrowsky*, C. C. A., 250 Fed. 584; *Bjornquist v. Boston & A. R. Co.*, C. C. A., 250 Fed. 929. But see *Pennill v. Roanoke Times Co.*; *Jerrick v. Same*, 252 Fed. 910.

¹⁰ *Shelton v. Tiffin*, 6 How. (C. S.), 163, 185, 12 L. ed. 387, 397; *Lessee of Butler v. Farnsworth*, 4 Wash. 101, 1 Abb. (U. S.) 211; *Chicago & N. W. R. Co. v. Ohle*, 117 U. S. 123, 29 L. ed. 837; *Reynolds v. Adden*, 136 U. S. 348, 352, 34 L. ed. 360, 361; *Kenna v. Brockhaus*, 5 Fed. 762; *Woolridge v. McKenna*, 8 Fed. 650; *Sanger v. Seymour*, 25 Fed. 289; *McDonald v. Salem Capital Flour-Mills Co.*, 31 Fed. 577, 12 Sawyer, 492; *Rivers v. Bradley*, 53 Fed. 305; *Chiatovich v. Hanchett*, 78 Fed. 193; *Alabama G. S. R. Co. v. Carroll*, C. C. A., 84 Fed. 772, 28 C. C. A. 207; *Caldwell v. Firth*, C. C. A., 91 Fed. 177; *Nichols v. Nichols*, 92 Fed. 1; *Blair v. Silver Peak Mines*, 93 Fed. 332; denying rehearing 84 Fed. 737; *Hanchett v. Blair*, 100 Fed. 817, 41 C. C. A. 76; *Willingham v. Swift & Co.*, 165 Fed. 223; *Harding v. Standard Oil Co.*, 182 Fed. 421; *Sherman v. Southern Pac. Co.*, 192 Fed. 711; *Illinois Life Ins. Co. v. Shennelon*, 109 Fed. 674, where the

party had no dwelling in the State of which she was held to be a citizen; but had stored her furniture therein, while she was absent to attend to litigation in another State, where she owned property and had lived before her marriage to her deceased husband; *Adams v. Shirk*, 117 Fed. 801, 55 C. C. A. 25, (payment of the dues of a resident member in two clubs, at one of which the party had a room, accompanied by the maintenance of an office in the same city, the party's wife being absent from both States, insufficient to constitute a change); *Corel v. Chicago, R. I. & P. Ry Co.*, 123 Fed. 452, (filing a homestead claim, and the construction of a house on the land where another family lived, accompanied by several visits to the Territory, remaining as long as two months there at one time, is insufficient); *Pond v. Vermont Valley R. Co.*, 12 Blatchf. 280, 293. In *Harton v. Howley*, 155 Fed. 491, a married man had left his wife and child in a house built by his wife, in one State, where he usually spent Sunday, paid taxes and voted when he last exercised the right of suffrage; it was *Held*, that he had not changed citizenship therefrom; although for two years he had been engaged in business in another State and lived there, occupying a room in a hotel throughout the week and testified that he was a resident of the latter State. In *Laws v. Fleming*, 177

when proved, is *prima facie* evidence thereof.¹¹ Where it was

Fed. 450, 453, the deposition of the plaintiff in another suit in a State court, where, in answer to the question "When did you first make Fairmont your home?" he had replied, "About the first of the year;" was not conclusive against his affidavit that he was a registered voter, paid a poll-tax, and had a furnished house temporarily closed in another State, but that because of his connection with the building of a railroad he had temporarily resided in Fairmont with no intention of establishing his business there. In *Thompson v. Ward*, 199 Fed. 861, 863, the defendant was served within the State and his wife then stated that they intended to move to another State. He did not, when served, make any statement concerning his residence, but subsequently filed an affidavit making a general statement that he resided and was a citizen of another State. Two others, residents of another State, made affidavits that he had moved his household goods from the State where he was served prior to the commencement of the suit and that he was not a citizen of Iowa, but that his headquarters had been in the other State until recently, then he had been transferred to another place in the same State, where he was now temporarily located. It was proved that, at the last general election, he had voted in the State where he was served. *Held* that the evidence was insufficient to show that he was a citizen of any other State. In *Davis v. Baltimore & O. R. R. Co.* Fed. an action was brought for a personal injury to plaintiff's wife in West Virginia. Plaintiff when a citizen of

Massachusetts accepted employment in West Virginia for no particular time. He lived there for about a year writing letters which showed that he considered the removal as more or less of an experiment. He never took his household goods there. It was *Held* that he had not changed his citizenship. In *Sullivan v. Lloyd*, 213 Fed. 275, defendant, who was not married and had no family, in order to avoid a suit by the plaintiff for breach of promise left his residence in Massachusetts had returned to Illinois where he was born and formerly lived. He intended in good faith to change his citizenship to Illinois and testified that he had come back there "for good." Before leaving, he gave directions to give up the apartment he had been occupying, to remove his furniture and store it in Rhode Island. This was done, the apartments were sublet and he did not return to them. He conveyed a printing business which he had been operating in Massachusetts to trustees from whom he had been receiving an income from another source and the plant was sold after the suit was brought. He remained in Illinois as a visitor at his brother's house with no residence or place of business there which he could call his own nine days before the suit was brought. It was *Held* that he had not become a citizen of Illinois. In *Simpson v. Phillipsdale Paper Mills Co.*, 223 Fed. 64, a bachelor gave up his holdings in Massachusetts and moved his personal belongings to Rhode Island where he engaged lodging for the purpose of changing his citizenship so that he might sue a Massachusetts company in

found that plaintiff "is and was a resident of the State of Mis-

the Federal Courts. He spent comparatively little time in Rhode Island, but kept his office in Massachusetts and spent more nights there than in Rhode Island, although he had no regular lodgings in that State. He received his mail in his office in Massachusetts and paid therefrom his rent for his lodging in Rhode Island. He had his name taken off the list of voters in Massachusetts and asked to have it placed on the list in Rhode Island, but failed to make a personal application for this when told such application was required. His work compelled him to travel a large part of his time and he ordinarily registered from a city in Massachusetts. It was *Held* that he had not changed his citizenship.

11 *Kenna v. Brockhaus*, 5 Fed. 762; *Eisele v. Oddie*, 128 Fed. 941. In *Gilfert v. David*, 235 U. S. 561, plaintiff, with his family removed from Michigan to Connecticut, where he had inherited property which he wished to sell should he be able to obtain what he thought it was worth and was engaged in litigation. He occupied a house which he owned in Connecticut. He left his desk with his brother-in-law in Michigan which he said was for the purposes of "holding his residence there." He told several people that he intended to live in Michigan and expressed his preference to that State, as a residence. He continued to pay membership dues to orders in Michigan to which he belonged. For ten years he was absent from Michigan except for a short time for a temporary purpose. He took a letter from his church in Michigan to a church in Connecticut. He sold

his residence in Michigan and a large part of the furniture there in use. *Held* that he was a citizen of Connecticut. A declaration by a single man, that he intended to remain upon and run a ranch in one State, and that he intended to vote at a presidential election, although he subsequently said that he did not vote because he was not a citizen of that State; was held, sufficient to establish his change of residence from another State that where the ranch was located, he having led "a sort of nomadic life. But for the last two or three years the evidence indicated very clearly, that San Antonio," a city in such State, "was headquarters and the place of residence for business purposes or pleasure." *Winn v. Gilmer*, 27 Fed. 817. In *Jones v. Subera*, 150 Fed. 462, a single man had transacted business and occupied rooms in a State for more than two years, and had described himself in conveyances therein as a resident thereof; it was *Held*, that he was a citizen of that State; although he testified, that during all that time he had maintained a home in the State of his former citizenship and expected to return thereto when his business affairs in the other State were concluded. *Reckling v. McKinstry*, 185 Fed. 842, holding: that defendant had changed his citizenship to a State where he had lived for more than a year, under an express intention to make his home there, had engaged in business, leased business property, bought a home, joined a chamber of commerce, and paid the poll-tax, although in his affidavit he stated that he "is not determined to make this his home or to become a

Mississippi at the day of bringing this suit," it was held that this established that he was a citizen and resident of the State.¹² But it was held in another case that a stipulation at the opening of the trial that plaintiff was a resident of a State other than that of which defendants were citizens was insufficient to establish the diversity of citizenship.¹³

Absence at school¹⁴ or in a prison¹⁵ or on duty in the army,¹⁶ is insufficient to constitute a change of citizenship.

It has been held: that the acceptance and discharge of the duties of receiver of a railroad, within a State, does not constitute a change of citizenship.¹⁷ A State statute, providing that a non-resident cannot act as an administrator, does not make an administrator appointed therein a citizen of the State; but the jurisdiction of the District Court of the United States is determined by his actual citizenship, notwithstanding his appointment.¹⁸ A statement in a document signed by him, that a person is "of" a specified State, is evidence that he is a citizen of the same;¹⁹ but does not estop him from proving the contrary.²⁰

citizen of this state, but is seriously considering the advisability of moving back to his home in" another State. In *Philadelphia & R. Ry. Co. v. Skerman*, C. C. A., 247 Fed. 269, the plaintiff was an alien and unmarried residing in Pennsylvania where he received a personal injury from the defendant, a corporation of that State. He testified that he moved to New York with the intention of there residing. He stayed two weeks in one county and then moved to another county in New York, where he stayed two weeks longer and began his suit. He then returned to the former county where he remained two weeks, and finding no work, went to New Jersey, whence he returned to the county where he sued about three weeks before trial. The verdict of the jury that he was a resident of New York was sustained. See also *Gar-*

rett v. Mallard, C. C. A., 238 Fed. 385.

¹² *Reichman v. Harris*, C. C. A., 252 Fed. 371.

¹³ *Hogg v. Maxwell*, C. C. A., 215 Fed. 360.

¹⁴ *Chicago & N. W. R. Co. v. Ohle*, 117 U. S. 123.

¹⁵ *Guarantee Co. of North America v. First Nat. Bank (Virginia)*, 28 S. E. 909, absence while in a penitentiary is insufficient.

¹⁶ *Stoker v. Leavenworth*, 7 La. O. S. 390, holding that army officers, stationed on duty in a state, did not become citizens there.

¹⁷ *Brisenden v. Chamberlain*, 53 Fed. 807.

¹⁸ *McDuffie v. Montgomery*, 128 Fed. 105.

¹⁹ *Rucker v. Bolles*, C. C. A., 80 Fed. 504.

²⁰ *Reynolds v. Adden*, 136 U. S.

Where a woman is deserted by her husband or leaves him for a sufficient cause and removes to another State with the intention of there residing, she becomes a citizen of the latter State and may on that ground invoke the Federal jurisdiction.³¹ Upon the insanity of a husband, and his confinement in an asylum, his wife becomes the head of the family, and may change the place of residence to another State, although her husband remains in confinement in the State where they formerly were citizens and domiciled.³²

It has been said: that a minor cannot acquire a separate domicile from that of his father during the latter's life, except by the emancipation of the child and a complete surrender of the parental control as to the choice of the domicile.³³ A minor who has reached the age of discretion and has no parents, grandparents or statutory guardian, may acquire a citizenship by domicile in any State for the purpose of acquiring the right to sue in the Federal courts.³⁴ "When a young man leaves the parental home, and strikes out into the world; goes to another State; engages in business for a considerable length of time—the natural inference would be that he intended to build himself a new home, and domicile in the State where he had taken up his residence. So, likewise, if a man of years, overtaken by misfortune—perhaps reduced from luxury to penury and want—with no family ties to bind him, and the home of former years has passed from him, and from under his control, in the desperation of his situation abandons the State where these misfortunes have overtaken him, and remains away for a term of years—enters into the business of life with a residence in a neighboring State—

348; *Illinois Life Ins. Co. v. She-
nehon*, 109 Fed. 674.

³¹ *Williamson v. Osenton*, 232 U.
S. 619; *Town of Watertown v.
Greaves*, C. C. A., 112 Fed. 183;
Gordon v. Yost, 140 Fed. 79; *Fitch
v. Huff*, C. C. A., 218 Fed. 17. *Con-
tra*, *Poppenhauser v. India Rubber
Comb Co.*, 14 Fed. 707; *Hatch v.
Ferguson*, 57 Fed. 959; *Nichols v.
Nichols*, 92 Fed. 1; *Thompson v.
Stalman*, 139 Fed. 93. See *Comitis
v. Parkerson*, 56 Fed. 556, 22 L. R.

A. 148; *Jennes v. Landes*, 85 Fed.
801.

³² *McKnight v. Dudley*, C. C. A.,
148 Fed. 204.

³³ *Woolridge v. McKenna*, 8 Fed.
650; where the father, after the
mother's death, had placed the child
in question under the permanent
care of her aunt at the latter's resi-
dence in another state.

³⁴ *Bjornquist v. Boston & A. R.
Co.*, C. C. A., 250 Fed. 929.

the inference would naturally arise that he had no desire or intention of longer remaining in the locality of all his misfortunes." ²⁵

When the permanent residence and citizenship of a party, at a date shortly before the beginning of the suit, is proved, the presumption is that the same continues until there is proof of a change.²⁶ Evidence that an alien married in one of the United States does not justify the presumption that she lost her alienage when there is no proof of the citizenship of her husband.²⁷ There is no presumption that the president of a corporation is a citizen of the State that chartered it.²⁸ An intention to return unaccompanied by acts does not restore the former residence after it has been actually changed.²⁹ It has been said that a mere floating intention of a return after accomplishing the object for which the change was made does not destroy the effect of acts which would otherwise accomplish a change of citizenship.³⁰ "A man may reside in a State for an indefinite period of time without becoming a citizen, but the moment a man takes up his residence in a State different from that where he formerly was domiciled or was a citizen, with intent and purpose of making the new place of residence his future permanent home, that moment he loses his former domicile, and becomes domiciled in the new place; or, in other words, he ceases to be a citizen of the former place of residence, and becomes a citizen of the State of his adoption." ³¹

²⁵ Winn v. Gilmer, 27 Fed. 817, 818, 819.

²⁶ Heath v. Austin, Fed. Cas. No. 6,305 (12 Blatchf. 320); Collins v. City of Ashland, 112 Fed. 175.

²⁷ Lehigh Valley Coal Co. v. Washko, C. C. A., 231 Fed. 42.

²⁸ Utah-Nevada Co. v. DeLamar, C. C. A., 133 Fed. 113. But see Thomson-Houston El. Co. v. Electrose Mfg. Co., 155 Fed. 543; *infra*, § 61.

²⁹ Pacific M. L. I. Co. v. Tompkins, C. C. A., 101 Fed. 539.

³⁰ Gillert v. David, 235 U. S. 561.

³¹ Winn v. Gilmer, 27 Fed. 817;

Kemna v. Brockhaus, 5 Fed. 762, 763, 764, 766, 767, per Dyer, J :

"The general rule upon the subject of citizenship is well settled. It is that, 'in order to give jurisdiction to the courts of the United States, the citizenship of the party must be founded on a change of domicile, and permanent residence in the State to which he may have removed from another State. Mere residence is *prima facie* evidence of such change, although when it is explained and shown to have been for temporary purposes, the presumption is destroyed. The inten-

The filing of a declaration of his intention to become a citizen of the United States does not terminate a party's alienage, although he is permitted by the laws of the State of his residence to vote and hold office there.²² When a naturalized citizen

tion is to be collected from acts.' Lessee of Butler v. Farnsworth, 4 Wash. 101, 1 Abb. (U. S.), 211. 'If a citizen of one State think proper to change his domicile, and to remove himself and family * * * into another State, with a *bona fide* intention of abandoning his former place of residence, and to become an inhabitant or resident of the State to which he removes, he becomes, immediately upon such removal, accompanied with such intention, a resident citizen of that State within the meaning of the provision of the Constitution relative to the jurisdiction of the Federal courts, and may maintain an action in the Circuit Court of the State which he has abandoned. * * * Time in relation to his new residence, occupation, a sudden removal back after instituting a suit, and the like, are circumstances which may be relied upon to show that his first removal was not *bona fide* or permanent, but will not disprove his citizenship in the place of his new domicile, if the jury are satisfied that his first removal was *bona fide* and without an intention of returning.' Cooper v. Galbraith, 3 Wash. 564. 'If there has been an actual removal, with intent to make a permanent residence, and the acts of the party correspond with the purpose, the change of domicile is completed, and the law forces upon him the character of a citizen of the State where he has chosen his domicile.' Butler v. Farnsworth, *supra*. A temporary return to one's former place of residence, with views and

for objects merely temporary, does not revive a former citizenship. Burnham v. Rangely, 1 Woodb. & M. 7. 'If the change of residence or citizenship is apparent only, and there has been, in fact, no change of residence, but only transfer of apparent residence, *animo revertendi*, to give color of jurisdiction in a suit in the State of actual residence, it may not avail; but, where there is not actual change of residence and citizenship before suit brought, the motive to such change is not material, even if it was a desire to give capacity to sue in the courts of the United States.' Pond v. Vermont Valley R. Co., 12 Blatchf. 293. So, to effect a change of citizenship from one State to another, there must be an actual removal, and actual change of domicile, with a *bona fide* intention of abandoning the former place of residence and establishing a new one, and the acts of the party must correspond with such purpose. * * * The question is one of mixed law and fact. * * * It is apparent that the circumstance of the plaintiff's return to Milwaukee in December was one which if unexplained, would tend to throw doubt upon the permanency of the alleged settlement in Minnesota. But if her return was for an object merely temporary, as she alleges, then her domiciliary *status* in that State would not be affected.' See Adams v. Shirk, C. C. A., 117 Fed. 801.

²² Baird v. Byrne, Fed. Cas. No. 757 (3 Wall. Jr. 1); Maloy v. Duden, 25 Fed. 673; Creagh v. Equit-

took an oath of allegiance to the sovereign of a foreign country, of whom he had never been a subject, and accepted from that King an appointment as consul, but continued to reside in the United States; it was held, that he remained an American citizen, and could not remove a case because of alienage.³³ It was held, that the marriage in the United States of a citizen thereof to a foreign subject, with whom she lived in the United States until his death, did not make her an alien, although her husband was never naturalized.³⁴ A citizen of Cuba is an alien, and may sue in a District Court of the United States, or may remove to such court a suit brought against him, in the cases in which an alien might so sue or remove.³⁵

The fact that a plaintiff has changed his residence and citizenship, for the purpose of bringing suit in the Federal court,³⁶ or to prevent a removal to such court,³⁷ does not divest it of jurisdiction if the change has been actually made, unless there is intention of return.³⁸ It has been said that the burden rests upon the defendant to prove that the removal of the plaintiff from one State to another was for the purposes of suing in the Federal Court.³⁹

It has been held that a party may testify that up to a certain date he was a citizen of a specified State, and that others cannot, but must confine their testimony to facts from which his citizenship can be inferred.⁴⁰

able Life Assur. Soc., 88 Fed. 1; Lanz v. Randall, 4 Dill. 425; Oroscio v. Gagliardo, 22 Cal. 83.

³³ Fish v. Stoughton (New York), 2 Johns. Cas. 707.

³⁴ See Comitias v. Parkerson, 56 Fed. 556, 22 L. R. A. 148.

³⁵ Betancourt v. Mutual Reserve Fund Life Ass'n, 101 Fed. 305; Davis v. Dixon, 184 Fed. 509.

³⁶ Briggs v. French, 2 Sumn. 251, 255, 256; Catlett v. Pacific Ins. Co., 1 Paine, 594; Cooper v. Galbraith, 3 Wash. C. C. 546, 533; Case v. Clarke, 5 Mason, 70; Robertson v. Carson, 19 Wall. 94, 106, 22 L. ed. 178, 180; Wiemer v. Louisville Water Co., 130 Fed. 244.

³⁷ Chicago & N. W. R. Co. v. Ohle, 117 U. S. 123, 29 L. ed. 827.

³⁸ Morris v. Gilmer, 129 U. S. 315, 32 L. ed. 690; King v. U. S., 59 Fed. 9; Kingman v. Holthaus, 59 Fed. 305; Allen v. So. Cal. Ry. Co., 70 Fed. 370; Chambers v. Prince, 75 Fed. 176; Ala. G. S. R. Co. v. Carroll, C. C. A., 84 Fed. 772; Sullivan v. Lloyd, 213 Fed. 275; Pannill v. Roanoke Times Co., 252 Fed. 910. See Williamson v. Osenton, 232 U. S. 619.

³⁹ Davis v. Baltimore & O. R. Co. 256 Fed. 407. But see Sullivan v. Lloyd, 213 Fed. 275.

⁴⁰ Bucker v. Bolles, C. C. A., 80 Fed. 504.

An allegation that a party is "a citizen of London, England," was held, to be insufficient to show that he was an alien.⁴¹ But the averment that the complainants were "all of Cognac, France, and citizens of the Republic of France," was held to be sufficient.⁴² Where plaintiffs sued as executors; it was held to be insufficient to allege "that said plaintiffs, as such executors, are citizens of the State of New York;"⁴³ but, it was held, to be sufficient to allege that the defendants, "as they are the qualified executors of the last will and testament of James Brown, deceased, were, each and all, at the time of the commencement of this suit, and still are, citizens of the State of New York; and that the defendant John S. Schultze, also a qualified executor of the last will and testament of James Brown, deceased, was then, and still is, a citizen of the State of New Jersey."⁴⁴

It has been held: that an allegation that the plaintiff was a citizen of the United States, and a resident of a specified State therein, was sufficient in view of the Fourteenth Amendment, to show that he was a citizen of such State.⁴⁵ The fact that a plaintiff has changed his residence and citizenship for the purpose of bringing suit in the Federal court does not divest the jurisdiction if the change has actually been made⁴⁶ without any intention to return.⁴⁷ It has been held: that where the plaintiff alleges that he is a citizen of a certain State, and that fact is denied, the burden of proof is upon the defendant.⁴⁸

⁴¹ *Stuart v. Easton*, 156 U. S. 46, 39 L. ed. 341. Cf. *Rondot v. Tp. of Rogers*, C. C. A., 79 Fed. 676; *Jennes v. Landes*, 84 Fed. 73; s. c., 85 Fed. 801. But see *Betancourt v. Mutual R. F. L. Ass'n*, 101 Fed. 305.

⁴² *Hennessey v. Richardson Drug Co.*, 189 U. S. 25, 47 L. ed. 497.

⁴³ *Amory v. Amory*, 95 U. S. 186, 24 L. ed. 428.

⁴⁴ *Cooke v. Seligman*, 7 Fed. 263.

⁴⁵ *Clausen v. American Ice Co.*, 144 Fed. 723.

⁴⁶ *Briggs v. French*, 2 Sumn. 251, 255, 256; *Catlett v. Pacific Ins. Co.*, 1 Paine, 594; *Cooper v. Galbraith*, 3 Wash. C. C. 546, 553; *Case v.*

Clarke, 5 Mason, 70; *Robertson v. Carson*, 19 Wall, 94, 106, 22 L. ed. 178, 180.

⁴⁷ *Morris v. Gilmer*, 129 U. S. 315, 32 L. ed. 690; *Ala. G. S. R. Co. v. Carroll*, C. C. A., 84 Fed. 772; *Kingman v. Holthaus*, 59 Fed. 305; *King v. U. S.*, 59 Fed. 9; *Chambers v. Prince*, 75 Fed. 176; *Allen v. So. Cal. Ry. Co.*, 70 Fed. 370.

⁴⁸ *Gilmer v. Grand Rapids*, 16 Fed. 708; *Foster v. Cleveland, C. & St. L. Ry. Co.*, 56 Fed. 434; *Sheppard v. Graves*, 14 How. 505, 14 L. ed. 518; *Nat. M. Acc. Ass'n v. Sparks*, C. C. A., 83 Fed. 225; *Adams v. Skirt*, 117 Fed. 801, 53

§ 47. **Corporations.** For the purposes of the jurisdiction of a District Court of the United States, either originally or upon removal, a corporation is treated as if it were a citizen and resident of the State, by or under the laws of which it was chartered; or, as is generally said, it is conclusively presumed to be composed of the citizens of such State.¹ The same presumption exists as regards a corporation chartered by or under the laws of a foreign country.² A national banking association, so far as the jurisdiction of the Federal courts is concerned, stands in the same position as a citizen of the State in which it is located.³ A corporation organized by or under an Act of Congress when not a National Bank cannot invoke or be subjected to the Federal jurisdiction because of difference of citizenship.⁴ Where stockholders in a corporation are themselves joined with or against it as parties to a suit, the presumption does not ex-

C. C. A. 25; *Hill v. Walker*, C. C. A., 167 Fed. 241.

§ 47. ¹ *Louisville, C. & C. R. Co. v. Leison*, 2 How. 497, 11 L. ed. 353; *Marshall v. Baltimore & O. R. Co.*, 16 How. 314, 14 L. ed. 953; *Muller v. Dows*, 94 U. S. 446, 24 L. ed. 208; *Steamship Co. v. Tugman*, 106 U. S. 118; *St. Louis & St. F. Ry. Co. v. James*, 161 U. S. 545, 562, 40 L. ed. 802, 808; *Southern Ry. Co. v. Allison*, 190 U. S. 326, 47 L. ed. 1078; *Barney v. Globe Bank*, Fed. Cas. No. 1,031 (5 Blatchf. 107); *Terry v. Imperial Fire Ins. Co.*, Fed. Cas. No. 13,838 (3 Dill. 408); *Purcell v. British Land & Mortgage Co.*, 42 Fed. 465; *Western Union Tel. Co. v. Dickinson*, 40 Ind. 444; *Stanley v. Chicago, R. I. & P. Ry. Co.*, 62 Mo. 508; *Barrowcliffe v. La Caisse Generale des Assurances Agricoles et des Assurance Contre L'Incendie (New York)*, 1 City Ct. R. 151; *Shelby v. Hoffman (Ohio)*, 7 Ohio St. 451; *Fox v. American Casualty*

& Security Co. (Pennsylvania), 12 Pa. Co. Ct. R. 207, 2 Pa. Dist. R. 158. See State corporation as party in Federal courts, by Judge F. E. Baker, 13 Am. Law Review, 7.

² *Merchants' Cotton-Press & Storage Co. v. Insurance Co. of North America*, 151 U. S. 368, 38 L. ed. 195; *Terry v. Imperial Fire Ins. Co.*, Fed. Cas. No. 13,838 (3 Dill. 408); *Purcell v. British Land & Mortgage Co.*, 42 Fed. 465; *Barrowcliffe v. La Caisse Generale des Assurances Agricoles et des Assurance Contre L'Incendie (New York)*, 1 City Ct. R. 151; *Baumgarten v. Alliance Assur. Co.*, 153 Fed. 301; *United States v. N. Y. & O. S. S. Co.*, 216 Fed. 61.

³ 24 St. at L. p. 554; *Petri v. Commercial Nat. Bank*, 142 U. S. 644, 35 L. ed. 1144; *First Nat. Bank v. Forest*, 40 Fed. 705; *Farmers' Nat. Bank v. McElhinney*, 42 Fed. 101; *supra*, § 28.

⁴ *Bankers Tr. Co. v. Texas & Pac. Ry. Co.*, 241 U. S. 295.

tend to them in their individual capacity, although it still exists so far as the corporation is concerned.⁵

The location of the principal or usual place of business of the corporation is immaterial;⁶ even if all of its business is transacted, and all of its offices and places of business are situated, outside of the State where it was chartered;⁷ and although it was organized for the purpose of doing business in other States.⁸

No such presumption exists in the case of a corporation which it is proved was organized for the sole purpose of bringing a controversy, in which its members were interested, within the jurisdiction of a District Court of the United States.⁹ But where it appeared, that the incorporation was in good faith for the purpose of taking title to land in another State in order to facilitate the sale of the land, although it was stipulated that a further reason was to afford an opportunity to invoke the jurisdiction of a Federal Court in any litigation begun by or against the land owners;¹⁰ for several years prior to the suit in the Federal court, the original owner had discussed with counsel the advisability of conveying the land in question to a corporation, in order to be able to avoid individual liability for money bor-

⁵ *Dodge v. Woolsey*, 18 How. 331, 15 L. ed. 401; *Bacon v. Robertson*, 18 How. 480, 15 L. ed. 499; *Doctor v. Harrington*, 196 U. S. 579, 49 L. ed. 606; *Hanchett v. Blair*, 100 Fed. 817, 41 C. C. A. 76; *Dodd v. Louisville Bridge Co.*, 130 Fed. 186; *Utah-Nevada Co. v. De Lamar*, 133 Fed. 113, 66 C. C. A. 179.

⁶ *Phinizy v. Augusta & K. R. Co.*, 56 Fed. 273; *United States v. S. P. Shotter Co.*, 110 Fed. 1.

⁷ *Pacific R. R. v. Missouri Pac. Ry. Co.*, 23 Fed. 565.

In *Gould v. Texas & Pac. Ry. Co.*, 176 N. Y. App. Div. 818, held that such a corporation was a domestic corporation in the State where the charter authorized the incorporators to meet, and it maintained its executive offices where annual meetings

of stockholders and directors were held.

⁸ *Baughman v. National Waterworks Co.*, 46 Fed. 4.

⁹ *Lehigh Mining & Mfg. Co. v. Kelly*, 160 U. S. 327, 336, 40 L. ed. 444, 447; *Miller & Lux v. East Side Canal & Irrigation Co.*, 211 U. S. 293, 53 L. ed. 189; *Southern Realty Investment Co. v. Walker*, 211 U. S. 603, 53 L. ed. 346; *Gelders v. Haygood*, 182 Fed. 109, directing the disbarment of the attorneys unless within sixty days they dissolved the corporation and dismissed the suit brought in its name. *Phoenix-Buttes Gold Min. Co. v. Winstead*, 286 Fed. 855. See *Kreder v. Cole*, C. C. A., 149 Fed. 647; § 363, *infra*.

¹⁰ *Doane v. California Land Co.*, C. C. A., 243 Fed. 67.

rowed to use in its improvement;¹¹ and where the property affected by the litigation was a small portion of that conveyed to the corporation; it was held: that the fact that the sole consideration for the transfer was the stock of the company, which had no other assets than that received from the grantors, whose citizenship was not diverse from that of the defendants, did not prevent the maintenance of the suit by the corporation in a Federal court.¹²

No such presumption exists in the case of a *de facto* corporation, which never acquired a legal existence.¹³

A State is not considered to be a citizen nor can it invoke or be subjected to the Federal jurisdiction because of diversity of citizenship.¹⁴ A municipal corporation, such as a city,¹⁵ a township,¹⁶ or a county,¹⁷ or a public board, composed of public officers, which has been created a corporation by the State laws,¹⁸ is considered to be a citizen of the State within which it is situated, or to be composed of citizens of that State. An averment that the Board of Trustees of a State University was created by and exists under and by virtue of the law of a State, with authority to sue and be sued and to make and to use a common seal, without any allegation that it was a corporation created by and existing under the laws thereof, was held to be insufficient to sustain the jurisdiction of the Federal court on the ground of diverse citizenship, where the citizenship of the trustees did not appear.¹⁹

Where a corporation, originally created in one State, after-

¹¹ *Irvine Co. v. Bond*, 74 Fed. 849.

¹² *Slaughter v. Mallet-Land & Cattle Co.*, C. C. A., 141 Fed. 282.

¹³ *Gastonia Cotton Mfg. Co. v. W. L. Wells Co.*, 128 Fed. 369, 63 C. C. A. 111; reversing 118 Fed. 190; *Cowles v. Mercer County*, 7 Wall. 118, 19 L. ed. 86; *Ysleta v. Canada*, 67 Fed. 6; *Loeb v. Trustees of Columbia Tp., Hamilton County, Ohio*, 91 Fed. 37; *New Orleans v. Sheppard*, 10 La. Ann. 268.

¹⁴ *Title Guaranty & Surety Co. v. State of Idaho*, 240 U. S. 136; *Deseret Water, Oil & Irrigation Co. v. State of California*, C. C. A., 202

Fed. 498; *Chicago, R. I. & P. Ry. Co. v. State of Nebraska*, C. C. A., 251 Fed. 278.

¹⁵ *Ysleta v. Canada*, 67 Fed. 6; *New Orleans v. Sheppard*, 10 La. Ann. 268.

¹⁶ *Loeb v. Trustees of Columbia Tp., Hamilton County, Ohio*, 91 Fed. 37.

¹⁷ *Cowles v. Mercer County*, 7 Wall. 118, 19 L. ed. 86.

¹⁸ *Thomas v. Board of Trustees*, 195 U. S. 207.

¹⁹ *Thomas v. Board of Trustees*, 105 U. S. 207, 49 L. ed. 160.

wards becomes compulsorily a corporation of another State, in order to extend its powers, and it is engaged in interstate commerce; it is treated for the purpose of jurisdiction, as composed of citizens of the State which first gave it corporate existence;²⁰ but it was said that unless the case arises under the Constitution and laws of the United States, the Federal court cannot adjudicate its rights or liabilities as a corporation of a State, citizens of which are upon the other side of the controversy.²¹ Otherwise, where a corporation is chartered by two or more States, it has generally been held: that it should be treated, for the purpose of jurisdiction, as composed of citizens of the State where the suit is brought;²² but the rule may be different where the cause

²⁰ *St. Louis & St. F. Ry. Co. v. James*, 161 U. S. 545, 40 L. ed. 802; *Louisville, N. A. & C. Ry. Co. v. Louisville Trust Co.*, 174 U. S. 552, 43 L. ed. 1081; *Southern Ry. Co. v. Allison*, 190 U. S. 326, 47 L. ed. 1078; reversing 129 N. C. 336, 40 S. E. 991; *Callahan v. Louisville & N. R. Co.*, 11 Fed. 536; *Missouri Pac. Ry. Co. v. Castle*, 224 U. S. 541, 56 L. ed. 875; *Atlantic Coast Line R. Co. v. Dunning, C. C. A.*, 166 Fed. 850; *St. Louis & S. F. R. Co. v. Cross*, 171 Fed. 480; *Cummins v. Chicago, B. & Q. R. Co.*, 193 Fed. 238; *Wilson v. Southern Ry. Co. (North Carolina)*, 36 S. E. Rep. 701, (overruling: *Debnam v. Southern Bell Telephone & Telegraph Company*, 126 N. C. 881, 36 S. E. 269; *Layden v. Knights of Pythias*, etc., 128 N. C. 546, 39 S. E. 47; and *Mathis v. Railway Company*, 53 S. C. 246, 257); *Wilson v. Southern Ry. Co. (South Carolina)*, 41 S. E. 971, 64 S. C. 162; affirming on rehearing judgment, 36 S. E. 701; *Mathis v. Southern Ry. Co. (South Carolina)*, 31 S. E. 240; *Calvert v. Southern Ry. Co. (South Carolina)*, 41 S. E. 963, 64 S. C. 139; affirming on rehearing judgment 36 S. E. 750.

See *Patch v. Wabash Railroad Co.*, 207 U. S. 277, 52 L. ed. 204.

²¹ *Louisville, N. A. & C. Ry. Co. v. Louisville Trust Co.*, 174 U. S. 552, 563, 577, 43 L. ed. 1081, 1087, 1092.

²² *Ohio & M. R. Co. v. Wheeler*, 1 Black, 286, 17 L. ed. 130; *Railway Co. v. Whitton*, 13 Wall. 270, 20 L. ed. 571; *Muller v. Dows*, 94 U. S. 444, 24 L. ed. 207; *Memphis & C. R. Co. v. Alabama*, 107 U. S. 581, 27 L. ed. 518; *Patch v. Wabash Railroad Co.*, 207 U. S. 277, 52 L. ed. 204; *Minot v. Philadelphia, W. & B. R. Co.*, Fed. Cas. No. 9,645 (2 Abb. U. S. 323); affirmed in 18 Wall. 206, 21 L. ed. 888; *St. Louis, A. & T. H. R. Co. v. Indianapolis & St. L. R. Co.*, Fed. Cas. No. 12,237 (9 Biss. 144); *Horne v. Boston & M. R. R.*, 18 Fed. 50; *Colglazier v. Louisville, N. A. & C. Ry. Co.*, 22 Fed. 568; *Union Trust Co. v. Rochester & P. R. Co.*, 29 Fed. 609; *Page v. Fall River, W. & P. R. Co.*, 31 Fed. 257; *Phinix v. Augusta & K. R. Co.*, 56 Fed. 273; *Taylor v. Illinois Cent. R. Co.*, 89 Fed. 119; *Smith v. New York, New Haven & H. Railroad*, 96 Fed. 504; *Walters v. Chicago, B. & Q. R.*

of action arose in another State from that where it is sued.²²

Co., 104 Fed. 337; *Boston & Maine R. R. v. Hurd*, 108 Fed. 116, 47 C. A. 615, 56 L.R.A. 193; *Goodwin v. New York, N. H. & H. R. Co.*, 124 Fed. 358; *Goodwin v. Boston & M. R. R.*, 127 Fed. 986; *Alabama & G. Mfg. Co. v. Riverdale Cotton Mills*, C. C. A., 127 Fed. 497; *Lake Shore & M. S. Ry. Co. v. Eder*, C. C. A. 174 Fed. 944; *St. Louis & S. F. R. Co. v. Cross*, 171 Fed. 480; *Fairfield v. Great Falls Mfg. Co.*, 175 Fed. 305; *Peterborough R. R. v. Boston & M. R. R.*, 239 Fed. 97; *Lewis v. Maysville & B. S. R. Co.* (Kentucky), 76 S. W. 526, 25 Ky. Law. Rep. 948; *Illinois Cent. R. Co. v. Hibbs* (Kentucky), 78 S. W. 1116, 25 Ky. Law Rep. 1899; *Horne v. Boston & M. Railroad*, 62 N. H. 454; *Allegheny County v. Cleveland & P. R. Co.*, 51 Pa. (1 P. F. Smith), 228, 88 Am. Dec. 579; *Baltimore & O. R. Co. v. Pittsburg, W. & K. R. Co.*, 17 W. Va. 812. This distinction was noted by the court in *Southern Railway Co. v. Allison*, 190 U. S. 326, 337, 338, 47 L. ed. 1078, 1083, 1084; but without stating whether it would be followed in the future. *Contra*, *Nashua & Lowell R. R. Corp. v. Boston & L. R. R. Corp.*, 136 U. S. 356, 34 L. ed. 363. In that case, two railroad corporations with the same name, having their junction at the State line, were respectively incorporated by the laws of New Hampshire and Massachusetts, the New Hampshire corporation being the first created. Their subsequent consolidation was first authorized by a law of Massachusetts, which, by its terms, did not take effect until authorized by a law of New Hampshire and accepted by the stockholders, both of

which authorities were subsequently obtained. It was held: that the consolidated company, a New Hampshire corporation, might sue another Massachusetts corporation for an accounting in a suit in the Circuit Court of the United States for the District of Massachusetts. Of this case, Judge Lowell said: "The Supreme Court, although, perhaps not with complete logical consistency, treated the plaintiff as being a corporation created in 1835," the date of the first incorporation prior to the consolidation, "by New Hampshire and by New Hampshire alone. * * * The two corporations of New Hampshire and Massachusetts, operated together, was held, by the Supreme Court, to constitute * * * an anomalous union of two corporations created for distinct purposes by different States, which had been united as to their business and property, but not as to their corporate existence." *Goodwin v. N. Y., N. H. & H. R. Co.*, 124 Fed. 358, 365. The statutes of Alabama required a railroad company, previously incorporated in Tennessee, to open books in Alabama for the subscription to its capital stock, in order to afford citizens of that State an opportunity to subscribe to a specified proportion of the same, and also provided that elections for directors should be held at the same time in both Alabama and Tennessee; the court held, that by reason of the particular language used in the act, there had been a new corporation formed in Alabama; and that the company could not remove a suit brought against it in Alabama by a citizen of that State. *Memphis & Charles-*

Where the foreign corporation, subsequent to the injury which caused the suit, became incorporated in the State where the injury was done, it was held that, for the purposes of the suit, it should be treated as a foreign corporation.²⁴ Where there is a merger, one corporation remaining in existence and the other being absorbed in the same, the company continues to be a citizen of the same State as that of the former.²⁵ In case of a consolidation of corporations chartered by different States; if the consolidation creates a new corporate entity and is made under the laws of a single State, it seems that the new company must be treated as a citizen of such State alone.²⁶ If such consolidation, however, is made under the laws of both the States, then, it has been held: that the consolidated corporation is to be treated as a citizen of both, and when sued in either State by a citizen thereof, it has no right of removal;²⁷ but that the District Court

ton R. R. Co. v. Alabama, 107 U. S. 581, 584, 27 L. ed. 518, 519.

²³ Patch v. Wabash Railroad Co., 207 U. S. 277, 283, 52 L. ed. 204, 207.

²⁴ Mowery v. Southern Ry. Co., 129 N. C. 351, 40 S. E. 88.

²⁵ Lee v. Atlantic Coast Line R. Co., 150 Fed. 775; where the fact that the transaction left a large part of the capital stock of one of the companies outstanding and all that of the other surrendered and cancelled; was held, to be evidence of the intent that the former company should continue in existence.

²⁶ Westheider v. Wabash Railroad Co., 115 Fed. 840. There the former corporations conveyed all their property to the new company, and the agreement of consolidation was recorded in the offices of the Secretary of State and recorders of the different counties where one of the railroads was situated in Illinois; but the new corporation was held to have been incorporated under the laws of Ohio and to be a citizen thereof, and not a citizen of Illi-

nois. In Patch v. Wabash Railroad Co., 207 U. S. 277, 52 L. ed. 204; Winn v. Wabash Railroad Co., 118 Fed. 55, it was held, that the same consolidated company remained, in each of the States where one of its constituents was situated, a citizen thereof. For a case deciding which of two corporations of the same name was the plaintiff's employer see Postal Telegraph-Cable Co. v. Darrow, C. C. A., 250 Fed. 581.

²⁷ Muller v. Dows, 94 U. S. 444, 24 L. ed. 207; Patch v. Wabash Railroad Co., 207 U. S. 277, 52 L. ed. 204; Chicago & W. I. R. Co. v. Lake Shore & M. S. Ry. Co., 5 Fed. 19, 10 Biss. 122; Johnson v. Philadelphia, W. & B. R. Co., 9 Fed. 6; Paul v. Baltimore & O. & C. R. Co., 44 Fed. 513; Goodwin v. New York, N. H. & H. R. R. Co., 124 Fed. 358; Goodwin v. Boston & Maine R. R., 127 Fed. 986; Wasley v. Chicago, R. I. & P. Ry. Co., 147 Fed. 608; Cummins v. Chicago, B. & Q. R. Co., 193 Fed. 238; Case v. Atlanta & C. A. L. Ry. Co., 225 Fed. 862. But see Nashua & Lowell R. R. Cor-

of the United States has jurisdiction of a suit against it in one of these States by a citizen of another.²⁸

A general law enabling foreign corporations of a certain class to transact business in a State upon compliance with certain conditions, or a special enabling law to such effect, does not prevent a corporation which complies with the same from removing a suit against it because of a difference of citizenship between it and a citizen of such a State.²⁹

The appointment of an attorney in a foreign State with a consent that process served upon him shall bind the corporation;³⁰ or the operation of a railroad in another State under a lease,³¹

potation v. Boston & Lowell R. R. Corporation, 136 U. S. 356, 34 L. ed. The Boston & Albany Railroad Company has been held to be a corporation of both Massachusetts and New York so as to justify the assessment of a transfer tax on its shares in each State. *Moody v. Shaw*, 173 Mass. 375; *Matter of Cooley*, 113 App. Div. (N. Y.) 388.

²⁸ *Marshall v. Baltimore & O. R. Co.*, 16 Howard 314, 14 L. ed. 953; *Wheeling v. City of Baltimore*, Fed. Cas. No. 17,502 (1 Hughes, 90); *Williamson v. Krohn*, 66 Fed. 655, 13 C. C. A. 668, 31 U. S. App. 325; *Missouri Pac. Ry. Co. v. Meeh*, C. C. A., 69 Fed. 753, 30 L.R.A. 250; *Smith v. New York, N. H. & H. R. Co.*, 96 Fed. 504; *Winn v. Wabash R. Co.*, 118 Fed. 55; *Wasley v. Chicago, R. I. & P. Ry. Co.*, 147 Fed. 608.

²⁹ *Owen v. New York Life Ins. Co.*, Fed. Cas. No. 10,631 (1 Hughes, 322); *Scott v. Texas Land & Cattle Co.*, 41 Fed. 225; *Amsden v. Norwich Union Fire Ins. Soc.*, 44 Fed. 515; *Amsden v. Traders' Ins. Co. of Chicago*, 44 Fed. 515; *Goodloe v. Tennessee Coal, Iron & R. Co.*, 117 Fed. 348; *Morton v. Mutual Life Ins. Co.*, 105 Mass. 141, 7 Am. Rep. 505; *Fisk v. Chicago, R. I. & P. R.*

Co. (New York), 53 Barb. 472; *Newhall v. Atlantic, etc., Ins. Co.*, 8 Phila. 106.

³⁰ *Lee v. Aetna Ins. Co.*, Fed. Cas. No. 8,181; *Hatch v. Chicago, R. I. & P. R. Co.*, Fed. Cas. No. 6,204 (6 Blatchf. 105); *Owen v. New York Life Ins. Co.*, Fed. Cas. No. 10,631 (1 Hughes, 322); *Fales v. Chicago, M. & St. P. Ry. Co.*, 32 Fed. 673; *Scott v. Texas Land & Cattle Co.*, 41 Fed. 225; *Amsden v. Norwich Union Fire Ins. Soc.*, 44 Fed. 515; *Amsden v. Traders' Ins. Co. of Chicago*, 44 Fed. 515; *Morton v. Mutual Life Ins. Co.*, 105 Mass. 141, 7 Am. Rep. 505; *Fisk v. Chicago, R. I. & P. R. Co. (N. Y.)*, 53 Barb. 472; *Stevens v. Phoenix Ins. Co.*, 41 N. Y. 149; *Newhall v. Atlantic, etc., Ins. Co.*, 8 Phila. 106; *Fox v. American Casualty Ins. & Security Co. (Pennsylvania)*, 12 Pa. Co. Ct. R. 207, 2 Pa. Dist. R. 158.

³¹ *Baltimore & O. R. R. Co. v. Koontz*, 104 U. S. 5, 26 L. ed. 643; *Callahan v. Louisville & N. R. Co.*, 11 Fed. 536; *Crane v. Chicago & N. W. Ry. Co.*, 20 Fed. 402; affirming *Chicago & N. W. Ry. Co. v. Crane*, 113 U. S. 424, 28 L. ed. 1064; *Wilkinson v. Delaware, L. & W. R. Co.*, 22 Fed. 353; *Willson v. Winchester & P. R. Co.*, 99 Fed. 642, 41 C. C. A.

or under a purchase from a domestic corporation;³² or the filing, in the office of the Secretary of State, of duly authenticated copies of its charter and by-laws;³³ or, it has been held, the subsequent acceptance of a paper described as a charter issued by the Secretary of State and reciting a merger, union and consolidation of a domestic with a foreign corporation;³⁴ or the legislative recognition of the existence within a State of a corporation chartered elsewhere;³⁵ or even the legislative grant of a charter making it a domestic corporation, when such grant is not accepted:³⁶ do not make a foreign corporation a citizen of such other State and cut off its right of removal.

Where parties sued, or were sued, as corporations, and there was no averment that they were created by, or organized under, the laws of any specified State, it was held to be insufficient to allege that one was a citizen of a certain State;³⁷ or that it was

215; affirming decree, *Wilson v. Winchester & P. R. Co.*, 82 Fed. 15; *Treadway v. Chicago & N. W. Ry. Co.*, 21 Iowa 351.

³² *Williams v. Missouri, K. & T. Ry. Co.*, Fed. Cas. No. 17,728 (3 Dill. 267); *Antelope Co. v. Chicago, B. & Q. R. Co.*, 16 Fed. 295; *Chicago, St. P., M. & O. Ry. Co. v. Dakota County*, 28 Fed. 219; *Conn v. Chicago, B. & Q. R. Co.*, 48 Fed. 177; distinguishing *Fitzgerald v. Missouri Pac. Ry. Co.*, 45 Fed. 812; *Morgan v. East Tennessee & V. R. Co.*, 48 Fed. 705.

³³ *Pennsylvania R. Co. v. St. Louis, A. & T. H. R. Co.*, 118 U. S. 290, 30 L. ed. 83; *St. Louis, A. & T. H. R. Co. v. Pennsylvania R. R. Co.*, 118 U. S. 630, 30 L. ed. 284; *Southern Ry. Co. v. Allison*, 190 U. S. 326, 47 L. ed. 1078; reversing 129 N. C. 336; *Chicago, I. & N. P. R. Co. v. Minnesota & N. W. R. Co.*, 29 Fed. 337.

³⁴ *Lee v. Atlantic Coast Line R. Co.*, 150 Fed. 775, 792.

³⁵ *Martin's Adm'r v. Baltimore & Ohio R. Co.*, 151 U. S. 673, 38 L. ed.

311; *Antelope Co. v. Chicago, B. & Q. R. Co.*, 16 Fed. 295; *Moore v. Chicago, St. P., M. & O. Ry. Co.*, 21 Fed. 817; *Taylor County Court v. Baltimore & O. R. Co.*, 35 Fed. 161; *Baltimore & O. R. Co. v. Ford*, 35 Fed. 170; following *Baltimore & O. R. Co. v. Harris*, 12 Wall. 65, 20 L. ed. 354; *Chapman v. Alabama G. S. R. Co.*, 59 Fed. 370; *Markwood v. Southern Ry. Co.*, 65 Fed. 817.

³⁶ *Pennsylvania R. Co. v. St. Louis, A. & T. H. R. Co.*, 118 U. S. 290, 30 L. ed. 83; *Nashua & Lowell R. R. Corporation v. Boston & Lowell R. R. Corporation*, 136 U. S. 356, 34 L. ed. 363.

³⁷ *Thomas v. Board of Trustees of Ohio State University*, 195 U. S. 207, 49 L. ed. 160; *Loneragan v. Illinois Cent. R. Co.*, 55 Fed. 550; *Frisbie v. Chesapeake & O. R. Co.*, 57 Fed. 1; *De Loy v. Traveler's Ins. Co.*, 59 Fed. 319; *American S. R. Co. v. Johnson*, 60 Fed. 503; *Winkler v. Chicago & E. I. R. Co.*, 108 Fed. 305; *Dalton v. Milwaukee Mechanics' Ins. Co.*, 118 Fed. 876; *Knight v. Litcher & Moore Lumber Co.*, 136

"duly established by law, having its principal place of business" in a specified State,³⁸ or that it "claims to be" a corporation organized under the laws of a specified State, as a company of a specified character.³⁹ An allegation that a party was a corporation under the laws of the State of Virginia, and a citizen of Virginia, and a resident of the western district thereof, was held to be sufficient.⁴⁰ A stipulation that the plaintiff's assignor was duly incorporated and existed accompanied by the articles of incorporation was held to be sufficient to establish that it was organized under the laws of the State named in the complaint.⁴¹

§ 48. Unincorporated stock companies and associations.

There is no presumption as regards the citizenship of members of unincorporated joint stock companies, even where the law under which they were organized authorizes them to sue and be sued in the name of one or more of their officers; and where one of them is a party there is no diversity of citizenship of all the parties on the opposite side of the controversy.¹ The same rule applies to voluntary associations, such as trade unions, which are not incorporated.²

Fed. 404. *Contra*, *Oakey v. Commercial & Railroad Bank*, 14 La. O. S. 515; *Guarantee Co. of North America v. First Nat. Bank (Virginia)*, 28 S. E. 909.

³⁸ *New York & New England R. R. Co. v. Hyde*, C. C. A., 56 Fed. 188, 191.

³⁹ *Lownsdale v. Gray's Harbor Boom Co.*, 117 Fed. 983.

⁴⁰ *Mathieson Alkali Works v. Mathieson*, C. C. A., 150 Fed. 241.

⁴¹ *Piedmont Carolina Ry. Co. v. Shaw*, 223 Fed. 975.

§ 48. ¹ *Chapman v. Barney*, 129 U. S. 677; *Dinsmore v. Philadelphia & R. R. Co.*, Fed. Cas. No. 3,921; *Jewish Colonization Ass'n v. Solomon & Germanski*, 125 Fed. 994. *Contra*, *Maltz v. American Express Co.*, Fed. Cas. No. 9,002 (1 Flippin, 611); *Fargo v. Louisville, N. A. & C. Ry. Co.*, 6 Fed. 787;

Baltimore & O. R. Co. v. Adams Express Co., 22 Fed. 404; *Whitman v. Hubbell*, 30 Fed. 81; *Saunders v. Adams Express Co.*, 136 Fed. 494; *Spencer v. Patey*, C. C. A., 243 Fed. 555. See *Rosenfield v. Adams Express Co. (Louisiana)*, 21 La. Ann. 233. All these cases arose under the New York statute. But see *Boatner v. American Express Co.*, 122 Fed. 714; where the treasurer of such a joint stock association was allowed to remove a suit brought against him under section 25 of the Kentucky civil code of practice, authorizing one or more of numerous parties to sue or defend for the benefit of all.

² *A. R. Barnes & Co. v. Berry*, 156 Fed. 72; *Irving v. Joint Dist., Council of New York, &c., of United Brotherhood of Carpenters, &c.*, 180 Fed. 896.

§ 49. Partnerships. There is no presumption that the members of a partnership, whether general or limited, are citizens of the State where it was organized; and the citizenship of all its members must be considered when a removal is sought in a suit to which it is a party, even when the State law authorizes them to sue and be sued in the firm name.¹ It was so held in a State where a partnership was considered to be a legal entity,² and as to limited partnerships organized under the Michigan,³ New York,⁴ and Pennsylvania⁵ statutes. Where a copartnership was sued alone by its firm name under section 3468 of the Iowa Code, authorizing a suit to be brought either against a partnership or its members, or both, the members of the firm not being named in the plaintiff's petition, which alleged the defendant to be a corporation, it was held, that the suit could not be removed by the members of the firm, who were citizens of a different State from that of the plaintiff.⁶

§ 50. Under grants of different States. Where there is a controversy between citizens of the same State claiming land under grants of different States, it seems that the District Court of the United States has jurisdiction irrespective of the amount involved.¹ Where one party claimed land under a grant of New Hampshire made when Vermont was a part of that State, and the other under a grant from Vermont made after their

§ 49. ¹Great Southern Fire Proof Hotel Co. v. Jones, 177 U. S. 449, 44 L. ed. 842; H. L. Bruett & Co. v. F. C. Austin Drainage Excavator Co., 174 Fed. 668, under Iowa statute; Empire Rice Mill Co. v. K. & E. Neumond, 199 Fed. 800; Columbia Digger Co. v. Rector, 215 Fed. 618.

²Empire Rice Mill Co. v. K. & E. Neumond, 199 Fed. 800, Louisiana state. As to the Ohio statute, see Irvine v. Church, 227 Fed. 252.

³Fred Macey Co. v. Macey, 135 Fed. 725, 68 C. C. A. 363.

⁴Jewish Colonization Ass'n v. Solomon & Germanski, 125 Fed. 994.

⁵Great Southern Fire Proof Hotel

Co. v. Jones, 177 U. S. 449, 44 L. ed. 842; reversing, 86 Fed. 370, 30 C. C. A. 108; and over-ruling: Bushnell v. Park Bros. & Co., 46 Fed. 209; Carnegie, Phipps & Co. v. Hulbert, 53 Fed. 10, 3 C. C. A. 391, 10 U. S. App. 454; Andrews Bros. Co. v. Youngstown Coke Co., C. C. A., 86 Fed. 585. In all these cases the partnership was organized under Pa. Act of June 2, 1874 (P. L. 271).

⁶Ralya Market Co. v. Armour & Co., 102 Fed. 530.

§ 50. ¹See Holt on Concurrent Jurisdiction, § 60; In re Hohorst, 150 U. S. 653, 660, 37 L. ed. 1211, 1214; In re Keasby & Mattison Co.,

separation, it was held that the controversy arose between persons claiming lands under grants of different States.² Where a controversy is founded upon conflicting grants of different States, the Federal courts have jurisdiction irrespective of the equitable title of the parties before either grant.³ It was held: that the Federal courts did not take jurisdiction of a case between citizens of the same States, where the defendant claimed the land in dispute under a grant by the State of North Carolina, while the plaintiff claimed under a grant by the State of Tennessee, in which, however, the State of Tennessee did not act by virtue of her sovereignty as a State, but only by virtue of a power delegated by North Carolina to perfect titles, which, before the separation of the States were inaccurate and imperfect.⁴ Under the former Judiciary Act, it was held that a party claiming land under a grant from a State where the suit was pending could not remove the case because the other party claimed under a grant from another State.⁵

In a suit between citizens of the same State claiming land under grants of different States, a party who resides in another district may be there served.⁶

Where, after the decision in such a suit between citizens of different States, the Supreme Court of the United States in a suit between the States had decided to the contrary, a bill of review of the decree in the former suit was dismissed, when filed by a speculative purchaser from the parties who had been unsuccessful against a person who had for a valuable consideration bought the land from the successful party.⁷ And it was later held that the former decision was *res adjudicata* against a suit in the District Court of the State where the Supreme Court had held that the land was located.⁸

160 U. S. 221, 230, 40 L. ed. 402, 405.

² Pawlet v. Clark, 9 Cranch, 292, 3 L. ed. 735; Colson v. Lewis, 2 Wheat. 377, 4 L. ed. 266.

³ Colson v. Lewis, 2 Wheat. 377, 379, 4 L. ed. 266.

⁴ Thompson v. Kendrick's Lessee, 6 Tenn. (5 Hayw.) 113.

⁵ Shepherd's Heirs v. Young, 1 T. B. Monroe (17 Ky.) 203.

⁶ Ferguson v. Babcock Lumber and Land Co., C. C. A., 252 Fed. 705; see *infra*, § 166.

⁷ Hopkins v. Hebard, 235 U. S. 287.

⁸ Ferguson v. Babcock Lumber and Land Co., C. C. A., 252 Fed. 705.

§ 51. Ancillary jurisdiction. After a Federal court has acquired jurisdiction, through the existence of the necessary difference of citizenship between the original parties, ancillary proceedings may be therein instituted, although parties upon the different sides of the controversy are citizens of the same State and there is no other ground of Federal jurisdiction.¹ The question is not whether the proceeding is supplemental and ancillary, or is independent and original, in the nomenclature of the rules of equity pleading, but whether it is supplementary and ancillary, or is to be considered entirely new and original, in the sense which the courts have sanctioned in establishing the line which divides the jurisdiction of the Federal courts from that of the State courts.² Thus, not only can a bill of revivor or a supplemental bill,³ or a cross bill,⁴ be maintained in a Federal court which had jurisdiction of the original litigation; but so can a bill to enjoin the prosecution of proceedings therein⁵ or elsewhere⁶ at law or in equity,⁷ or for set-off,⁸ or a bill to re-

§ 51. ¹ *Dunn v. Clarke*, 8 Pet. 1, 8 L. ed. 845; *Clarke v. Mathewson*, 12 Pet. 163, 9 L. ed. 1041; *Freeman v. Howe*, 24 How. 450, 460, 16 L. ed. 749, 752; *Minnesota Co. v. St. Paul Co.*, 2 Wall. 609, 17 L. ed. 886; *Jones v. Andrews*, 10 Wall. 327, 19 L. ed. 935; *Krippendorf v. Hyde*, 110 U. S. 276, 28 L. ed. 145; *Pacific R. of Mo. v. Mo. P. R. Co.*, 111 U. S. 505, 522, 28 L. ed. 498, 504; *Dewey v. W. F. G. C. Co.*, 123 U. S. 329, 31 L. ed. 179; *Gumbel v. Pitkin*, 124 U. S. 131, 31 L. ed. 374; *Seymour v. Phillips & C. Const. Co.*, 7 Biss. 460. But see *Christmas v. Russell*, 14 Wall. 69, 20 L. ed. 762.

² *Miller, J.*, in *Minnesota Co. v. St. Paul Co.*, 2 Wall. 609, 633, 17 L. ed. 886, 895. See *Hume v. City of New York*, C. C. A., 255 Fed. 488.

³ *Clarke v. Mathewson*, 12 Pet. 164, 9 L. ed. 1041.

⁴ *Morgan's La. & T. R. & St. Co. v. Texas Cent. Ry. Co.*, 137 U. S. 171, 34 L. ed. 625. See *infra*, § 201; *Central Trust Co. v. Bridges*, 57 Fed. 753.

⁵ *Sherman Nat. Bank v. Shubert Theatrical Co.*, C. C. A., 247 Fed. 256; *Venner v. Graves*, C. C. A., 255 Fed. 686.

⁶ *St. Louis-San Francisco Ry. Co. v. McElvain*, 253 Fed. 123; see *Venner v. Graves*, 255 Fed. 686.

⁷ *Bradshaw v. Miners' Bank*, C. C. A., 81 Fed. 902; *Krippendorf v. Hyde*, 110 U. S. 276, 28 L. ed. 145; *Leigh v. Kewanee Mfg. Co.*, 127 Fed. 990; *South Penn. Oil Co. v. Calf Creek Oil & Gas Co.*, 140 Fed. 507; *Campbell et al. v. Golden Cycle Min. Co.*, 141 Fed. 610; *Loy v. Alston*, C. C. A., 172 Fed. 90.

⁸ *Loy v. Alston*, C. C. A., 172 Fed. 90.

strain or regulate,⁹ or to set aside,¹⁰ or to modify,¹¹ or to obtain a judicial construction,¹² or to enforce by injunction,¹³ *scire facias*,¹⁴ levy of a tax,¹⁵ or otherwise,¹⁶ or to protect¹⁷ a judgment

⁹ *Dunn v. Clark*, 8 Pet. 1, 8 L. ed. 845; *Freeman v. Howe*, 24 How. 450, 460, 16 L. ed. 749, 752; *Jones v. Andrews*, 10 Wall. 327, 19 L. ed. 935; *Krippendorf v. Hyde*, 110 U. S. 276, 28 L. ed. 145; *Johnson v. Christian*, 125 U. S. 642, 31 L. ed. 820; *Lang v. Choctaw, Oklahoma & Gulf R. Co., C. C. A.*, 160 Fed. 355; *Loy v. Alston, C. C. A.*, 172 Fed. 90.

¹⁰ *Pacific R. of Mo. v. Mo. P. R. Co.*, 111 U. S. 505, 522, 28 L. ed. 498, 504; *Poster v. Mansfield, C. & L. M. R. Co.*, 36 Fed. 627; *s. c.*, 146 U. S. 88, 36 L. ed. 899; *Carey v. Houston & T. C. Ry. Co.*, 161 U. S. 115, 40 L. ed. 638; *Maitland v. Gibson*, 79 Fed. 136; *Lacanagruas v. Chapins*, 144 U. S. 119, 36 L. ed. 368; *Broadis v. Broadis*, 86 Fed. 951; *Ladd v. West*, 55 Fed. 353; *Hill v. Kuhlman, C. C. A.*, 87 Fed. 498; *McDonald v. Seligmans*, 81 Fed. 753; *Richardson v. Loree, C. C. A.*, 94 Fed. 375; *O'Connor v. O'Connor*, 146 Fed. 994; *Lang v. Choctaw, Oklahoma & Gulf R. Co., C. C. A.*, 160 Fed. 355; *Loy v. Alston, C. C. A.*, 172 Fed. 90. Where an action was brought upon the award of an arbitrator, it was held that a suit to set aside the award for fraud was ancillary to the same, but that the court could not thus obtain jurisdiction to bring in a stranger to the former action, who was a citizen of the same State as the complainant, for the purpose of impeaching an award in the latter's favor, made at the same arbitration, which was separate and distinct from that between the other parties.

Hecht v. Youghioghney & Lehigh Coal Co., 162 Fed. 812.

¹¹ *Thompson v. Schenectady Ry. Co.*, 124 Fed. 274.

¹² *Minnesota Co. v. St. Paul Co.*, 2 Wall. 609, 17 L. ed. 886; *Jenks v. Brewster*, 96 Fed. 625; *Lang v. Choctaw, Oklahoma & Gulf R. Co., C. C. A.*, 160 Fed. 355; *Loy v. Alston, C. C. A.*, 172 Fed. 90.

¹³ *Railroad Co. v. Chamberlain*, 6 Wall. 748, 18 L. ed. 859; *Root v. Woolworth*, 150 U. S. 401, 37 L. ed. 1123; *Riverdale Cotton Mills v. Ala. & Ga. Mfg. Co.*, 198 U. S. 188, 49 L. ed. 1008; *Wabash Railroad Co. v. Adelbert College*, 208 U. S. 38, 53, 52 L. ed. 379, 385. But see *Alabama & G. Mfg. Co. v. Riverdale Cotton Mills, C. C. A.*, 127 Fed. 497.

¹⁴ *Pullman's P. C. Co. v. Washburn*, 66 Fed. 790; *s. c. in C. C. A.*, 76 Fed. 1005; *Lafayette County v. Wonderly, C. C. A.*, 92 Fed. 313.

¹⁵ *Preston v. Calloway, C. C. A.*, 183 Fed. 19; *Maitland v. Gibson*, 79 Fed. 136; *Brun v. Mann, C. C. A.*, 12 L.R.A.(N.S.) 154, 151 Fed. 145, 149.

¹⁶ *Cushman v. Warren-Scharf Asphalt Paving Co., C. C. A.*, 220 Fed. 857, (a suit to enforce payment of an assessment levied pursuant to a writ of mandamus awarded by the Federal Court). *Lang v. Choctaw, Oklahoma & Gulf R. Co., C. C. A.*, 160 Fed. 355; *Loy v. Alston, C. C. A.*, 172 Fed. 90. But see *Central Trust Co. v. Grantham*, 83 Fed. 540. Where creditors brought a class-suit to administer in equity the amounts due the corporation from stockholders within the territorial juris-

or decree of, or a bond¹⁸ given to, or an attachment,¹⁹ or execution,²⁰ issued by, a Federal court; even where other incidental relief is prayed,²¹ and irrespective of the citizenship of the parties. So can a bill or petition for the appointment of a receiver in aid of a pending action at law; for example, one of ejectment²² or, it seems, when authorized by the State practice, in aid of a judgment at law;²³ a bill by a stranger to a suit to enjoin a sale by the marshal of property which he claims to be his;²⁴ a bill to determine the manner in which the proceeds of a judgment or decree shall be distributed, at least when they have been paid into court,²⁵ and a bill in the nature of an interpleader.²⁶

In such a suit the fact that a new party is made plaintiff or defendant whose citizenship would have defeated an original bill by the same plaintiff is no objection to the jurisdiction.²⁷ A bill to enjoin proceedings in a District Court of the United States was there maintained although an indispensable party defendant was one, a suit against whom the Federal court had previously remanded because of the insufficiency of the matter

diction, it was *held* that, ancillary to the jurisdiction which was thus obtained, the court might in an ancillary bill enter a decree against a stockholder whose liability was less than \$2,000. *Robertson v. Conway*, C. C. A., 188 Fed. 570.

¹⁷ *Ferguson v. Omaha & S. W. R. Co.*, C. C. A., 227 Fed. 513, (a bill to protect the purchaser at a foreclosure sale). *Lee Line Steamers v. Robinson*, C. C. A., 232 Fed. 417, (a suit to set aside the assignment of a judgment); *Ross v. Miller*, C. C. A., 252 Fed. 697, (to set aside a release of a judgment).

¹⁸ *Lamb v. Ewing*, 56 Fed. 269; *Leslie v. Brown*, 95 Fed. 171.

¹⁹ *Lant v. Manley*, C. C. A., 75 Fed. 627; *Davis v. Martin*, C. C. A., 113 Fed. 6; *Hatcher v. Hendrie & Bolthoff Mfg. & Sy. Co.*, C. C. A., 113 Fed. 6.

²⁰ *Lant v. Manley*, C. C. A., 75 Fed. 627; *Davis v. Martin*, C. C. A., 113 Fed. 6.

²¹ *Hill v. Kuhlman*, C. C. A., 87 Fed. 498.

²² *Ulman v. Clark*, 75 Fed. 868.

²³ See *Mutual Res. Fund Life Ass'n v. Phelps*, 190 U. S. 147, 47 L. ed. 987.

²⁴ *Davis v. Martin*, C. C. A., 113 Fed. 6.

²⁵ *Myers v. Luzerne County*, 124 Fed. 436.

²⁶ *Sherman Nat. Bank v. Shubert Theatrical Co.*, 247 Fed. 256.

²⁷ *Ferguson v. Omaha & S. W. R. Co.*, C. C. A., 227 Fed. 513; *St. Louis-San Francisco Ry. Co. v. McElvain*, 253 Fed. 123; *Venner v. Pennsylvania Steel Co.*, 250 Fed. 292; *Sherman Nat. Bank v. Shubert Theatrical Co.*, C. C. A., 247 Fed. 256.

in dispute.²⁸ A bill for the reformation of a policy of insurance is ancillary to an action upon such policy.²⁹

An original bill or a petition, to foreclose: a mortgage,³⁰ or a mechanic's lien,³¹ or other lien³² upon a railway or other property, or upon the proceeds of property, in the possession of a receiver appointed by a Federal court in a prior suit to foreclose a prior or subsequent mortgage, or otherwise in its possession; can be brought in such court independent of the citizenship of the parties, even after sale in the former suit; although it brings in new parties whose citizenship would have defeated the jurisdiction had they been joined in the original bill.³³ But where the court had no jurisdiction to appoint the receiver it cannot obtain jurisdiction by his seizure of the property.³⁴

So may a suit to partition, the property.³⁵ Ancillary jurisdiction includes the power to hear and determine all questions respecting the title, the possession, or the control, of property in the custody of the court;³⁶ even after the property has been sold, when the claim relates to matters that were disposed of, or that might have been disposed of, by the proceedings resulting in the same;³⁷ and irrespective of any difference of the citizenship of

²⁸ *Virginia-Carolina Chem. Co. v. Home Ins. Co.*, C. C. A., 113 Fed. 1.

²⁹ *Rosenbaum v. Council Bluffs Ins. Co.*, 3 L.R.A. 189, 37 Fed. 724; *Abraham v. North G. F. Ins. Co.*, 3 L.R.A. 188, 37 Fed. 731.

³⁰ *Morgan's L. & T. R. & S. S. Co. v. Texas Cent. Ry. Co.*, 137 U. S. 171, 34 L. ed. 625; *Farmers' L. & Tr. Co. v. Houston & T. C. Ry. Co.*, 44 Fed. 115; *Carey v. Huston, T. & C. R. Co.*, 52 Fed. 671; *Compton v. Jesup*, 68 Fed. 263; *Toledo, St. L. & K. C. Ry. Co. v. Continental T. R. Co.*, C. C. A., 95 Fed. 497.

³¹ *Central Tr. Co. v. Bridges*, C. C. A., 57 Fed. 753.

³² *Blake v. Pine M. I. & C. Co.*, C. C. A., 76 Fed. 624; *Central Tr. Co. v. Benedict*, C. C. A., 78 Fed. 198; *Central Tr. Co. v. Carter*, C. C. A., 78 Fed. 225; *State Tr. Co. v.*

Kansas City P. & G. R. Co., 115 Fed. 367. As to the jurisdiction by cross-bill, see also *Everett v. Independent School District*, 102 Fed. 529; *Brooks v. Laurant*, C. C. A., 98 Fed. 647; *Mississippi Valley Tr. Co. v. Railway Steel S. Co.*, C. C. A., 258 Fed. 346; *infra*, §§ 201, 608.

³³ *Infra*, § 201. *Lilienthal v. McCormick*, C. C. A., 117 Fed. 89.

³⁴ *Primos Chemical Co. v. Fulton Steel Corp.*, 254 Fed. 454.

³⁵ *City of New Orleans v. Howard*, C. C. A., 160 Fed. 393.

³⁶ *Wabash Railroad Co. v. Adelbert College*, 208 U. S. 38, 53, 52 L. ed. 379, 385.

³⁷ *Julian v. Central Trust Co.*, 193 U. S. 93, 48 L. ed. 629; *Wabash Railroad Co. v. Adelbert College*, 208 U. S. 38, 53, 52 L. ed. 379, 385.

the parties, a District Court of the United States may entertain a bill, to restrain parties claiming liens from seeking to enforce the same against the property elsewhere than in such District Court.³⁸ When property has been seized by a marshal of the United States, the Federal court may take jurisdiction, by removal, of a proceeding in a State court to enjoin the marshal from proceedings under the writ.³⁹ There is no ancillary jurisdiction of a suit to foreclose a mortgage upon a line that has been in the possession of Federal receivers of a street railroad system, who have been operating the same under a lease which they have elected to surrender; when they have offered to return the property to the lessor.⁴⁰

After a Federal court has appointed a receiver, it has ancillary jurisdiction over all suits brought by him irrespective of the citizenship of the parties and of the amount involved.⁴¹ He cannot, however, remove into such a court all suits brought against him.⁴² It has been held at circuit that a suit pending against the corporation at the time of the receivership may, on the petition of the receiver, be removed into the Federal court,

³⁸ *Julian v. Central Trust Co.*, 193 U. S. 93; *Wabash Railroad Co. v. Adelbert College*, 208 U. S. 38, 53, 52 L. ed. 379, 385.

³⁹ *Frank v. Leopold & Feron Co.*, 169 Fed. 922.

⁴⁰ *Guaranty Tr. Co. v. Second Ave. R. Co.*, 165 Fed. 487.

⁴¹ *White v. Ewing*, 159 U. S. 36, 40 L. ed. 67; *Pope v. Louisville, N. A. & C. Ry. Co.*, 173 U. S. 573, 43 L. ed. 814; *Connor v. Alligator L. Co.*, 98 Fed. 155; *Bowman v. Harris*, 95 Fed. 917; *Alexander v. So. Home Bldg. & L. Ass'n*, 120 Fed. 963; *Hampton Roads Ry. & El. Co. v. Newport News & O. P. Ry. & El. Co.*, 131 Fed. 534; *Gunby v. Armstrong, C. C. A.*, 133 Fed. 417; *Cooper v. Newton*, 160 Fed. 190; *Hume v. City of New York, C. C. A.*, 255 Fed. 488; *Hollander v. Heaslip, C. C. A.*, 222 Fed. 808; see *supra*, § 37, *infra*, § 311. So

when he is an ancillary receiver. *Brookfield v. Hecker*, 118 Fed. 342. Held, that jurisdiction may thus be taken of a petition by the receivers for an injunction to restrain the enforcement of a State statute reducing the charges for the transportation of passengers or freight. *Trust Co. of America v. Chicago, P. & St. L. Ry. Co.*, 199 Fed. 593; that a Circuit Court of the United States would not take jurisdiction of a suit, by a receiver appointed by a Federal court, in another Circuit Court, unless the matter in dispute exceeded the jurisdictional amount. *Sullivan v. Swain*, 96 Fed. 259.

⁴² *Gableman v. Peoria, Decatur & Evansville Ry. Co.*, 179 U. S. 335, 45 L. ed. 220; *Baggs v. Martin*, 179 U. S. 206, 45 L. ed. 155; *supra*, §§ 5, 24, 37, *infra*, §§ 537, 538.

at least when the plaintiff has intervened there, although original jurisdiction over the same could not have been entertained.⁴³ Where assets are in the course of administration, all persons entitled to participate may come in under the jurisdiction acquired between the parties by ancillary or supplemental pleading, even though jurisdiction would be lacking if said proceedings had been originally and independently prosecuted.⁴⁴ It has been held that a person, whose citizenship, if an original party, would have deprived the court of jurisdiction, cannot intervene when the court has possession of no fund or proceeding in which he is interested.⁴⁵

Where in a suit to foreclose a mortgage to secure its bonds issued by a corporation the Federal court had made a foreclosure sale without any reservation and distributed the proceeds for the benefit of other holders of rights or liens; meanwhile, by independent proceedings in the State Courts, a judgment had been rendered against the same company because of its guarantee of bonds issued by another and such judgment had been presented and registered as a claim in the Federal court because it was contingent at the date set for proving claims there; it was held that the Federal court had no ancillary jurisdiction of a suit to have such State judgment impressed as a lien on the property which it had sold.⁴⁶ It has been held: that pending a foreclosure suit a bill to enjoin the sale of shares of the capital stock of the defendant, not covered by the mortgage, is not ancillary to the former suit; although the defendant has the equity or redemption therein; ⁴⁷ that where a railroad had been sold under a decree of fore-

⁴³ Rice v. Durham Water Co., 91 Fed. 433.

⁴⁴ Rouse v. Letcher, 156 U. S. 47, 49, 39 L. ed. 341, 342; Second Nat. Bank v. New York Silk Mfg. Co., Fed. Cas. No. 12,801 a; New York Silk Mfg. Co. v. Second Nat. Bank, 10 Fed. 204. See Henderson v. Moode, 49 Fed. 887; *infra*, § 258e.

⁴⁵ Seligman v. Santa Rosa, 81 Fed. 524; United El. S. Co. v. La. El. L. Co., 68 Fed. 673; G. & C. Merriam Co. v. Saalfeld, 241 U. S. 22, (where the defendant to the

ancillary bill had paid the expense of the defense to the former suit); Venner v. Pennsylvania Steel Co., 250 Fed. 292, (a purchaser *pendente lite*), *contra*, Ferguson v. Omaha & S. W. R. Co., C. C. A., 227 Fed. 513, (a bill to protect the purchaser at a foreclosure sale).

⁴⁶ Hamer v. N. Y. Rys. Co., 244 U. S. 266.

⁴⁷ Raphael v. Trask, 194 U. S. 272, 48 L. ed. 973, s. c. 118 Fed. 777.

closure by a Federal court such court had no jurisdiction over a subsequent suit to restrain the enforcement of a State judgment of ejectment obtained by a plaintiff who was not a party to the foreclosure;⁴⁸ that after judgment in ejectment, which awards a writ of possession, the court has no jurisdiction of an application by the marshal or other officer to whom the writ is addressed, seeking instructions as to the performance of his ministerial duties, when there are adverse claims of strangers to the suit;⁴⁹ that a Federal court after formal judgment has no jurisdiction, independent of a difference of citizenship, to enforce an agreement under which the same was entered, when the construction of the judgment is not in question;⁵⁰ It has been held: that where the original proceedings are dismissed, the ancillary proceedings fall with such dismissal, even though such dismissal is voluntary by the plaintiff,⁵¹ and that upon the authorized surrender of property by Federal receivers to a State receiver, the Federal court loses jurisdiction of a suit previously begun to foreclose a mortgage upon the same, when there is no diversity of citizenship between the parties.⁵² But that the discharge of the receiver does not compel the dismissal of an ancillary suit brought by him against a stranger which may be continued by the person who has bought the assets.⁵³ A creditor's bill between citizens of the same State founded upon a decree in admiralty has been held not within the jurisdiction of a Federal court.⁵⁴ It has been held at Circuit that a bill cannot thus be sustained, irrespective of the citizenship of the parties, when filed to set aside for fraud, subsequent to its entry, the decree of the Federal court or a contract affecting such decree;⁵⁵ nor when filed to set aside for fraud a stipulation and decree in a former suit, the defendants to the bill being neither parties to

⁴⁸ *Central Trust Co. v. Grantham*, 83 Fed. 540.

⁴⁹ *Dickinson v. Huntington*, C. C. A., 185 Fed. 703.

⁵⁰ *Stillman v. Combe*, 197 U. S. 436, 49 L. ed. 822.

⁵¹ *Venner v. Graves*, C. C. A., 255 Fed. 686.

⁵² *Guaranty Tr. Co. v. Second Ave. R. Co.*, 171 Fed. 1020. See S. C., 165 Fed. 487.

⁵³ *Keith Lumber Co. v. Houston Oil Co.*, C. C. A., 257 Fed. 1.

⁵⁴ *Winter v. Swinburne*, 8 Fed. 49. See *Provident Savings Soc. v. Ford*, 114 U. S. 635, 29 L. ed. 261; *Metcalf v. Watertown*, 128 U. S. 586, 32 L. ed. 543; *supra*, §§ 24, 39.

⁵⁵ *Yeatman v. Bradford*, 44 Fed. 536.

the former suit nor the personal representatives of such parties, but trustees created by a defendant to such suit after the decree, and where none of the property affected by the former suit was within the custody of the court;⁵⁶ nor when filed against defendants to a former decree and a third party to whom it was alleged that lands, the subject matter of the former suit, were conveyed prior to the commencement of the same.⁵⁷ After a final decree granting damages for the injury to a street railway by the construction of another railroad, where the jurisdiction had attached because a constitutional question was involved, Mr. Justice Brewer refused to take jurisdiction of a supplemental bill to enjoin the construction of the rival railroad upon other grounds, none of which presented a Federal question.⁵⁸

Conversely, there is a similar limitation upon the jurisdiction of the Federal courts. This is well explained in the following extract from an opinion by Bradley, J.: "The question presented with regard to the jurisdiction of the Circuit Court is, whether the proceeding, to procure nullity or the former judgment in such a case as the present is or is not in its nature a separate suit, or whether it is a supplementary proceeding, so connected with the original suit as to form an incident to it, and substantially a continuation of it. If the proceeding is merely tantamount to the common-law practice of moving to set aside a judgment for irregularity, or to a writ of error, or to a bill of review, or an appeal, it would belong to the latter category, and the United States court could not properly entertain jurisdiction of the case.⁵⁹ Otherwise, the Circuit Courts of the United States would become invested with power to control the proceedings in the State courts, or would have appellate jurisdiction over them in all cases where the parties are citizens of different States. Such a result would be totally inadmissible. On

⁵⁶ *Ralston v. Sharon*, 51 Fed. 702.
See *Sowles v. First Nat. Bank of Plattsburgh et al.*, 133 Fed. 846.

⁵⁷ *Anglo Florida P. H. Co. v. McKibben*, 65 Fed. 529. See *Montgomery v. McDermott*, 99 Fed. 502.

⁵⁸ *Omaha H. R. Co. v. Cable T. W. Co.*, 33 Fed. 689.

⁵⁹ *Graver v. Faurot* 64 Fed. 241; *Little Rock Ry. Co. v. Burke*, 66 Fed. 83; *Hall v. Ames, C. C. A.*, 190 Fed. 138. But see *Northern Pac. Ry. Co. v. Kurtzman*, 82 Fed. 241; *Queens Land & Title Co. v. Kings County Tr. Co.*, 255 Fed. 222.

the other hand, if the proceedings are tantamount to a bill in equity to set aside a decree for fraud in the obtaining thereof, then they constitute an original and independent proceeding, and, according to the doctrine laid down in *Gaines v. Fuentes*,⁶⁰ the case might be within the cognizance of the Federal courts. The distinction between the two classes of cases may be somewhat nice, but it may be affirmed to exist. In the one class there would be a mere revision of errors and irregularities, or of the legality and correctness of the judgments and decrees of the State courts, and in the other class the investigation of a new case arising upon new facts, although having relation to the validity of an actual judgment or decree, or the party's right to claim any benefit by reason thereof."⁶¹

A suit to make the judgment or decree of a State court the judgment or decree, respectively, of the Federal court can be maintained at common law⁶² and in equity.⁶³ The Federal court may take jurisdiction of a creditor's bill to enforce a judgment of the State court in the same district.⁶⁴ Proceedings supplementary to execution under the judgment of a State court authorized by State statutes against a judgment debtor or third persons cannot be instituted in or removed to the Federal courts; although a creditor's bill may be.⁶⁵ A petition, after judgment in a State court, by plaintiff in ejectment to have the defendant's damages allowed to him, is a mere incident to the ejectment suit and the Federal courts can take no jurisdiction of it.⁶⁶ It has been held that a bill cannot be maintained to

⁶⁰ 92 U. S. 10, 23 L. ed. 524; *Cf.* *Arrowsmith v. Gleason*, 129 U. S. 86, 32 L. ed. 630; *Robb v. Vo*, 155 U. S. 13, 39 L. ed. 52; *Hatch v. Ferguson*, 52 Fed. 833; *Davenport v. Moore*, 74 Fed. 945; *Strand v. Griffith*, C. C. A., 144 Fed. 828; *Schultz v. Highland Gold Mines Co.*, 158 Fed. 337; *Union Ry. Co. v. Illinois Cent. R. Co.*, C. C. A., 207 Fed. 745. But see *Travelers' Protective Ass'n v. Gilbert*, C. C. A., 55 L.R.A. 538, 111 Fed. 269; *Bailey v. Willeford*, 126 Fed. 803. As to suits to set aside decrees of naturalization, see *infra*, § 151b.

⁶¹ *Barrow v. Hunton*, 99 U. S. 80, Glenn, 56 Fed. 372.

⁶² *Barr v. Simpson*, Baldwin, 543.

⁶³ See *Davis v. Davis*, 65 Fed. 380; *Collins v. Ashland*, 112 Fed. 175.

⁶⁴ *Feidler v. Bartleson*, C. C. A., 161 Fed. 30.

⁶⁵ *Webber v. Humphreys*, 5 Dill. 223; *Poole v. Thatcherdeft*, 19 Fed. 49; *Buford v. Strother*, 3 McCrary, 253; s. c., 10 Fed. 406; *Flash v. Dillon*, 22 Fed. 1.

⁶⁶ *Chapman v. Barger*, 4 Dillon, 587.

set aside or interfere with the enforcement of an interlocutory decree in a cause pending in another court, when such decree is not a contempt of a Federal court.⁶⁷ It has been held that where the jurisdiction depends solely upon the ancillary nature of the bill, upon the dismissal of the former suit the ancillary suit must be dismissed for want of jurisdiction;⁶⁸ and that relief germane to the ancillary relief, if the prayer for the same does not make the bill multifarious, can be granted, although an independent original bill for such other relief could not have been maintained in the Federal court; but that if the ancillary relief is denied, all other prayers for relief fall with the same; and that affirmative relief against a person who is not a party, nor a privy, to the original action, and whose claims have not accrued prior to its commencement, cannot be granted.⁶⁹ The dependence of an ancillary suit upon an original suit for purposes of jurisdiction does not throw both cases into hotchpot, and dispense with the ordinary rules of pleading and practice as to parties proper and necessary to each cause of action. The parties to the original bill have no more right to intervene in the dependent cause than if the court had independent jurisdiction of the same; and after jurisdiction has been acquired, the pleadings, practice and proceedings are pursued exactly as if it were an original suit.⁷⁰ It has been held that the court does not in the second suit take judicial notice of the pleadings or proceedings in the former litigation, unless they are formally put in evidence.⁷¹

§ 52. Property in the custody of another court of co-ordinate jurisdiction. In general. A court of the United States, through a spirit of judicial comity, will usually refuse to interfere with property in the custody of a State court.¹ Conversely,

⁶⁷ *Furnald v. Glenn*, C. C. A., 64 Fed. 49.

⁶⁸ *Cabaniss v. Reco Min. Co.*, C. C. A., 116 Fed. 318.

⁶⁹ *Campbell v. Golden Cycle Min. Co.*, 141 Fed. 610, 614, 616, 617.

⁷⁰ *Continental Tr. Co. v. Toledo, St. L. & K. C. R. Co.*, 82 Fed. 642, 645, per Taft, J.

⁷¹ *Richardson v. Loree*, 94 Fed. 375. But see *infra*, § 329a.

§ 52. 1 *Hagan v. Lucas*, 10 Pet. 400, 9 L. ed. 470; *Taylor v. Carryl*, 20 How. 583; *Peale v. Phipps*, 14 How. 368, 14 L. ed. 459; *Levi v. Columbia Ins. Co.*, 1 Fed. 206; *Hubbard v. Bellew*, 3 Fed. 447; *Union Mut. Life Ins. Co. v. University of Chicago*, 6 Fed. 443; *Hutchinson v. Green*, 6 Fed. 833, 836-839; *Hamilton v. Chouteau*, 6 Fed. 339; *Heldritter v. Elizabeth Oil-cloth Co.*, 112

it will not tolerate interference by a State court with property over which it has taken jurisdiction.²

It has been said that "the forbearance which courts of co-ordinate jurisdiction, administered under a single system, exercise toward each other, whereby conflicts are avoided, by avoiding interference with the process of each other, is a principle of comity, with perhaps no higher sanction than the utility which comes from concord; but between State courts and those of the United States, it is something more. It is a principle of right and of law, and therefore of necessity. It leaves nothing to discretion or mere convenience. These courts do not belong to the same system, so far as their jurisdiction is concurrent and although they co-exist in the same space, they are independent, and have no common superior. They exercise jurisdiction, it is true, within the same territory, but not in the same place; and when one takes into its jurisdiction a specific thing, that is as much withdrawn from the judicial power of the other as if it had been carried physically into a different territorial sovereignty. To attempt to seize it by a foreign process is futile and void."³ "This rule, in its application to Federal and State courts, being the outgrowth of necessity, is a principle of right and of law, which leaves nothing to the discretion of a court, and may not be varied to suit the convenience of litigants."⁴

"When a court of competent jurisdiction has, by appropriate proceedings, taken property into its possession through its offices, the property is thereby withdrawn from the jurisdiction of all other courts. The latter courts, though of concurrent jurisdiction, are without power to render any judgment which invades or disturbs the possession of the property while it is in the custody of the court which has seized it. For the purpose

U. S. 294, 28 L. ed. 729; McKinney v. Landon, C. C. A., 209 Fed. 300; U. S. v. Marrin, 227 Fed. 314. But see *Dwight v. Central Vermont R. Co.*, 9 Fed. 785.

² *Freeman v. Howe*, 24 How. 450, 16 L. ed. 749; *Heidritter v. Elizabeth Oil-cloth Co.*, 112 U. S. 294, 28 L. ed. 729; *Sharon v. Terry*, 1 L.R.A. 572, 36 Fed. 337; *Covell v. Heyman*, 111 U. S. 176, 28 L. ed.

390; *In re Tyler*, 149 U. S. 164, 186, 37 L. ed. 689, 696; *White v. Schloerb*, 178 U. S. 542, 44 L. ed. 1183.

³ Mr. Justice Matthews in *Covell v. Heyman*, 111 U. S. 176, 182, 28 L. ed. 390, 392; approved in *Re Tyler*, 149 U. S. 164, 186, 37 L. ed. 689, 696, per Fuller, C. J.

⁴ *Thayer, J.*, in *Merritt v. Am. Steel Barge Co.*, 79 Fed. 228, 231.

of avoiding injustice which otherwise might result, a court during the continuance of its possession has, as incident thereto and as ancillary to the suit in which the possession was acquired, jurisdiction to hear and determine all questions respecting the title, the possession or the control of the property. In the courts of the United States this incidental and ancillary jurisdiction exists, although in the subordinate suit there is no jurisdiction arising out of diversity of citizenship or the nature of the controversy. Those principles are of general application and not peculiar to the relation of the courts of the United States to the courts of the States; they are, however, of especial importance with respect to the relations of those courts, which exercise independent jurisdiction in the same territory, often over the same property, persons, and controversies; they are not based upon any supposed superiority of one court over the others, but serve to prevent a conflict over the possession of property, which would be unseemly and subversive of justice; and have been applied by this court in many cases," some of which are cited, "sometimes in favor of the jurisdiction of the courts of the States and sometimes in favor of the jurisdiction of the courts of the United States, but always, it is believed, impartially and with a spirit of respect for the just authority of the States of the Union."⁵ This is a general rule of comity, which usually prevails between courts of the same State.⁶

Even where the custody of the State court has been acquired through fraud, the Federal court will usually not interfere so long as the former retains its hold upon the property.⁷ An objection founded upon this rule does not put the jurisdiction of the court at issue so that the question can be certified immediately to the Supreme Court.⁸ It has been held that after the trial of an action at common law it is too late to raise this objec-

⁵ Mr. Justice Moody in *Wabash Railroad Co. v. Adelbert College*, 208 U. S. 38, 53, 52 L. ed. 378, 385.

⁶ *O'Mahoney v. Belmont*, 62 N. Y. 133, 149; *Milwaukee R. R. Co. v. Milwaukee & Minnesota R. R. Co.*, 20 Wis. 165, 88 Am. Dec. 735.

⁷ *Thayer J.*, in *Merritt v. Amer-*

ican Steel Barge Co., 79 Fed. 228, 231.

⁸ *Attleborough Nat. Bank v. N. W. Mfg. & C. Co.*, 28 Fed. 113; *Louisville Tr. Co. v. Knott*, 191 U. S. 225, 48 L. ed. 159, overruling *Shields v. Coleman*, 157 U. S. 168, 39 L. ed. 660.

tion to the jurisdiction.⁹ But where the trustee elected by the creditors of an insolvent had failed to claim property until after a levy thereupon under a Federal judgment, on his intervention a decree was entered setting aside the levy, upon his payment of the costs of the same and filing an order of the State court authorizing him to take possession.¹⁰

This doctrine does not prevent the removal to the Federal court, in a proper case, of a suit in which a State court has appointed a receiver¹¹ or the removal of a suit by such receiver,¹² nor a suit in one court against a corporation over the property of which another court has appointed a receiver;¹³ nor the allowance of an equitable set-off against the judgment of another court;¹⁴ nor the removal of a suit in which a State Court has taken property into its possession under a common law writ;¹⁵ nor a suit to set aside a mortgage, which the mortgagee claims to be a valid lien upon a fund in the possession of a Federal court of bankruptcy.¹⁶

It was recently said by the Supreme Court of the United States, that "the declaration of a lien on the property is a step toward the invasion of its possession, which we have held to be beyond the jurisdiction of the State court."¹⁷ Before that decision, it

⁹ *Gilman v. Perkins*, 7 Fed. 887. See *Erwin v. Lowry*, 7 How. 172, 12 L. ed. 655; *Mo. Pac. R. Co. v. Fitzgerald*, 160 U. S. 556, 40 L. ed. 536.

¹⁰ *Geilinger v. Philippi*, 133 U. S. 246, 257, 33 L. ed. 614, 617, *infra*, § 53.

¹¹ *In re Iowa & Minn. Constr. Co.*, 10 Fed. 401. Where, however, all the property of a foreign corporation had been placed in the hands of a receiver appointed by the State court, the Federal court said, that a case instituted by attachment, which had been removed thereto, should be remanded. *Goldberg, Bowen & Co. v. German Ins. Co.*, 152 Fed. 831, 834.

¹² *Porter v. F. M. Davies & Co.*, C. C. A., 223 Fed. 465.

¹³ *Chicago, R. I. & P. Ry. Co. v.*

Union Pac. R. Co., C. C. A., 254 Fed. 235.

¹⁴ *Northwestern Port Huron Co. v. Babcock*, C. C. A., 223 Fed. 479.

¹⁵ *Kern v. Huidekoper*, 103 U. S. 485, 491, 492, 26 L. ed. 354, 356, 357.

¹⁶ *Frank v. Vollkommer*, 205 U. S. 521, 51 L. ed. 911, in which the author was counsel.

¹⁷ *Wabash Railroad Co. v. Adelbert College*, 208 U. S. 609, 611, 52 L. ed. 642, 643, s. c., 208 U. S. 38, 52 L. ed. 79; *City of New Orleans v. Howard*, C. C. A., 160 Fed. 393, a partition suit. See *Security Trust Co. v. Union Trust Co.*, 134 Fed. 301; *Lang v. Choctaw, Oklahoma & Gulf R. Co.*, C. C. A., 160 Fed. 355; *Oppenheimer v. San Antonio Land & Irr. Co.*, C. C. A., 246 Fed. 934.

was held that the doctrine did not prevent a suit to foreclose a mortgage, or to establish a lien, upon property in a State court's custody;¹⁸ provided that no sale was ordered until the proceedings in the State court were terminated;¹⁹ and that neither the sheriff, nor, without the permission of the court, a State receiver was a necessary party to the suit;²⁰ that a Federal court may foreclose a mortgage upon property, held by a receiver appointed by a State court, in a suit to which the mortgagee was not a party, and can then determine the claim of the holders of receiver's certificates issued under the order of the State court to a preference over the mortgage;²¹ that a State court may foreclose an attorney's lien upon a cause of action after the removal of the case to the Federal court, subsequent to a settlement between the parties;²² that a State court may entertain proceedings to condemn land, pending a suit in equity in a Federal court for an injunction against a trespass upon the same by the respondent in the condemnation proceedings, or, in the alternative, for the payment of its value;²³ or a suit to determine the ownership of land pending a proceeding in a Federal court to condemn the property for public purposes;²⁴ that a proceeding in a State court for a writ of assistance, under a foreclosure decree of sale, does not operate as a bar to an action of ejectment

¹⁸ *Wheelwright v. St. Louis, N. O. & O. C. & T. Co.*, 50 Fed. 709, 711; *Gates v. Bucki*, 53 Fed. 961, 968; *Edwards v. Hill*, C. C. A., 59 Fed. 723; *Jenks v. Brewster*, 96 Fed. 625, holding that where a person, not a party to a suit in a Federal court, had subsequently to the institution of the same begun an action in the State court to foreclose his lien, to which the Federal plaintiff was one of the defendants, the decree of the State court bound the parties to the same and the purchaser of the property, pending the litigation under the decree of the Federal court; *Metropolitan Trust Co. v. Lake Cities El. Ry. Co.*, 100 Fed. 897. So held in 1918, *Brown v. Crawford*, 254 Fed.

146. *Contra*, *Cochran v. Pittsburg, S. & N. R. Co.*, 158 Fed. 549; *Cohen v. Solomon*, 66 Fed. 411; *Hardin v. Union Tr. Co. of Philadelphia, Pa.*, C. C. A., 191 Fed. 152.

¹⁹ *Wheelwright v. St. Louis, N. O. & O. C. & T. Co.*, 50 Fed. 709, 711. But see *Erwin v. Lowry*, 7 How. 172, 12 L. ed.

²⁰ *Porter v. Sabin*, 149 U. S. 473, 37 L. ed. 815.

²¹ *Metropolitan Trust Co. v. Lake Cities El. Ry. Co.*, 100 Fed. 897. *Infra*, § 314.

²² *Oishei v. Pennsylvania R. R. Co.*, 101 App. Div. (N. Y.) 473.

²³ *Benjamin v. Brooklyn Union El. R. Co.*, 120 Fed. 428.

²⁴ *U. S. v. Eisenbeis*, C. C. A., 112 Fed. 190.

between the same parties for the same property, brought in a Federal court by the applicant for the writ;²⁵ that the pendency in the State court, of an action of ejectment, does not prevent a suit in the Federal court, by the defendant against the plaintiff, to quiet the title to the same land;²⁶ nor an action *in personam* between the same parties involving the same issues, provided that the property is not seized therein.²⁷

It has been held that the pendency of a suit in a Federal court to foreclose a lien upon timber on certain lands does not prevent an attachment upon the same timber in a subsequent action at law in the State court for a breach of another contract for the sale of part of the same;²⁸ that property seized and sold by an internal revenue collector, under the statutes of the United States, cannot be replevied from the purchasers by the former owner, under process from the State court, since the remedy for a wrongful seizure, given by the statute, is exclusive.²⁹

Property in the possession of a statutory receiver, not appointed by the court, such as a receiver of a national bank appointed by a Comptroller of the Currency, is not considered to be in the court's custody.³⁰

Property is deemed to be in the custody of the court from the time when a suit or action seeking to have it placed there has been begun; either by the levy of a writ in a proceeding *in rem*;³¹ or in the nature of a suit *in rem*³² or by the filing of

²⁵ *Lamar v. Spalding*, C. C. A., 154 Fed. 27.

²⁶ *North Carolina Mining Co. v. Westfeldt*, 151 Fed. 290. Where in an action of ejectment in a State court defendants filed a counter-claim alleging that they were in possession and praying a determination of conflicting claims in accordance with the State statutes (Revised N. C. 1905, § 1589), it was held that complainant could not subsequently sue in equity in the Federal courts for similar relief. *Westfeldt v. North Carolina Min. Co.*, C. C. A., 166 Fed. 706.

²⁷ *Rejall v. Greenhood*, 60 Fed. 784; *Merritt v. American S. B. Co.*,

79 Fed. 228; *Copeland v. Bruning*, C. C. A., 127 Fed. 550. *Infra*, § 57. *Cf. Huntington v. Laidley*, 176 U. S. 668, 44 L. ed. 630. But see *infra*, § 177.

²⁸ *Nelson v. Camp*, C. C. A., 191 Fed. 712.

²⁹ *Allen v. Sheridan*, 145 Fed. 963.

³⁰ *In re Chetwood*, 165 U. S. 443, 41 L. ed. 782.

³¹ *Taylor v. Carryl*, 20 How. 583, 15 L. ed. 1028; *Heidritter v. Elizabeth Oil-cloth Co.*, 112 U. S. 294, 28 L. ed. 729; *U. S. v. Eisenbeis*, C. C. A., 112 Fed. 190.

³² *Sharp v. Bonham*, 213 Fed. 660, (a suit between the representative of two religious societies to

a bill praying the appointment of a receiver;³³ or by the filing of a bill for the distribution of the assets of a corporation;³⁴ or, it has been held, by the issue of a restraining order upon the tendering of a bill for filing, upon notice to the defendants, although, because of the absence of some of them, leave to file was not granted until subsequent to the institution of a suit in the State court;³⁵ or by an adjudication in bankruptcy.³⁶

But it has been held that, except in the case of bankruptcy, this doctrine does not apply when the issues and the subject matter of the two suits are different and actual possession has not been taken before the institution of the second suit.³⁷

It has been held that the issue of a writ of attachment by the Federal Court in an action *in personam* and its filing as a lien against the defendant's property does not prevent the State Court from appointing a receiver of the same property in a suit by a person nor in privity with the Federal Action.³⁸ It has been held: that, when no actual possession has been taken, property is not put into the exclusive custody of the State Court by the institution of a suit to establish and enforce a lien thereupon, when no actual possession has been taken;³⁹ nor by the filing of

determine the right to the use of a church held by trustees who were made defendants). *Amusement Syndicate Co. v. El Paso Land Imp. Co.*, 251 Fed. 345, (a suit to compel the removal of part of a building when a suit in the State Court for the same purposes by substantially the same parties had previously been instituted).

³³ *Farmers' L. & T. Co. v. Lake St. El. R. Co.*, 177 U. S. 51, 44 L. ed. 667. *Cf. Humane Bit Co. v. Barnet*, 117 Fed. 316; *McKinney v. London*, C. C. A., 209 Fed. 300.

³⁴ *Louisville T. Co. v. Knott*, C. C. A., 130 Fed. 820.

³⁵ *St. Louis & S. F. R. Co. v. Hadley*, 155 Fed. 220.

³⁶ *White v. Schloerb*, 178 U. S. 542, 44 L. ed. 1183.

³⁷ *Empire Trust Co. v. Brooks*, C. C. A., 232 Fed. 641. *Contra, McKin-*

ney v. Kansas Natural Gas Co., 206 Fed. 772; *Central Dist. Print. & Tel. Co. v. Farmers & P. Nat. Bank*, C. C. A., 255 Fed. 59.

³⁸ *Pac. Coast Pipe Co. v. Conrad City Water Co.*, 237 Fed. 673.

³⁹ *Compton v. Jesup*, 68 Fed. 263, 283; *Morrill v. Am. Reserve Bond Co.*, 151 Fed. 305; *Jackson v. Parkersburg & O. V. Ry. Co.*, 233 Fed. 784. See *Jacob Tome Institute v. Whitecomb*, C. C. A., 160 Fed. 835. See *Rodgers v. Pitt*, 96 Fed. 668, 673. But where the State courts had held that, under its statutes, the filing of a petition was the institution of the suit, it was held that the filing of a petition for partition precluded a subsequent suit in the Federal court prior to the service of process. *Mound City Co. v. Castleman*, C. C. A., 187 Fed. 921, affirming 177 Fed. 510.

a bill, which does not pray for a receiver, when a receiver is appointed by another court before the first court is asked to make such an appointment.⁴⁰ The Federal Court acquires no exclusive jurisdiction over the property by the issue of a summons when the suit in the State Court is begun before the bill in equity is filed.⁴¹

In personal actions, the priority of a suit is ordinarily determined by the time when the parties are served with process and not by the date of the filing of any papers in the same.⁴²

Property continues in the custody of a court until the cause is practically terminated, or the custody finally abandoned; although, it has been held, that a formal order of termination is not indispensable.⁴³ When a receiver, appointed by a Federal court, has been discharged upon the filing of a bond by a defendant, the Federal court abandons its custody of the property and a State court may appoint a receiver thereof;⁴⁴ and it is improper for the District Court of the United States to vacate its order of discharge and claim possession by virtue of its prior receivership;⁴⁵ but where, before a receiver appointed by a State court had taken possession, an appeal accompanied by a *supersedeas* staying proceedings was taken from a State court of review, which subsequently affirmed the order, a receiver appointed by a Federal court pending the appeal was directed to surrender his possession to the State receiver.⁴⁶ The discharge of a Federal receivership, before the appointment of a State receiver, was held to validate the latter; although made in a suit sustained

⁴⁰ Knott v. Evening Post Co., 124 Fed. 342. See Empire Trust Co. v. Brooks, C. C. A., 232 Fed. 641.

⁴¹ Waldo v. Wilson, C. C. A., 231 Fed. 654, reversing 221 Fed. 505.

⁴² Benoist v. Smith, 191 Fed. 514.

⁴³ Buck v. Piedmont & A. L. Ins. Co., 4 Fed. 849; Andrews v. Smith, 5 Fed. 833; Lake Nat. Bank v. Wolfeborough Sav. Bank, C. C. A., 78 Fed. 517; Foster v. Lebanon Springs R. Co., 100 Fed. 543, but see Shields v. Coleman, 157 U. S. 168, 181, 39 L. ed. 660, 665; Mis-

souri Pac. R. Co. v. Fitzgerald, 160 U. S. 556, 40 L. ed. 536.

⁴⁴ Shields v. Coleman, 157 U. S. 168, 39 L. ed. 660. But see Union Trust Co. v. Rockford, R. I. & St. L. R. Co., 6 Biss. 197; § 55, *infra*.

⁴⁵ Shields v. Coleman, 157 U. S. 168, 39 L. ed. 660. But see Union Trust Co. v. Rockford, R. I. & St. L. R. Co., 6 Biss. 197, § 55, *infra*.

⁴⁶ Texas v. Palmer, C. C. A., 22 L.R.A. (N.S.) 316, 158 Fed. 705; *aff'd*. Palmer v. Texas, 212 U. S. 118.

during the pendency of the Federal receivership.⁴⁷ It has been held that a State sheriff may seize property while still in the possession of the United States marshal, after an order by the Federal court directing its return to its owner.⁴⁸

Where the Federal court, in its decree of foreclosure and sale, reserved, for future adjudication, all questions arising under the pleadings or proceedings not therein disposed of or determined; it was held, that a State court had no power to establish, or to foreclose, a lien upon the property in the hands of a purchaser at the foreclosure sale.⁴⁹ But not when there is no such reservation; even, it has been held, when the decree required the purchaser to assume the obligation that the lien secured.⁵⁰ It has been held that a State court may take jurisdiction of a suit against the purchaser at a foreclosure sale, to enforce his liability to pay a debt of the mortgagor, which he assumed as part of the consideration.⁵¹ It has been held that comity requires a State court to be bound by the Federal court's determination, as to when the latter's possession and control of property, of which it first acquired jurisdiction, ceases.⁵²

This doctrine does not prevent the filing of a bill to set aside.⁵³ or stay,⁵⁴ proceedings under a judgment or decree of a State court; nor, it has been held, a bill to enforce a decree of a State court pending an appeal therefrom which does not operate as a *supersedeas*; ⁵⁵ nor does the doctrine apply to a case where the

⁴⁷ *Liggett v. Glenn*, 51 Fed. 381.

⁴⁸ *Daniels v. Lazarus*, 665 Fed. 718; *Lazarus v. McCarthy*, 32 N. Y. Supp. 833. But see *infra*, § 56.

⁴⁹ *Wabash Railroad Co. v. Adelbert College*, 208 U. S. 38, 52, L. ed. 379; s. c., 208 U. S. 609, 52 L. ed. 642; *Fidelity Insurance Trust & Safe-Deposit Co. v. Norfolk & W. R. Co.*, 88 Fed. 815; *Taylor v. Norfolk & O. V. Ry Co.*, C. C. A., 162 Fed. 452; *Lang v. Choctaw, Oklahoma & Gulf R. Co.*, C. C. A., 160 Fed. 355.

⁵⁰ *Tr. Co. of America v. Norfolk & S. Ry. Co.*, 183 Fed. 803.

⁵¹ *Guardian Trust Co. v. Kansas City Southern Ry Co.*, C. C. A., 146 Fed. 337. But see *Fidelity*

Insurance, Trust & Safe-Deposit Co. v. Norfolk & W. R. Co., 88 Fed. 815.

⁵² *Swinerton v. Oregon Pac. R. Co.*, 123 Cal. 417, 56 Pac. 40. So held of a Federal court, *Hall v. Ames*, 182 Fed. 1008.

⁵³ *Gaines v. Fuentes*, 92 U. S. 10, 23 L. ed. 524, *Barrow v. Hunt*.

⁵⁴ *Kern v. Huidekoper*, 103 U. S. 485, 491, 26 L. ed. 354, 356, 357; *In re Iowa & Minnesota Construction Co.*, 10 Fed. 401. But see *Central Nat. Bank v. Stevens*, 169 U. S. 432, 42 L. ed. 807; *Cornue v. Ingersoll*, C. C. A., 176 Fed. 194.

⁵⁵ *Baltimore & O. R. Co. v. Wabash R Co.*, C. C. A., 119 Fed. 678.

Federal courts exercise superior jurisdiction for the purpose of enforcing the supremacy of the Constitution and laws of the United States.⁵⁶ Where a Federal court has appointed a receiver, in a case where a receiver was previously appointed by a State court, the proper remedy is an application by the State receiver, to the Federal court, for the delivery of the possession of the property to the applicant.⁵⁷ It has been said that where a State court has, by proper process, secured the custody or dominion of specific property, which it is one of the objects of a subsequent suit in the Federal court between the same parties to subject to its decree, the latter suit should not be stayed or dismissed, but should proceed as far as may be without creating a conflict concerning the possession or disposition of the property, and that then, if need be, it shall be stayed until the proceedings in the State court have been completed or the time for their termination has elapsed.⁵⁸ The doctrine does not apply to a case where the State Court is acting in an administrative and not in a judicial capacity, such as proceedings in a county court directing the presentation of county warrants for redemption, cancellation, reissue, or classification.⁵⁹

§ 53. Property covered by insolvent assignments. It has been held: that the possession of an assignee appointed by an insolvent in a voluntary assignment is not the possession of a State court, although in pursuance of a State statute he has filed a bond and a petition for the settlement of his accounts, praying also for instructions concerning his administration, and that the Federal court consequently could appoint a receiver of property thus assigned; ¹ that where a State court has, by docket-

⁵⁶ *Tefft v. Sterberg*, 40 Fed. 2, 6, per *Speer, J.*, citing *Covell v. Heyman*, 111 U. S. 176, 28 L. ed. 390. But see *infra*, § 59.

⁵⁷ *Texas v. Palmer*, C. C. A., 22 L.R.A. (N.S.) 316, 158 Fed. 705; *aff'd Palmer v. Texas*, 212 U. S. 118; *Waters-P. S. Oil Co. v. Texas*, 47 Tex. Civ. App. 162, 103 S. W. 836; *State v. Port Royal & Augusta R. R. Co.*, 45 S. C. 470, 23 S. E. 363; *People v. New York City Ry. Co.*, 57 Misc. (N. Y.) 114.

⁵⁸ *Mound City Co. v. Castleman*, C. C. A., 187 Fed. 921.

⁵⁹ *Falls City Const. Co. v. Monroe County*, 208 Fed. 482.

§ 53. ¹ *Powers et al. v. Blue Grass B. & L. Ass'n* 86 Fed. 705; under Kentucky statute; *Watson v. Bettman*, 88 Fed. 825; under New York statute. *Cf. Adler v. Ecker*, 2 Fed. 126; *The James Roy*, 59 Fed. 784; *George T. Smith, Co., Co. v. McGroarty*, 136 U. S. 237; *Swofford Bros. D. G. Co. v. Mills*, 86 Fed.

ing the proceeding, taken possession of property covered by an insolvent's assignment, a Federal court may entertain a bill to establish a claim against it, but it may not attempt by process against the property to enforce such claim after it has been established,² nor appoint a receiver,³ and that a vessel in the possession of an assignee, appointed by a voluntary assignment under the insolvent law of Minnesota, cannot be taken from him by a marshal of the United States upon a libel *in rem* to enforce a claim against the insolvent.⁴ Where a State statute provided, that, on the making by a judgment debtor of a general assignment for the benefit of creditors within ten days after the levy of an execution on his property, such levy should be dissolved and the property turned over to the assignee; it was held to apply to a levy under a judgment of the Circuit Court of the United States, and that the assignee might apply to the Federal court for the release of the levy by a proceeding in the nature of a supplemental bill in equity.⁵ Where the trustee, under an insolvent assignment, had failed to claim property until after a levy thereupon under a judgment of the Federal court; on his intervention in the Circuit Court of the United States, a decree was entered setting aside the levy, upon his payment of the costs thereof and filing an order of the State court authorizing him to take possession.⁶

§ 54. Property in the custody of State courts of probate.

A Federal court cannot direct the distribution of all the assets held by an executor or administrator, at least so far as to affect the rights of the creditors, legatees or next of kin, who are citizens of the same State as the defendants, and who have no right to seek the Federal jurisdiction.¹ It has been held that a Federal

556; under Wyoming statute, sustaining an attachment by the Federal court; *Peale v. Phipps*, 14 How. 368, 14 L. ed. 459. *Contra*, *Val. Blatz Brewing Co. v. Walsh*, 84 Fed. 5; under Minnesota statute.

² *Edwards v. Hill*, C. C. A., 59 Fed. 723, 726; under Kansas statute.

³ *Geilinger v. Philippi*, 133 U. S. 246, 257, 33 L. ed. 614, 617; under

Louisiana statute; *Val. Blatz Brewing Co. v. Walsh*, 84 Fed. 5; under Minnesota statute.

⁴ *The J. G. Chapman*, 62 Fed. 939.

⁵ *Broehon v. Wilson*, C. C. A., 91 Fed. 617; under Wisconsin statute.

⁶ *Geilinger v. Philippi*, 133 U. S. 246, 257, 33 L. ed. 614, 617; under Louisiana statute.

§ 54. ¹ *Byers v. McAuley*, 149 U. S. 608, 47 L. ed. 867. *Cf. Hale v.*

court of equity cannot entertain a bill by a legatee, to compel an accounting by the surviving partner, and a payment of the balance due by him to the executors for distribution, when the executors and the survivor are citizens of the same state;² unless an executor is the surviving partner.³ Nor issue an execution against the estate of a decedent;⁴ nor compel the repayment, by a legatee, of a surcharge which he has received under a decision of a State orphans' court;⁵ nor entertain a bill to set aside a sale of stocks, made by executors, and to take the proceeds out of their possession;⁶ nor a bill by an unsecured creditor, even a judgment creditor,⁷ to compel a general accounting by the executor and a distribution of the estate;⁸ nor it has been held a bill to compel any accounting by the executor when a previous suit or proceeding for such an accounting is pending in the State court⁹ although the latter complainant was not a party to such former suit or proceeding;¹⁰ nor to compel an executor to file a bond,¹¹ nor to require him to deliver funds to an administrator appointed in another State;¹² nor, while the administration of the State court of probate is pending, a bill by the surviving husband of a decedent or his grantee against her administrator, to quiet the title to the husband's share of her separate estate;¹³ nor in the absence of fraud to set aside the orders of the State Court of Probate;¹⁴ nor a bill to prevent¹⁵ or to set aside the probate of a will,¹⁶ unless the State law authorizes such a bill

Tyler, 115 Fed. 833, 839; *Hastings v. Douglass*, 249 Fed. 378; *Smith v. Jennings*, C. C. A., 238 Fed. 49.

² *Moore v. Fidelity Trust Co.*, 134 Fed. 489; s. c., C. C. A., 138 Fed. 1.

³ *Am. Baptist Home Mission Society v. Stewart*, 192 Fed. 976.

⁴ *Williams v. Benedict*, 8 How. 107, 112, 12 L. ed. 1007, 1008; *Yonley v. Lavender*, 21 Wall. 276, 22 L. ed. 536.

⁵ *Chandler v. Pomeroy*, 87 Fed. 262, 266.

⁶ *Jordan v. Taylor*, 98 Fed. 643.

⁷ *Johnson v. Johnson*, 225 Fed. 413.

⁸ *Byers v. McCauley*, 149 U. S. 609, 13 Sup. Ct. 906, 37 L. ed. 867;

McCauley v. McCauley, 202 Fed. 280.

⁹ *McCauley v. McCauley*, 202 Fed. 280.

¹⁰ *Thiel Detective Service Co. v. McClure*, 130 Fed. 55.

¹¹ *Field v. Camp*, 193 Fed. 160.

¹² *Watkins v. Eaton*, C. C. A., 183 Fed. 384.

¹³ *Thorpe v. Sampson*, 84 Fed. 63.

¹⁴ *Northrup v. Browne*, C. C. A., 204 Fed. 224.

¹⁵ *Miller v. Weston*, C. C. A., 199 Fed. 104.

¹⁶ *Ellis v. Davis*, 109 U. S. 485, 27 L. ed. 1006; *Farrell v. O'Brien*, 199 U. S. 89, 110, 50 L. ed. 101, 111. It has been held that this can-

to be filed in a proceeding *inter partes*, which is not a mere continuation of the probate proceedings.¹⁷

In proper cases, the Federal Courts have jurisdiction over suits for the partition of the real estate of a deceased ancestor,¹⁸ for the construction of a will,¹⁹ or for the appointment of a receiver to protect the estate of a decedent until a temporary or permanent administrator or executor has received letters from the Court of Probate.²⁰ But not after temporary administrators have been appointed although it is contended that such appointment was fraudulent and illegal.²¹

The Federal Courts have jurisdiction in proper cases to de-

not be done under the California statute, *Stead v. Curtis*, C. C. A., 191 Fed. 529; nor under the Maine statute, *Thompson v. Nichols*, 254 Fed. 973; nor under the Missouri statute, *Oakley v. Taylor*, 64 Fed. 245; nor under the Washington statute, *Farrell v. O'Brien*, 199 U. S. 89, 110, 50 L. ed. 101, 111; nor under the Texan statute, *Sutton v. English*, 246 U. S. 199. The orders and judgments of probate courts in the due and orderly administration of estates are conclusive upon the Federal courts. *Johnson v. Waters*, 111 U. S. 640, 667, 4 Sup. Ct. 619, 28 L. ed. 547; *Newberry v. Wilkinson*, C. C. A., 199 Fed. 673, 680. Where the probate court at the place of domicile of the testatrix admitted to probate a will, but rejected a codicil for want of testamentary capacity, it was held that this decision must be followed by the Federal court in the Northern District of New York, although a Surrogate's Court of New York had admitted the codicil to probate. *Higgins v. Eaton*, C. C. A., 183 Fed. 388, reversing 178 Fed. 153, 254 Fed. 973, where it was contended that the probate proceedings had not been due process of law.

¹⁷ *Broderick's Will*, 21 Wall. 503, 519, 22 L. ed. 599, 605; *Williams v. Crabb*, C. C. A., 59 L.R.A. 425, 117 Fed. 193, 204 (Illinois statute); *Wart v. Wart*, 117 Fed. 766 (Iowa statute); *Pulver v. Leonard*, 176 Fed. 586 (Minnesota statute); *Sawyer v. White*, C. C. A., 122 Fed. 223 (Missouri statute); *McDermott v. Hannon*, 203 Fed. 1015 (New York statute); *Richardson v. Green*, C. C. A., 61 Fed. 423; s. c., 159 U. S. 264, 40 L. ed. 142 (Oregon statute). See *infra*, § 82.

¹⁸ *Hastings v. Douglass*, 249 Fed. 378; *Sutton v. English*, 246 U. S. 199, 207.

¹⁹ *Byers v. McAuley*, 149 U. S. 608, 37 L. ed. 867; *Toms v. Owen*, 52 Fed. 417; *Wood v. Paine*, 66 Fed. 807; *Waterman v. Canal-Louisiana Bank & T. Co.*, 215 U. S. 33, 54 L. ed. 80; *Spencer v. Watkins*, C. C. A., 169 Fed. 379; *McClelland v. Rose*, C. C. A., 247 Fed. 721. See *Sutton v. English*, 246 U. S. 199, 207.

²⁰ *Underground El. Rys. Co. v. Owsley*, 169 Fed. 67, aff'd C. C. A., 176 Fed. 26. See *infra*, § 302.

²¹ *Smith v. Jennings*, C. C. A., 238 Fed. 49, reversing 232 Fed. 921.

cide questions relating to the interests of heirs, devisees or legatees, in trusts, which may be determined without interfering with probate or assuming a general administration.²² Where a State court of probate had established the right of a devisee to land in another State it was held that the courts of the latter State could not recognize the right of a public administrator there appointed to any part of such land.²³ After a State court of probate has begun the administration of the assets of a decedent, a Federal court may establish a debt against the estate,²⁴ and direct the payment, by the personal representative or his sureties, of such debt,²⁵ or of a legacy, or of a distributive share;²⁶ or determine the rights of a devisee²⁷ establish a claim that he might have made in the probate court²⁸ when the case concerning which he seeks relief is not then pending in the Surrogates' Court;²⁹ and it may thus or otherwise adjudicate upon the construction of a will,³⁰ and compel an accounting by an executor or administrator;³¹ although the court, after declaring

²² *Sutton v. English*, 246 U. S. 199, 205.

²³ *Slater v. Thompson*, C. C. A., 255 Fed. 768.

²⁴ *Yonley v. Lavender*, 21 Wall. 276, 22 L. ed. 536; *Hess v. Reynolds*, 113 U. S. 73, 28 L. ed. 927; *Schurmeier v. Connecticut Mut. Life Ins. Co.*, C. C. A., 171 Fed. 1.

²⁵ *Yonley v. Lavender*, 21 Wall. 276, 22 L. ed. 536; *Hess v. Reynolds*, 113 U. S. 73, 28 L. ed. 927. See also *Erwin v. Lowry*, 7 How. 172, 12 L. ed. 655.

²⁶ *Payne v. Hook*, 7 Wall. 425, 19 L. ed. 260; *Byers v. McAuley*, 149 U. S. 608, 37 L. ed. 867; *Brendel v. Charch*, 82 Fed. 262; *Waterman v. Canal-Louisiana Bank & Tr. Co.*, 215 U. S. 33, 54 L. ed. 80; *Pulver v. Leonard*, 176 Fed. 586; *Order of St. Benedict of New Jersey v. Steinhäuser*, 179 Fed. 137; *Higgins v. Eaton*, C. C. A., 183 Fed. 388, reversing 178 Fed. 153; *Am. Baptist Home Mission Society v. Stewart*,

192 Fed. 976; *Fraser v. Cole*, C. C. A., 214 Fed. 556; *Maling v. Maling*, 217 Fed. 127; *Jennings v. Smith*, 242 Fed. 561. As to the effect upon such a proceeding of a previous intervention in the State court by the State claiming an *escheat*. *McClellan v. Carland*, 217 U. S. 268, 54 L. ed. 762; *S. C., C. C. A.*, 187 Fed. 915. See, also, *Barker v. Eastman*, 192 Fed. 659.

²⁷ *Swann v. Austell*, 253 Fed. 807.

²⁸ *McPherson v. Mississippi Valley Tr. Co.*, C. C. A., 122 Fed. 367.

²⁹ *McCauley v. McCauley*, 202 Fed. 280.

³⁰ *Byers v. McAuley*, 149 U. S. 608, 37 L. ed. 867; *Toms v. Owen*, 52 Fed. 417; *Wood v. Paine*, 66 Fed. 807; *Waterman v. Canal-Louisiana Bank & T. Co.*, 215 U. S. 33, 54 L. ed. 80; *Spencer v. Watkins*, C. C. A., 169 Fed. 379.

³¹ *Payne v. Hook*, 7 Wall. 425, 19 L. ed. 260; *Hale v. Tyler*, 115 Fed. 833, 839. See *Comstock v. Herron*,

the rights of the parties by its decree, may refuse to take jurisdiction of an accounting and leave that matter to be determined by the appropriate State tribunal.³² It may entertain a bill in equity against testamentary trustees for an accounting, after the administration of the personal estate by the executors has been terminated, although the State statute gives the probate court jurisdiction over the accounts of testamentary trustees; provided that the suit in the Federal court was begun prior to an application to the probate court for an account.³³ Where the probate court has no jurisdiction to determine the validity of the assignment of a share of the estate, the Federal court has in a proper case jurisdiction to decide that question and establish the rights of an assignee by a decree which should be recognized and enforced by the court of probate.³⁴ In such a suit, the Federal court may direct a final distribution and settlement of the trust.³⁵ The Federal court may remove a testamentary trustee.³⁶ The Federal court has jurisdiction of a suit by the beneficiary of a trust for an accounting by a trustee although during his minority which has terminated his guardian has brought a suit to remove the trust estate from the possession of the trustee into another jurisdiction the questions in which have become moot because of the termination of the trust upon the majority of the beneficiary.³⁷

It has been held that the Federal court may fix the compensation of the trustees; and that it is not bound by orders of the State probate court fixing such compensation, which were made after the bill in the Federal court was filed.³⁸ It has been held: that a Federal court may entertain a bill in equity; to decree that an administrator or other person who has obtained property through a decree of a State court of probate fraudulent-

55 Fed. 803. *Newberry v. Wilkin-*
son, C. C. A., 199 Fed. 673. A Fed-
eral court may take jurisdiction of
a suit by the foreign guardian of an
incompetent to compel an account-
ing by a guardian residing within
the district. *Pulver v. Leonard*, 176
Fed. 586.

³² *Crocker v. Oakes*, 117 Fed. 363.

³³ *Herron v. Comstock*, C. C. A.,
139 Fed. 370.

³⁴ *Gatzert v. Lucey*, 218 Fed. 395.

³⁵ *Herron v. Comstock*, C. C. A.,
139 Fed. 370.

³⁶ *Davis Trs. Co. v. Smith*, 226
Fed. 410.

³⁷ *Harrison v. Washington Loan*
& Tr. Co., Ct. App., D. C., 258 Fed.
273.

³⁸ *Herron v. Comstock*, C. C. A.,
139 Fed. 370; *Brown v. Fletcher*,
C. C. A., 231 Fed. 91.

ly obtained holds the same as trustee for the parties truly interested.³⁹ To surcharge, correct and set aside, a settlement of the accounts of administrators, which has been confirmed by a decree of the proper State court; ⁴⁰ to set aside a fraudulent transfer of property, made by an administratrix with the sanction of the State probate court; ⁴¹ to set aside a fraudulent sale of land, made by the decedent in his lifetime, although the State probate court has authority to grant a license, at least where the complainant does not seek to sell the same, and thus authorize the administrator to bring a suit for the same purpose, when no such license was granted previous to the filing of the bill; ⁴² to set aside a release obtained by an administrator or guardian by fraud; ⁴³ to set aside an election obtained from a widow through fraud; ⁴⁴ it has been suggested, to set aside a judgment of the State court of probate obtained by fraud; ⁴⁵ at the suit of a creditor to enjoin an administrator from paying over the money, or distributing the property of the estate, to others joined with him as parties defendant, although the Federal court cannot ascertain the amount of unpaid claims nor whether the estate is in a condition for final distribution; ⁴⁶ to enjoin an ancillary administrator from transmitting the assets to the court of original administration until a claim of a creditor has been determined; ⁴⁷ after the determination by the State court is complete, to subject to the payment of a debt of the decedent, property in the hands of a distributee; ⁴⁸ a bill to enforce an attachment on the estate of the decedent, levied by the Federal court before his death, when the State statute authorizes attachments and executions to be levied upon equitable interests in real estate; ⁴⁹ to sell land for the benefit of a creditor of the estate, when the administratrix

³⁹ *Diamond v. Connolly*, C. C. A., 251 Fed. 234.

⁴⁰ *Bertha Zinc & Mineral Co. v. Vaughn*, 88 Fed. 566; *Diamond v. Connolly*, C. C. A., 251 Fed. 234. *Contra*, *Northrup v. Browne*, C. C. A., 204 Fed. 224.

⁴¹ *Central Nat. Bank v. Fitzgerald*, 94 Fed. 16.

⁴² *Hale v. Tyler*, 115 Fed. 833.

⁴³ *Pulver v. Leonard*, 176 Fed. 586.

⁴⁴ *Eddy v. Eddy*, C. C. A., 168 Fed. 590.

⁴⁵ *Sutton v. English*, 246 U. S. 199, 207; *Broderick's Will*, 21 Wallace, 503, 519, 22 L. ed. 599, 605. But see *Smith v. Jennings*, C. C. A., 238 Fed. 48.

⁴⁶ *Davis v. Davis*, 89 Fed. 532.

⁴⁷ *Ingersoll v. Coram*, 132 Fed. 168, 172; *aff'd* 211 U. S. 335.

⁴⁸ *Hale v. Coffin*, 114 Fed. 567.

⁴⁹ *Lant v. Manley*, C. C. A., 75

refuses to institute a proceeding for that purpose in the proper State court under statutory authority, although the administration is still pending in the State court undetermined;⁵⁰ to compel specific performance, by the heirs and administrators, of a contract by the decedent in relation to property of the decedent, which is in the process of administration in the State court;⁵¹ to compel an executor to pay an assessment levied after the decedent's death upon national bank stock, which he holds;⁵² to appoint a receiver of the decedent's assets within the district, where the executors disagree and can not act together;⁵³ and when no temporary administrator has been appointed, pending a conflict in the court of probate concerning the right to administration.⁵⁴ The occupation of land therein included by the widow after her quarantine has expired under a claim of title by devise does not take away such jurisdiction.⁵⁵ At the suit of a minority stockholder, to enjoin one of two executors from voting upon a majority of the stock in the corporation pending litigation in the State court, which has enjoined the other executor from voting thereupon.⁵⁶

The property of a debtor taken into the custody of a Federal Court by seizure under process issued under its judgment remains under its control to be applied in satisfaction thereof, notwithstanding the death or insolvency of the judgment debtor and the institution of proceedings in a State court to administer his estate, and irrespective of subsequent State legislation.⁵⁷

Fed. 627. See *Lant v. Kinne*, C. C. A., 75 Fed. 636.

⁵⁰ *Brun v. Mann*, C. C. A., 12 L.R.A. (N.S.) 154, 151 Fed. 145.

⁵¹ *Davis v. Davis*, 89 Fed. 532.

⁵² *In re Connaway*, 178 U. S. 421, 44 L. ed. 1134; *Wickham v. Hull*, 60 Fed. 326; *Brown v. Ellis*, 86 Fed. 357.

⁵³ *Ball v. Topkins*, 41 Fed. 486. See *infra*, § 302.

⁵⁴ *Underground El. Rys. Co. of London v. Owsley*, 169 Fed. 671; s. c., C. C. A., 176 Fed. 26.

⁵⁵ *Underground El. Rys. Co. of London v. Owsley*, 169 Fed. 671; s. c., C. C. A., 176 Fed. 26.

⁵⁶ *Villamil v. Hirsch*, 138 Fed. 690. As a condition of granting the injunction, the court enjoined the holding of a stockholders' meeting until the dispute between the executors had been decided by the State court. *Villamil v. Hirsch*, 143 Fed. 654.

⁵⁷ *Rio Grande R. Co. v. Gomila*, 132 U. S. 478, 481, 33 L. ed. 400, 401; *Leadville Coal Co. v. McCreery*, 141 U. S. 475, 35 L. ed. 824; *Straine v. Bradford Sav. B. & T. Co.*, 88 Fed. 571; *Johnston v. Johnston*, 225 Fed. 413.

§ 55. Property in the custody of receivers. The appointment of a receiver by a court,¹ or the filing therein, of a bill praying for the appointment of a receiver² or perhaps the presentment to the court, of a bill praying a receiver and the issue of a restraining order or other order thereupon,³ prevents the appointment of a receiver of the same property by a court of coördinate jurisdiction; except perhaps when the first suit is brought by creditors, secured or unsecured, or stockholders, and the second is instituted for the dissolution of the corporation, which is not prayed in the first suit.

In such a case, it has been held that the prior appointment of a receiver by the Federal court will not prevent the appointment of one for the same property by the State court, in an action to dissolve the corporation; but that such receiver should apply to the Federal court for the return of the property to him.⁴

Upon such an application the Federal Court cannot review the findings of the State Court which are based on evidence, but is

§ 55. ¹ *Shields v. Coleman*, 157 U. S. 168, 39 L. ed. 660; *Texas v. Palmer*, C. C. A., 22 L.R.A. (N.S.) 316, 158 Fed. 705, aff'd *Palmer v. Texas*, 212 U. S. 118; *Garner v. Southern Mut. Building & Loan Ass'n*, C. C. A., 84 Fed. 3, 28 C. C. A. 381; *Lancaster v. Asheville St. Ry. Co.*, 90 Fed. 129; *Sullivan v. Algrem*, C. C. A., 160 Fed. 366; *Stirling v. Seattle, R. & S. Ry. Co.*, 198 Fed. 913; *Re Lasserot* C. C. A., 240 Fed. 325.

² *Farmers' Loan & Tr. Co. v. Lake Street El. R. Co.*, 177 U. S. 51, 44 L. ed. 667; *Appleton Water Works Co. v. Central Trust Co.*, C. C. A., 93 Fed. 286; *Holland Trust Co. v. International Bridge & Tramway Co.*, C. C. A., 85 Fed. 865. See *Palestine Water & Power Co. v. Palestine*, 91 Tex. 540, 44 S. W. 814, 40 L. R. A. 203; affirming 41 S. W. 659. *Contra*, *De La Vergue Refrigerating Mach. Co. v. Palmetto Brewing Co.*, 72 Fed. 579; where the Federal court appointed a receiver in a

foreclosure suit, after a rule to show cause in a State court why a receiver should not be appointed upon a stockholders' bill, and refused to deliver the property to the receiver subsequently appointed by the State court.

³ *St. Louis & S. F. R. Co. v. Hadley*, 155 Fed. 220; *O'Neil v. Welch*, C. C. A., 245 Fed. 261, reversing *Welch v. Union Casualty Ins. Co.*, 238 Fed. 968.

⁴ *State v. Port Royal & Augusta R. Co.*, 45 S. C. 470, 23 S. S. 363, 386; *Louisville, New Albany & Chicago R. R. Co. v. Cauble*, 46 Ind. 277, 280; *People v. New York City Ry Co.*, 57 Misc. (N. Y.) 114; *People v. Hasbrouck*, 57 Misc. (N. Y.) 130; *St. Louis Car Co. v. Stillwater R. Co.*, 53 Minn. 129. See *City Water Co. v. Texas*, 88 Tex. 600, 604; *Alderson Receivers*, § 20. See *Kansas City Pipe Line Co. v. Fidelity Title & Tr. Co.*, C. C. A., 217 Fed. 187.

limited to a consideration of the question of priority of jurisdiction.⁵ Such an application by temporary receivers appointed in a dissolution suit, was denied, without prejudice to its renewal in case their appointment should be made permanent.⁶

The fact that the first receivership was based upon the fraud of officers and directors and the second application upon the ground of insolvency, does not affect the rule.⁷ But it has been held that this doctrine does not apply when the actions are based upon different subject matters and different issues are therein raised, and the court in which suit first was brought has appointed no receiver before the second court has appointed a receiver who has taken possession.⁸ It has been said that the doctrine does not apply where the record shows that the first appointment was beyond the jurisdiction of the court, but that it does apply even if the first appointment was attained by fraud.⁹

It has been held that a receiver appointed by a Federal court of equity will not be ordered to take possession of property, upon which a State court has levied an attachment,¹⁰ or other process,¹¹ before his appointment was prayed. Where a State court had attached a debt, before the court of another State had appointed the receiver of the creditor, the Federal court directed that judgment be entered against the receiver in an action by him to collect the debt, unless he should consent to a stay of proceedings until the State court had acted upon the matter.¹²

⁵ *McKinney v. Landon*, U. C. A., 209 Fed. 300. See *Pac. Const. Pipe Co. v. Conrad City Water Co.*, 237 Fed. 673.

⁶ *Pennsylvania Steel Co. v. New York City Ry. Co.* (Lacombe, J., S. D. N. Y.), N. Y. L. J., February 4, 1908. But see *Robinson v. Mutual Reserve Life Ins. Co.*, 162 Fed. 794.

⁷ *Stirling v. Seattle, R. & S. Ry. Co.*, 198 Fed. 913.

⁸ *Empire Trust Co. v. Brooks*, C. C. A., 232 Fed. 41.

⁹ *Pac. Const. Pipe Co. v. Conrad City Water Co.* 237 Fed. 673.

¹⁰ *Southern B. & T. Co. v. Folsom*, C. C. A., 75 Fed. 929; *Hale v. Bugg*, 82 Fed. 33; *Dodds v. Palmer Moun-*

tain Tunnel Co., 188 Fed. 447. But see *Kansas City Pipe Line Co. v. Fidelity Title & Tr. Co.*, C. C. A., 217 Fed. 187. But see *Jackson v. Parkersburg & O. V. El. Ry. Co.*, 233 Fed. 784.

¹¹ *Lake Bisteneau Lumber Co. v. Mimms*, 22 So. 730, 49 La. Ann. 1283; *Knudsen v. First Trust & Savings Bank*, C. C. A., 245 Fed. 81.

¹² *Avery v. Boston Safe Deposit & Trust Co.*, 72 Fed. 700. See *Jackson v. Parkersburg & O. V. El. Ry. Co.*, 233 Fed. 784; *Pac. Const. Pipe Co. v. Conrad City Water Co.*, 237 Fed. 673.

It has been held that the entire property of a corporation is not in the custody of a court that has appointed a receiver over the assets of another corporation, which owns a majority of its stock and operates its railroad under a lease; and that consequently, a State court may appoint a receiver of the lessor, after the appointment by a Federal court of a receiver of the lessee and stockholder;¹³ but this rule will not apply if the Federal court has extended the receivership to the interest of the lessor in the property.¹⁴

A stipulation staying proceedings in the Federal court, after a motion for a receiver has been made, does not justify the subsequent appointment of a receiver by a State court.¹⁵ Where, after the appointment of a receiver, the Federal court accepted a bond in lieu of the property and discharged the receiver, it was held that the State court might appoint a receiver; and that the Federal court could not subsequently appoint another receiver of its own to take the property from the possession of the State receiver;¹⁶ but an appeal to a State court of review from the order appointing a receiver, and the filing of a *supersedeas* bond, which stays the proceedings, before the receiver has taken possession, does not authorize the appointment of a receiver by the Federal court; and such Federal receiver must surrender the property to the State receiver after the State order of appointment has been affirmed; although such appointment was in aid of a decree, an appeal from which, accompanied by a *supersedeas*, is still pending in the State court of review.¹⁷ It has been held: that the appointment by the Federal court of a receiver of the assets of a lessor does not oust the State court of jurisdiction to enjoin the directors from amending the lease;¹⁸ and that after the Federal court has acquired jurisdiction of a bill praying the

¹³ *Central R. & B. Co., v. Farmers' L. & Tr. Co.*, 56 Fed. 357.

¹⁴ *Re Metropolitan Railway Receivership*, 208 U. S. 90, 52 L. ed. 403.

¹⁵ *McKechney v. Weir*, C. C. A., 118 Fed. 805.

¹⁶ *Shields v. Coleman*, 157 U. S. 168, 39 L. ed. 660. But see *Interstate Ry Co. v. Philadelphia, B. & T. St. Ry. Co.*, 164 Fed. 770.

¹⁷ *Texas v. Palmer*, C. C. A., 22 L.R.A. (N.S.) 316, 158 Fed. 705; *aff'd. Palmer v. Texas*, 212 U. S. 118, 53 L. ed. 435; *Sullivan v. Algrem* C. C. A., 160 Fed. 366; *Stirling v. Seattle, R. & S. Ry Co.*, 198 Fed. 913.

¹⁸ *Guaranty Trust Co. v. Northern Chicago St. Ry. Co.*, C. C. A., 130 Fed. 801.

removal of the trustee of a corporate mortgage, the appointment of another and the appointment of a receiver of the mortgaged property pending the suit, the State court cannot entertain proceedings for the appointment of a new trustee in accordance with the deed of trust.¹⁹ After the appointment of a receiver and until the termination of his receivership, his removal or discharge, no court, but that which appointed him, except in cases of bankruptcy, can interfere with the property placed in his custody.²⁰ The unauthorized appearance of the Federal receiver in a State court does not divest the Federal court of its exclusive jurisdiction in this respect.²¹

A receiver appointed by a State court cannot, except possibly in a suit for the infringement of a patent, be sued without the permission of his court.²² And if he refuses to sue upon a claim belonging to his estate, it has been held that no person interested can bring a suit to collect the same without his joinder as a defendant by the permission of such court.²³ Formerly a Federal receiver could not be sued without the permission of his court.²⁴ The Judiciary Act of 1887 abrogated this rule;²⁵ but a judgment against him cannot be enforced without the permission of the Federal court.²⁶

The appointment of a receiver of a corporation does not prevent a suit in another court against the subject of the receivership.²⁷

But the court which appointed the receiver of the property may enjoin the prosecution in another of suits to foreclose liens upon the same.²⁸ It has been held: that when a receiver has been

¹⁹ *State Nat. Bank v. Syndicate Co.*, 178 Fed. 359.

²⁰ *In re Tyler*, 149 U. S. 164, 37 L. ed. 689; *Porter v. Sabin*, 149 U. S. 473, 37 L. ed. 815; *Security Trust Co. v. Union Trust Co.*, 134 Fed. 301.

²¹ *Memphis Sav. Bank v. Houchens*, C. C. A., 115 Fed. 96, 111.

²² *Porter v. Sabin*, 149 U. S. 473, 37 L. ed. 815; *Rejall v. Greenhood*, 60 Fed. 784; *Ross v. Heckman*, 84 Fed. 6. But see *infra*, § 314.

²³ *Porter v. Sabin*, 149 U. S. 473, 37 L. ed. 815; *infra*, § 314.

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²⁴ *Barton v. Barbour*, 104 U. S. 126, 26 L. ed. 672.

²⁵ 25 St. at L. 866, § 3, p. 436; *infra*, § 314.

²⁶ *Porter v. Sabin*, 149 U. S. 473, 37 L. ed. 815; *Mo. Pac. Ry. Co. v. Texas Pac. Ry. Co.*, 41 Fed. 311, re-enacted in Jud. Code, § 66, 36 St. at L. 1087; *infra*, § 314.

²⁷ *Chicago, R. I. & P. Ry. Co. v. Union Pac. R. Co.*, C. C. A., 254 Fed. 235. See *infra*, §§ 270a, 313, 314.

²⁸ *Oppenheimer v. San Antonio Land & Irrigation Co., Limited*, C.

appointed of the property of a corporation, its mortgagee cannot without permission of the court which made such appointment take proceedings to foreclose a mortgage thereupon because of a subsequent default; ²⁹ that the appointment by a State court of a receiver of a corporation pending a suit in a Federal court to set aside a chattel mortgage which it had fraudulently obtained was no bar to such Federal suit; ³⁰ that a Federal court may foreclose a mortgage upon property held by a receiver appointed by a State court in a suit to which the mortgagee was not a party; that in such foreclosure suit the Federal court can determine the claims of the holders of receivers' certificates issued under the order of the State court to a preference over the mortgage, ³¹ and that where a suit was brought, in a Federal court, to foreclose a mortgage, prior to the institution of a suit in a State court in which a receiver was appointed, the Federal court might decree the foreclosure sale, notwithstanding the possession of such receiver. ³²

It has been held: that upon a bill to set aside the decree of a Federal court, as fraudulent, a State court has no jurisdiction to review the acts of receivers appointed by the Federal court before such decree. ³³

Property in the possession of a statutory receiver not appointed by a court is not usually considered to be in the court's custody. ³⁴ Where the receiver of a national bank appointed by the Comptroller of the Currency refuses to sue to collect a cause of action due the bank, one of the stockholders may sue in a State court to collect such assets on behalf of the bank, and should make the bank and its receiver parties defendant. ³⁵ After the appointment by the Comptroller of the receiver of a bank, the State court may levy a writ of attachment against the bank and the receiver as garnishee. The State court then has jurisdiction to enter a judgment establishing the claim, but not to

C. A., 246 Fed. 934. See *infra*, *hert College*, 208 U. S. 38, 52 L. ed. 379; quoted, *supra*, § 52.

²⁹ *Slade v. Massachusetts Coal & Power Co.*, 188 Fed. 369.

³⁰ *Sims v. United Wireless Tel. Co.*, 179 Fed. 540.

³¹ *Metropolitan Tr. Co. v. Lake Cities El. Ry Co.*, 100 Fed. 897. But see *Wabash R. R. Co. v. Adel-*

³² *Bridgeport El. & Ice Co., v. Meader*, C. C. A., 72 Fed. 115.

³³ *Kurtz v. Philadelphia & R. R. Co.*, 40 Atl. 988, 187 Pa. St. 59.

³⁴ *In re Chetwood*, 165 U. S. 443, 41 L. ed. 782.

³⁵ *Ibid.*

order the receiver to make a payment out of the assets of the bank. It is the duty of the receiver upon the service of the writ to report the facts to the Comptroller, and it then becomes the duty of the Comptroller to hold any funds coming to his hands through the Treasury as the proceeds of the assets subject to any rights that have been adjudicated by the State court.³⁶ In a proper case, an injunction may be granted to enjoin such a receiver from transmitting the assets to the Comptroller of the Currency.³⁷

The appointment of a receiver or trustee by a Court of Bankruptcy in a case of which it has jurisdiction supersedes the authority of a receiver appointed by a State court although he was previously in possession of the property; but comity requires that, except in an extraordinary case, the receiver in bankruptcy should apply to the State court for an order directing the delivery of possession to him before he institutes other proceedings for the same.³⁸

A suit, in which a State court has appointed a receiver, may be removed to the Federal court.³⁹ Where a Federal court has appointed a receiver in a case where a receiver was previously appointed by a State court, the proper remedy is an application by the State receiver, to the Federal court, for the delivery of the possession of the property to the applicant.⁴⁰

§ 56. Controversies between State sheriffs and United States marshals; and those arising out of attachments, garnishee process and executions. A court, which, through its officers, has levied upon property under a common-law writ, retains the

³⁶ Earle v. Conway, 178 U. S. 456, 44 L. ed. 1149; Earle v. Pennsylvania, 178 U. S. 449, 44 L. ed. 1146.

³⁷ American Can Co. v. Williams, C. C. A., 153 Fed. 882.

³⁸ In re Watts and Sachs, 190 U. S. 1, 27, 47 L. ed. 933, 941; *infra*, § 59.

³⁹ In re Iowa & Minnesota Construction Co., 10 Fed. 401. Where, however, all the property of a foreign corporation had been placed in the hands of a receiver appointed by the State court, the Federal

court said, that a case instituted by attachment which had been removed thereto, should be remanded. Goldberg, Bowen & Co. v. German Ins. Co., 152 Fed. 831, 834.

⁴⁰ Texas v. Palmer, C. C. A., 22 L.R.A. (N.S.) 316, 158 Fed. 705; Waters-P. Oil Co. v. Texas, 47 Tex. Civ. App. 162, 103 S. W. 836; State v. Port Royal & Augusta R. R. Co., 45 S. C. 470, 23 S. E. 363; People v. New York City Ry. Co., 57 Misc. (N. Y.) 114.

exclusive custody of the same until it abandons it.¹ This rule applies to a judgment,² and a fund in court³ which are not subject to attachment⁴ or garnishee process,⁵ by any other court, until the fund is distributed. The entry of a final decree or order for the distribution, is not a relinquishment of the jurisdiction of the court;⁶ and checks prepared by the clerk of the court for mailing, in accordance with such an order, cannot be attached or made subject to garnishee process.⁷ It has been held, however, that the State sheriff may seize property, while still in the possession of the United States marshal, after an order by the Federal court directing its return to its owner;⁸ that where the marshal, after levy under a writ of replevin, permitted the plaintiff's agents to pack the goods, to load them into a car, and to procure a shipping receipt and bill of lading for the same, these acts constituted a delivery to the plaintiff and a State sheriff might subsequently levy upon them under a writ of attachment issued by a State court;⁹ that, where a State sheriff had made no valid levy upon property by taking possession of the same, but merely had it pointed out to him, that did not prevent a subsequent seizure thereof by a marshal under process from a

§ 56. ¹Freeman v. Howe, 24 How. 450, 16 L. ed. 749; Krippendorf v. Hyde, 110 U. S. 276, 28 L. ed. 145; Summers v. White, C. C. A., 71 Fed. 106; De Galard v. Safe Deposit & Trust Co., 196 Fed. 981, a Federal suit in equity to obtain possession of bonds previously attached under process of a State court. When the sheriff held property under summary proceedings for a foreclosure under the Georgia statute, it was held to be in the custody of a State court. Tefft v. Sternberg, 5 L.R.A. 221 40 Fed. 2.

²Menees v. Matthews, 197 Fed. 633; Mack v. Winslow, C. C. A., 59 Fed. 316, 319, 8 C. C. A., 134; and cases cited.

³Corbitt v. Farmers' Bank of Delaware, 114 Fed. 602.

⁴Ibid.

⁵Mack v. Winslow, C. C. A., 59 Fed. 316, 319, 8 C. C. A., 134; Menees v. Matthews, 197 Fed. 633; and cases cited; Kantor v. Murchie, 210 Fed. 573; Swinerton v. Oregon Pac. R. Co., 123 Cal. 417, 56 Pac. 40. In Menees v. Matthews, 197 Fed. 633, the Federal court refused to stay an execution on its judgment because the circumstances tended to show collusion between the garnisher and the judgment debtors.

⁶Corbitt v. Farmers' Bank of Delaware, 114 Fed. 602.

⁷Swinerton v. Oregon Pac. R. Co. 123 Cal. 417, 56 Pac. 40.

⁸Daniels v. Lazarus, 65 Fed. 718; Lazarus v. McCarthy, 32 N. Y. Supp. 833.

⁹Animarium Co. v. Bright, 82 Fed. 197.

United States court of admiralty.¹⁰ It has been held that while a vessel is in the custody of a sheriff services on board are not maritime in their nature and cannot create an admiralty lien.¹¹ In the State of New York, where a warrant of attachment, issued by a District Court of the United States, has been duly filed in the office of the clerk of the court, in the same State, but in a different district from that where the writ was issued; the State court will not grant an injunction against the sale of the same, although the validity of the levy is contested; but will leave that matter for determination by the Federal courts.¹² It has been held that an injunction by a State Court forbidding the marshal from returning the property will not justify him in withholding it from the person legally entitled to the same.¹³

It was held: that after the levy upon land of an attachment issued by a State court of Tennessee, the Federal court cannot appoint a receiver of the same in a suit subsequently begun.¹⁴ It has been held: that where the levy of¹⁵ an attachment upon real estate gives to the court neither actual, nor constructive, possession thereof, but merely creates a lien upon the same; it can consequently be taken into the possession of a receiver of a Federal court subsequently appointed; and that where the property is not ample to meet all the claims against it, the Federal court will not permit its sale under execution before the title is acquired by its own decree.¹⁶ Where a State statute provides for successive attachments of the same property a prior attachment in a State court affords no ground for the discharge of an attachment in a Federal court.¹⁷ Otherwise, a Federal court will

¹⁰ *Fountain v. 624 Pieces of Timber*, 140 Fed. 381.

¹¹ *The Bethulia*, 200 Fed. 866.

¹² *Beardslee v. Ingraham*, 183 N. Y. 411, 3 L.R.A. (N.S.) 1073. Previous to this decision, the Federal court had denied an injunction against the prosecution, by State receivers, of an action to enjoin the marshal's sale. *Ingraham v. National Salt Co.*, 139 Fed. 684. Cf. *Hale v. Bugg*, 82 Fed. 33.

¹³ *Kantor v. Murchie*, 210 Fed. 573.

¹⁴ *Southern Bank & Tr. Co. v. Folsom*, C. C. A., 75 Fed. 929.

¹⁵ *Re Hall & Stillson Co.*, 73 Fed. 527; *Pac. Const. Pipe Co. v. City Water Co.*, C. C. A., 245 Fed. 846 (where the Federal court respected the possession of a receiver of the State court appointed under similar circumstances).

¹⁶ *In re Hall & Stillson Co.*, 73 Fed. 527.

¹⁷ *D. E. Loewe & Co. v. Lawlor*, 130 Fed. 633.

not appoint a receiver of property held by a sheriff under a common-law writ, levied before the receiver's appointment was prayed.¹⁸

A writ of replevin, issued by a State court, to take property within the possession of a marshal of the United States,¹⁹ and an injunction interfering with the marshal's control of the same,²⁰ are void, and a case of the latter character may be removed to the District Court of the United States. The Federal court may, however, entertain a suit against a State sheriff for damages caused by an illegal levy.²¹ The custody of property by a Federal court, under a levy by attachment, does not prevent the State courts from subsequently deciding the title to the same in an interpleader suit; and it has been held, that the decision therein will be binding upon the District Court of the United States.²² The levy by a State court, upon land in the possession of a person not a party to the suit, will not prevent him from suing in the Federal court, to cancel the deed subsequently given to the purchaser at the execution sale; nor from obtaining, from such court, an injunction against the sale.²³ In a proper case, a suit may be removed to a Federal court, notwithstanding the fact that a State court has previously therein taken property into its possession under a common-law writ.²⁴

Where there is a dispute between the State sheriff and the United States marshal as to the right to possession, the proper remedy is ordinarily a petition of intervention *pro interesse suo* by the sheriff in the Federal action.²⁵ It has been held that an original bill for an injunction will not lie.²⁶ But an ancillary

¹⁸ Southern B. & T. Co. v. Folsom, C. C. A., 75 Fed. 929; Dodds v. Palmer Mountain Tunnel Co., 188 Fed. 447.

¹⁹ Freeman v. Howe, 24 How. 450, 16 L. ed. 749; Summers v. White, C. C. A., 71 Fed. 106.

²⁰ Frank v. Leopold & Feron Co., 169 Fed. 922.

²¹ Porter v. Davidson, 62 Fed. 626.

²² Montgomery v. McDermott, 87 Fed. 374.

²³ Provident Life & Trust Co. v. Mills, 91 Fed. 435.

²⁴ Kern v. Huidekoper, 103 U. S. 485, 491, 492, 26 L. ed. 354, 356, 357.

²⁵ Pickett v. Tiler & S. Co., 40 Fed. 313; Gambel v. Pitkin, 124 U. S. 131, 31 L. ed. 374. See Freeman v. Howe, 24 How. 450, 16 L. ed. 749; People's Bank v. Calhoun, 102 U. S. 256, 26 L. ed. 101; Beckett v. Sheriff of Hartford Co., 21 Fed. 32.

²⁶ Pickett v. Tiler, & S. Co., 40 Fed. 313.

bill has been sustained in such a case. And it was said that in some cases a summary motion might be granted according to the circumstances.²⁷

In order to preserve his right to a priority, it seems that the proper course is for the sheriff to serve upon the marshal²⁸ or clerk²⁹ of the Federal court, as the case may require, a notice of his writ directed to such Federal officer as garnishee. A writ of replevin issued by a State court in such a case is void.³⁰ Although, it has been held, that proceedings in the State court, under an execution against the defendant's property, cannot be enjoined by the Federal court; when the sheriff had levied upon property not owned by the defendant judgment debtor, such an injunction was issued.³¹ A State court cannot levy an attachment or garnishee process against a debt pending an action in a Federal court to collect the same.³² Where the Federal court had attached a bank deposit, which was claimed by others not parties to the suit, and an action against the bank for its recovery had been instituted by one of these in a State court, it was held, that the plaintiff in the Federal court must appear in the State court and submit his rights to adjudication there for the protection of the bank; and that otherwise, his attachment should be set aside.³³ When the defendant has been served with garnishee process before action has been brought against him to collect the debt, he may call the attention of the court to the fact that such garnishment has been made and not been terminated. The court will not proceed further until the termination of the garnishee proceedings.³⁴ Bankruptcy cases are an exception to this rule.³⁵

§ 57. Effect of jurisdiction of another court over same cause of action. The doctrine does not prevent an action *in personam*

²⁷ *Krippendorf v. Hyde*, 110 U. S. 276, 287, 28 L. ed. 145, 149, per Matthews, J. See *Porter v. Davidson*, 62 Fed. 626.

²⁸ *Gambel v. Pitkin*, 124 U. S. 131, 31 L. ed. 374.

²⁹ *D. B. Martin Co. v. Shannonhouse*, 203 Fed. 517.

³⁰ *Freeman v. Howe*, 24 How. 450, 16 L. ed. 749; *Summers v. White*, C. C. A., 71 Fed. 106.

³¹ *Provident Life & Trust Co. v. Mills*, 91 Fed. 435.

³² *Wallace v. McConnell*, 13 Pet. 136, 10 L. ed. 95; *Rosenstein v. Tarr*, 51 Fed. 368; *Mack v. Winslow*, 59 Fed. 316; *Ohio R. Co. v. Fisher*, C. C. A., 115 Fed. 929.

³³ *U. S. v. Neeley*, 146 Fed. 763.

³⁴ *Rhederei A. Gesellschaft Oceana v. Clutha Shipping Co.*, 226 Fed. 339.

³⁵ *Infra*, § 59.

between the same parties involving the same issues; provided that the property is not seized therein.¹ Where suits are pending in a State and a Federal court, to enforce the same cause of action, the usual practice is to stay proceedings in the court where the second case was begun until the first is determined; not to dismiss the second suit.² A plea in abatement in such a case was not sustained;³ but a bill against an administrator, which sought to interfere with assets in the custody of a State court of probate, was held to be demurrable.⁴ Where the proceedings in the State court are of an administrative and not a judicial nature, the doctrine does not apply.⁵ Where the Federal court has first obtained jurisdiction it may enjoin proceedings in the State court subsequently begun.⁶ Where bills to enjoin the enforcement of a State statute had been previously presented to the Federal court, upon notice of an application to file the same, and restraining orders issued, but leave to file postponed because of the absence of one of the defendant's counsel; it was held: that these proceedings took precedence of subsequent suits in the State courts to enforce the statute; and that such subsequent suits by the defendants to the former bills might be enjoined;⁷ but where the Federal court had enjoined the enforcement of a State statute reducing the price of gas pending an adjudication concerning its validity in the suit there instituted, a State court held that it had power to enjoin the gas company from cutting off the supply of gas to a consumer for his refusal to pay the original price.⁸ It has been said that the rule that the first court which acquires

§ 57. ¹Porter v. Davidson, 62 Fed. 626; Rejall v. Greenhood, 60 Fed. 784; Merritt v. American S. B. Co., 79 Fed. 228; Copeland v. Bruning, C. C. A., 127 Fed. 550. Cf. Huntington v. Laidley, 176 U. S. 668, 44 L. ed. 630. See *infra*, § 177.

²Zimmerman v. SoRelle, 80 Fed. 417; Hughes v. Green, C. C. A., 84 Fed. 833; *infra*, § 177. See U. S. v. Belknap, 73 Fed. 19. *Contra*, R. M. Rose & Co. v. Southern Express Co., 223 Fed. 868; Woren v. Witherbee, Sherman & Co., 240 Fed. 1013.

³See *infra*, § 177.

⁴Lant v. Manley, 71 Fed. 7; reversed on another point, s. c., C. C. A., 75 Fed. 627. See *supra*, § 561.

⁵Falls City Const. Co. v. Monroe County, 208 Fed. 482.

⁶St. Louis & S. F. R. Co. v. Hadley, 155 Fed. 220; St. Louis & S. F. Ry. Co. v. M'Elvain, 253 Fed. 123, *infra*, § 270a.

⁷St. Louis & S. F. R. Co. v. Hadley, 155 Fed. 220. *Supra*, § 55.

⁸Richman v. Consol. Gas. Co., 186 N. Y. 209. The Court of Appeals intimated that the State court of original jurisdiction should stay the

jurisdiction over a suit takes it to the exclusion of the other applies only where the parties to the suits or their privies are the same and the same relief is sought in both cases.⁹ It has been held that the pendency in a Federal court of a suit by a gas company against a city to set aside, as an impairment of the contract made by its franchise, an ordinance regulating the pressure in complainant's mains, does not justify an injunction against a subsequent suit by the city against the company in a State court for an accounting under the original ordinance granting the franchise, upon the ground that the contract rates charged were excessive because of insufficient pressure, although such second suit prays an injunction against the further collection of such rates.¹⁰ Where a suit by one riparian owner against another to enjoin interference with the complainant's use of water, had been first brought in a Federal court, a subsequent suit in a State court in a different State, when brought by a privy of the defendant against the complainant to the first suit, was held to be rightfully enjoined.¹¹ Similar rules should usually be followed by the Federal courts when the State courts have first acquired jurisdiction of such suits for injunctions;¹² but it seems that they are not bound to do so.¹³ It has been held that the pendency in a State court of a suit to determine the validity of a State statute under the Federal Constitution does not divest the Federal court of jurisdiction of a subsequent suit involving the same question nor afford any reason to the Federal court for declining to assume jurisdiction even if the parties are the same.¹⁴ And in another case that where the previous suit was between private parties and the second is a proceeding instituted to determine the rights of all the parties interested there is no reason why the Federal court should not assume jurisdiction.¹⁵ It was held that a decree of a State court *in personam*, restraining a

trial until the determination in the Federal court of the issues there raised.

⁹ *Jackson v. Parkersburg & O. V. El. Co.*, 233 Fed. 784.

¹⁰ *Kansas City Gas Co. v. Kansas City*, 198 Fed. 500.

¹¹ *Rickey Land & Cattle Co. v. Miller & Lux*, 218 U. S. 258, 54 L. ed. 1032.

¹² *People's Gaslight & Coke Co. v. City of Chicago*, 192 Fed. 398; *Moss & Co., v. McCarthy*, 191 Fed. 202.

¹³ *People's Gaslight & Coke Co. v. City of Chicago*, 192 Fed. 398.

¹⁴ *R. M. Rose & Co. v. Southern Express Co.*, 223 Fed. 868.

¹⁵ *Pac. Live Stock Co. v. Lewis*, 241 U. S. 440.

water company from refusing to furnish water to the city on certain conditions, did not prevent a subsequent suit in the Federal court by a person in privity with the former defendant to enjoin the city from preventing his removing the plant.¹⁶ Where the suit in the State court was to compel the removal of parts of a building it was held that the Federal court should not entertain a subsequent suit for substantially the same object.¹⁷ Where a bill was filed by a Federal court to remove a trustee, have another appointed in his place, or, in the alternative, for the appointment of a receiver and a cancellation of certain fraudulent bonds secured by the trust deed; it was held that the State court was not bound to recognize any subsequent order in proceedings afterwards brought in the State court for the appointment of a new trustee, in accordance with the deed of trust.¹⁸ A State court cannot levy an attachment or garnishee process, against a debt, pending an action in a Federal court to collect the same.¹⁹ It has been held: that the pendency of a suit in a State court in another district, in which a trustee has been enjoined from beginning a foreclosure suit, does not affect the jurisdiction of a Federal court to foreclose the mortgage on the property in both States, at the suit of a majority of the bondholders.²⁰ It has been held: that the pendency of a suit in the Federal court to foreclose a lien, in which no receiver is appointed, does not affect the jurisdiction of a State court to entertain a suit for the foreclosure of a mortgage on the same property, when the mortgagee was not a party to the suit in the Federal court; and that the decree in the Federal court does not bind the mortgagee, nor affect the rights of a purchaser at the foreclosure sale.²¹

§ 58. Effect of the custody, by another court, of the person of an accused in criminal proceedings, or otherwise. This doctrine applies, to a limited extent, to the custody of a per-

¹⁶ *Laighton v. City of Carthage*, Mo., 175 Fed. 145.

¹⁷ *Amusement Syndicate Co. v. El Paso Land Imp. Co.*, 251 Fed. 345.

¹⁸ *State Nat. Bank v. Syndicate Co.*, 178 Fed. 359.

¹⁹ *Wallace v. McConnell*, 13 Pet. 136, 10 L. ed. 95; *Rosenstein v. Tarr*, 51 Fed. 368; *Mack v. Winslow*, 59 Fed. 316.

²⁰ *Woodbury v. Alleghany & K. R. Co.*, 72 Fed. 371.

²¹ *National Foundry & Pipe Works v. Oconto City Water Supply Co.*, C. C. A., 113 Fed. 793. See *National Foundry & Pipe Works v. Oconto Water Supply Co.*, 183 U. S. 216, 46 L. ed. 157.

son in a criminal case.¹ Thus, the Federal courts ordinarily refuse to discharge by *habeas corpus* before his trial, and even in some cases, before he has exhausted his remedy by writ or appeal, after conviction, a prisoner held under indictment by a State court.² So, where the marshal had seized under a charge of a crime against the United States a prisoner held by the sheriff under a charge of a violation of the State criminal law, the Federal court upon a plea in abatement sustained the indictment found by its own grand jury, but ordered that the accused be returned to the State authorities.³ Conversely, a State court has no power to release by *habeas corpus* a prisoner held under the process of a court of the United States.⁴ The acts of Congress, however, authorize in certain cases the removal of criminal proceedings from a State to a Federal court.⁵ And where an officer of the United States is arrested by State process, because of an act done in pursuance of his official duty, the Federal courts will usually interfere, by *habeas corpus*, to protect him.⁶ It has been held that an application for the removal of a criminal from one Federal district to another will be denied if the accused was in the custody of the State court before the Federal court obtained jurisdiction.⁷ The same rule applies when he is, at that time, in the custody of a court of the United States, in the district from which it is sought to remove him;⁸ unless such court relinquishes its jurisdiction, which it may do

§ 58. ¹ *Harkrader v. Wadley*, 100 U. S. 257, 25 L. ed. 648. See 172 U. S. 148, 164, 43 L. ed. 399, 404, per Shiras, J., citing *Ex parte Crouch*, 112 U. S. 178, 28 L. ed. 690.

² *Ex parte Royall*, 117 U. S. 241, 254, 29 L. ed. 868, 872; §§ 461, 466, *infra*.

³ *U. S. v. Wells*, 11 Am. Law Reg. (N.S.) 424, s. c., Fed. Cases No. 16,665.

⁴ *Ableman v. Booth*, 21 How. 506, 16 L. ed. 169. See *Tarble's Case*, 13 Wall. 397, 20 L. ed. 597; *Robb v. Connolly*, 111 U. S. 624, 28 L. ed. 542. In the Matter of Spangler, 11 Mich. 298.

⁵ U. S. R. S., §§ 641, 643; 18 St. at L., p. 401; *Tennessee v. Davis*,

100 U. S. 257, 25 L. ed. 648. See §§ 537, 551, 552, *infra*.

⁶ In *re Neagle*, 135 U. S. 1, 34 L. ed. 55; *Ohio v. Thomas*, 173 U. S. 276, 285, 43 L. ed. 699, 702; *Boske v. Comingore*, 177 U. S. 459, 44 L. ed. 846; *Anderson v. Elliott*, C. C. A., 101 Fed. 609; In *re Turner*, 119 Fed. 231; *West Virginia v. Laing*, C. C. A., 133 Fed. 887. See § 461, *infra*.

⁷ *Re James*, 18 Fed. 853; *U. S. v. Corrie*, 23 L. Rep. 145; *U. S. v. Burr*, 2 Burr's Trial, 455. See *Re Johnson*, 167 U. S. 120, 42 L. ed. 103.

⁸ *Re Johnson*, 167 U. S. 120, 124, 42 L. ed. 103, 104.

with the consent of the government; and if it does so, the accused will be removed.⁹ Where the first court declines to relinquish its jurisdiction, it has been held that the practice is for the marshal to hold, but not to execute, the second warrant, until it is determined whether the accused shall be held under that first issued.¹⁰ It has been said: "that the sovereignty, where jurisdiction first attaches, may yield it; and that the implied custody of a defendant by his sureties cannot prevent. They may, however, claim exemption from further liability to produce him."¹¹ Where a proceeding between citizens of different States had been brought in a State court, to determine the sanity of an alleged lunatic, the Federal court refused, pending the determination thereof, to review the right to his custody upon a writ of habeas corpus.¹² "Where one commences a criminal proceeding, who is already a party to a suit then pending in equity, if the criminal proceedings are brought to enforce the same rights that are in issue before that court, the latter may enjoin such criminal proceedings."¹³ When an indictment or proceeding is brought to enforce an alleged unconstitutional statute, which is the subject matter of inquiry in a suit already pending in a Federal court, the latter, having first obtained jurisdiction over the subject matter, has the right to hold and maintain such jurisdiction to the exclusion of all other courts, until its duty is fully performed; but it cannot interfere where the proceedings were pending in the State court before the jurisdiction of the Federal court was sought *ex parte*.¹⁴

§ 59. Effect of the custody of property by the State court, where the Federal courts exercise jurisdiction under the Constitution and laws of the United States. This doctrine does not apply where the Federal courts exercise superior jurisdiction, for the purpose of enforcing the supremacy of the Constitution and laws of the United States.¹

The institution of a proceeding in bankruptcy gives juris-

⁹ *Beavers v. Haubert*, 198 U. S. 77, 49 L. ed. 950; *Re Beavers*, 125 Fed. 988; *Peckham v. Henkel*, 166 Fed. 627.

¹⁰ *Re Beavers*, 125 Fed. 988.

¹¹ *Beavers v. Haubert*, 198 U. S. 77, 85, 49 L. ed. 950, 953.

¹² *Hoadley v. Chase*, 126 Fed. 818.

¹³ *Ex parte Young*, 209 U. S. 123, 162, 52 L. ed. 714, 730.

¹⁴ *Ibid.*

§ 59. 1 *Tefft v. Sternberg*, 5 L.R.A. 221, 40 Fed. 2, 6, per Speer, J.; citing *Covell v. Hyman*, 111 U. S. 176, 28 L. ed. 390.

diction to the District Court of the United States in certain cases to seize property taken into the custody of a State court, within four months before the filing of the petition.² The possession of a sheriff or other officer of a State court obtained more than four months before the filing of the petition in bankruptcy is usually respected by the State court.³ The possession of the property of a corporation by receivers appointed by a State court does not affect the jurisdiction of a District Court of the United States to adjudicate that corporation a bankrupt; nor it has been held deprive the directors of any power which they may possess to make a written admission of its inability to pay its debts and its willingness to be adjudicated a bankrupt, so as to support involuntary proceedings in bankruptcy.⁴ After an adjudication of bankruptcy, the appointment of a receiver⁵ or trustee⁶ by the bankruptcy court supersedes the authority of a receiver previously appointed by a State court because of insolvency, although the latter is in possession of the property; but comity requires that, except in an extraordinary case, the officer of the bankruptcy court should apply to the State court for an order for the delivery or possession to him before he institutes another proceeding for the same.⁷ It has been held that, before adjudication at least, the Federal court should not appoint a receiver when a receiver appointed by a State court is already in possession;⁸ and in the county of

² 30 St. at L., p. 564; In *re* Macon S. D. & L. Co., 112 Fed. 323, 333; *Carling v. Seymour Lumber Co.*, C. C. A., 113 Fed. 483; In *re* Tune, 115 Fed. 906; *Re* English, C. C. A., 127 Fed. 940; In *re* Moench & Sons' Co., C. C. A., 130 Fed. 685. See §§ 609, 635, *infra*.

³ In *re* Pilcher & Son, 228 Fed. 139.

⁴ In *re* Moench & Sons' Co., C. C. A., 130 Fed. 685; *Re* Electric Supply Co., 175 Fed. 612. Otherwise when enjoined. *Re* Hudson River El. R. Co., 173 Fed. 934. See *infra* §§ 625, 626.

⁵ *Re* J. W. Zeigler Co., 189 Fed.

259. In that case, the court refused to punish the State receiver for refusal to deliver possession of the property to the receiver in bankruptcy when he acted under the advice of counsel. See in *re* Watts and Sachs, 190 U. S. 1, 27, 47 L. ed. 933, 941.

⁶ *Re* Hecox, C. C. A., 164 Fed. 823.

⁷ *Re* Watts and Sachs, 190 U. S. 1, 27; *Re* Hecox, C. C. A., 164 Fed. 823.

⁸ *Re* Spalding, C. C. A., Second Ct., May 1905, reported in *Re* Oakland Lumber Co., C. C. A., 174 Fed. 634, 637; *Re* Desrochers, 183 Fed. 991; *Re* Standard Cordage Co., 184

New York it is the practice of the Supreme Court, in such a case, to instruct its receiver to apply to the Federal court to set aside the appointment there made and to appeal if such application be denied.⁹ The filing of a suit in equity in the District Court of the United States by a trustee in bankruptcy, to set aside as fraudulent a conveyance of mortgaged premises by the bankrupt and an interlocutory judgment in his favor therein, was held to be no ground for vacating an order appointing a receiver of the mortgaged premises in a suit of foreclosure subsequently brought in the State court.¹⁰ A District Court of the United States will enjoin a suit in a State court, begun subsequent to an adjudication of bankruptcy, to take possession of property held by the bankrupt or his trustee.¹¹

The rule as to proceedings in admiralty is not so clear. It has been held: that the appointment of a State receiver, who had not filed the statutory bond, nor taken possession, is no bar to the seizure of a boat by the marshal under process in admiralty.¹² That a vessel can be seized by the marshal under a libel in admiralty, to enforce a lien that arose for repairs before the appointment of the receiver, when the seizure is made after such appointment; but before the receiver has taken actual possession or notified the master, or any person on board the vessel, that he has been appointed;¹³ but that a tug, attached under process of a State court and delivered by the sheriff to a receiver appointed by said court, cannot be taken from him by a marshal of the United States in proceedings in admiralty upon claims that arose against the tug before his appointment.¹⁴ That, upon a similar claim, a marshal cannot take property from the hands of an assignee under the insolvency law of Minnesota.¹⁵ That a vessel operated by a State receiver can be seized in another State by the District Court of the United States, upon a libel in admiralty to enforce a claim that arose

Fed. 156. So held when an assignee in insolvency was in possession, *Re Rosenthal*, 144 Fed. 548, 549.

⁹ *People v. P. V. Rovnianek & Co.*, N. Y. L. J. Jan'y 12, 1911.

¹⁰ *Mutual Life Ins. Co. v. Fleischman*, 149 App. Div. (N. Y.) 23.

¹¹ *White v. Schloerb*, 178 U. S. 542, 44 L. ed. 1183.

¹² *Moran v. Sturges*, 154 U. S. 256, 38 L. ed. 981.

¹³ *The Lotta*, 65 Fed. 319.

¹⁴ *The E. L. Cain*, 45 Fed. 367.

¹⁵ *The J. G. Chapman*, 62 Fed. 939.

during his management of the vessel.¹⁶ That the seizure of a boat owned by a partnership upon a libel in admiralty to recover damages caused by a collision and the giving of security by one partner to free the boat from custody does not prevent another member of the firm, while the procedure in admiralty is pending, from suing in a State court for an accounting of profits.¹⁷

§ 60. Property in the custody of another Federal Court of Equity. The different District Courts of the United States, acting upon the principle of judicial comity, usually, when property has been taken into the custody of another District Court, or when proceedings have been instituted therein for such a purpose, refuse to interfere with the same. Thus, where proceedings to cancel a mortgage had been instituted in one district, the Federal Court of another district stayed proceedings upon a bill therein filed for the foreclosure of such mortgage until the determination of the first suit.¹ So, where a receiver has been appointed to take possession of certain property, such as a railroad, which is situated in several districts, it is the usual practice for the District Courts in the other districts to appoint the same person as ancillary receiver of the property within their territorial jurisdiction;² to treat the court in which the proceedings were first instituted as that of primary jurisdiction and of principal decree, and to make the administration of the property in the latter court ancillary thereto.³ Accordingly, the court of ancillary jurisdiction refused to direct the payment of a judgment against the corporation recovered in a State court within its district where an account of the funds in its receiver's hands was necessary, and referred the petitioner to the court of primary jurisdiction for relief.⁴ This rule however, is largely within the discretion of each District Court,

¹⁶ *The Willamette Valley, C. C. A.*, 66 Fed. 565; *s. c.*, *Chandler v. The Willamette Valley*, 63 Fed. 130.

¹⁷ *Alexina C. S. Dowd*, respondent, *v. James E. Hughes*, appellant, 173 N. Y. App. Div. 118.

§ 60. ¹ *Hurd v. Moiles*, 28 Fed. 897.

² *Williams v. Hintermeister*, 26

Fed. 889; *Parsons v. Charter Oak L. I. Co.*, 31 Fed. 305; *infra*, § 304.

³ *Farmers' I. & T. Co. v. Northern Pac. Ry. Co.*, 72 Fed. 26, 30, 31; *Clyde v. Richmond & D. R. Co.*, 65 Fed. 336.

⁴ *Central T. Co., v. East Tenn., Va. & G. R. Co.*, 30 Fed. 805.

and cases have arisen in which each court has administered the assets within its jurisdiction independently of the administration of the court of primary jurisdiction.⁵

Where the trustees of a second mortgage on a railroad had begun a foreclosure suit, making the trustee of the first mortgage a party, and receivers had been appointed and taken possession, it was held that the first mortgagee should not be allowed to bring an independent foreclosure suit, but must seek the relief he wished in the suit instituted by the second mortgagee.⁶ Where the evidence, affecting the decision of an application made to one of the courts of ancillary jurisdiction, was within the custody of another court of ancillary jurisdiction; the former denied the motion, without prejudice to an application to the latter.⁷ Where a controversy arose out of transactions in the ancillary jurisdiction, it was held: that the court there should determine the same.⁸ Where a Federal Court in another district, in a suit between other parties, had refused an injunction against a railroad merger and consolidation, the motion, for substantially the same relief, was denied.⁹ The court in which a trustee has begun a foreclosure suit should not enjoin the trustee from suing in a Federal Court in another district to enforce a guarantee of the bonds by a person who is a stranger to the foreclosure suit and held no interest in the mortgaged property.¹⁰

When the Federal Court in one district has forbidden certain acts, the party enjoined cannot by filing a bill in another district be granted permission to perform the acts enjoined.¹¹

⁵ The Wabash Cases: *Atkins v. Wabash, St. L. & P. Ry. Co.*, 29 Fed. 161; *Central T. Co. v. Wabash, St. L. & P. Ry. Co.*, 29 Fed. 618; *U. S. T. Co., v. Wabash, St. L. & P. Ry. Co.*, 42 Fed. 343. See also *Mercantile T. Co. v. Kanawha & O. Ry. Co.*, 39 Fed. 337; *Central T. Co. v. East Tenn., Va. & G. Ry. Co.*, 69 Fed. 658; *N. Y. Security & T. Co. v. Equitable Mtg. Co.*, 71 Fed. 556; *Reynolds v. Stockton*, 140 U. S. 254, 272, 35 L. ed. 464; *infra*, § 304.

⁶ *Mercantile Tr. Co. v. Atlantic & P. R. Co.*, 70 Fed. 518.

⁷ *Bowker v. Haight & Freese Co.*, 140 Fed. 797.

⁸ *Jones v. Central Trust Co.*, C. A., 73 Fed. 568.

⁹ *Daly v. Georgia & A. Ry.*, 112 Fed. 838, 840.

¹⁰ *Ex parte, Equitable Tr. Co.*, C. A., 231 Fed. 571.

¹¹ *Louisville & N. RR. Co. v. W. U. Tel. Co.*, C. C. A., 233 Fed. 82.

§ 60a. Conflicting jurisdiction of the Federal Courts in Bankruptcy and Equity. After an adjudication of bankruptcy in the same or another district the Federal Court sitting in equity has no jurisdiction to interfere with the custody of the property,¹ or with the administration of the estate by setting aside the adjudication² or sale in the bankruptcy proceeding or by staying the bankruptcy proceedings³ or by enjoining suit by the trustees in bankruptcy.⁴

§ 60b. Conflicting jurisdiction of Federal Courts of Admiralty and Equity. Before the abolition of the Circuit Courts it was held: that a District Court could not seize property by process in admiralty, in order to apply it upon a claim that arose before the appointment of a receiver by the Circuit Court in the same district unless the Circuit Court gave permission to such taking and application,¹ and that a Federal Court, which had, through its receiver, sold vessels subject to maritime liens and liens under the State laws for supplies, had no jurisdiction when sitting in equity to determine and enforce such liens, but that those matters belonged exclusively to the admiralty jurisdiction.²

§ 60c. Conflicting jurisdiction of Federal Courts in bankruptcy and in admiralty. It has been held, that where a court of admiralty acquires jurisdiction by the filing of a libel *in rem* against a boat before the filing of a petition in bankruptcy against the owner in the same or another district, although within four months before the institution of the proceedings in bankruptcy;¹ it may retain the possession for the purpose of determining all questions concerning maritime liens even when the boat was not seized in admiralty before the institution of the bankruptcy proceedings;² but that a court of bankruptcy should not direct that a boat in the possession of its receiver belonging to an estate in bankruptcy, be surrendered to a court of admiralty to be subject to the suit of a libellant, who seeks

§ 60a. ¹ *Cruchet v. Red Rover*
Min. Co., 155 Fed. 486.

² *Gibbons v. Dexter Horton Trust*
& Savings Bank, 225 Fed. 424.

³ *Ibid.*

⁴ *Hull v. Burr*, C. C. A., 206
Fed. 1.

§ 60b. ¹ *The Jonas H. French*,
119 Fed. 462.

² *Hudson v. N. Y. & A. Transp.*
Co. 175 Fed. 519.

§ 60c. ¹ *The Philomena*, 200 Fed.
859.

² *The Bethulia*, 200 Fed. 862.

to enforce a maritime lien against it for a liability which arose before or after the bankruptcy.³ A court in admiralty when distributing the proceeds of a sale may grant priority to the claims for fees and disbursements of a receiver in bankruptcy not a party to the admiralty proceedings.⁴

§ 61. Limitations upon jurisdiction by residence. Statutory provisions. The Judicial Code provides: "§ 51. Except as provided in the five succeeding sections, no person shall be arrested in one district for trial in another, in any civil action before a district court; and, except as provided in the six succeeding sections, no civil suit shall be brought in any district court against any person by any original process or proceeding in any other district than that whereof he is an inhabitant; but where the jurisdiction is founded only on the fact that the action is between citizens of different States, suit shall be brought only in the district of the residence of either the plaintiff or the defendant.

"§ 52. When a State contains more than one district, every suit not of a local nature, in the district court thereof, against a single defendant, inhabitant of such State, must be brought in the district where he resides; but if there are two or more defendants, residing in different districts of the State, it may be brought in either district, and a duplicate writ may be issued against the defendants, directed to the marshal of any other district in which any defendant resides. The clerk issuing the duplicate writ shall indorse thereon that it is a true copy of a writ sued out of the court of the proper district; and such original and duplicate writs, when executed and returned into the office from which they issue, shall constitute and be proceeded on as one suit; and upon any judgment or decree rendered therein, execution may be issued, directed to the marshal of any district in the same State."¹

"§ 53. When a district contains more than one division, every suit not of a local nature against a single defendant must be brought in the division where he resides; but if there are two or more defendants residing in different divisions of the dis-

³ *The Casco*, 230 Fed. 929.

809; s. c. in C. C. A. *The Falcon*,

⁴ *Hudson Oil & Supply Co. v.*

C. C. A., 177 Fed. 916.

Booraem, 216 U. S. 604, 54 L. ed.

§ 61. 1 St. at L. 1087.

636; affirming *Re Hughes*, 170 Fed.

trict it may be brought in either division. All mesne and final process subject to the provisions of this section may be served and executed in any or all of the divisions of the district, or if the State contains more than one district, then in any of such districts, as provided in the preceding section.² All prosecutions for crimes or offenses shall be had within the division of such districts where the same were committed, unless the court, or the judge thereof, upon the application of the defendant, shall order the cause to be transferred for prosecution to another division of the district. When a transfer is ordered by the court or judge, all the papers in the case, or certified copies thereof, shall be transmitted by the clerk, under the seal of the court, to the division to which the cause is so ordered transferred; and thereupon the cause shall be proceeded with in said division in the same manner as if the offense had been committed therein. In all cases of the removal of suits from the courts of a State to the District court of the United States such removal shall be to the United States District court in the division in which the county is situated from which the removal is made; and the time within which the removal shall be perfected, in so far as it refers to or is regulated by the terms of United States courts, shall be deemed to refer to the terms of the United States District Court in such division.

“§ 54. In suits of a local nature, where the defendant resides in a different district, in the same State, from that in which the suit is brought, the plaintiff may have original and final process against him, directed to the marshal of the district in which he resides.³

“§ 55. Any suit of a local nature, at law or in equity, where the land or other subject-matter of a fixed character lies partly in one district and partly in another, within the same State, may be brought in the district court of either district; and the court in which it is brought shall have jurisdiction to hear and decide it, and to cause mesne or final process to be issued and executed, as fully as if the said subject-matter were wholly

² It has been held that where defendants reside in different districts of the same State, an injunction may be served therein another dis-

trict from that in which the court sits. *Babbitt v. Burgess*, 2 Dillon, 169, Fed. Cas. No. 693.

³ See *infra*, § 64.

within the district for which such court is constituted.”⁴ A suit by a creditor of a railroad company to have its property, situated in different Federal districts of the same State, administered for the benefit of all creditors, is one of a local nature, which may be brought in either of such districts.⁵ It has been said that the appointment of a receiver therein is an equitable attachment of all property of the defendant within the State.⁶

“§ 56. Where in any suit in which a receiver shall be appointed the land or other property of a fixed character, the subject of the suit lies within different States in the same judicial circuit, the receiver so appointed shall, upon giving bond as required by the court, immediately be vested with full jurisdiction and control over all the property, the subject of the suit, lying or being within such circuit; subject, however, to the disapproval of such order, within thirty days thereafter, by the circuit court of appeals for such circuit, or by a circuit judge thereof, after reasonable notice to adverse parties and an opportunity to be heard upon the motion of such disapproval; and subject, also, to the filing and entering in the district court for each district of the circuits in which any portion of the property may lie or be, within ten days thereafter, of a duly certified copy of the bill and of the order of appointment. The disapproval of such appointment within such thirty days, or of failure to file such certified copy of the bill and order of appointment within ten days, as herein required, shall divest such receiver of jurisdiction over all such property except that portion thereof lying or being within the State in which the suit is brought. In any case coming within the provisions of this section, in which a receiver shall be appointed, process may issue and be executed within any district of the circuit in the same manner and to the same extent as if the property were wholly within the same district; but orders affecting such property shall be entered of record in each district in which the property affected may lie or be.”⁷

“§ 57. When in any suit commenced in any District Court of the United States to enforce any legal or equitable lien upon or claim to, or to remove any incumbrance or lien or cloud upon

⁴ 36 St. at L. 1087.

⁶ *Ibid.*

⁵ *Horn v. Pere Marquette R. Co.*,
151 Fed. Cas. 626, 627.

⁷ 36 St. at L. 1102, Comp. St.
§ 1038.

the title to real or personal property within the district where such suit is brought, one or more of the defendants therein shall not be an inhabitant of or found within the said district, or shall not voluntarily appear thereto, it shall be lawful for the court to make an order directing such absent defendant or defendants to appear, plead, answer, or demur by a day certain to be designated, which order shall be served on such absent defendant or defendants, if practicable, wherever found, and also upon the person or persons in possession or charge of said property, if any there be, or where such personal service upon such absent defendant or defendants is not practicable, such order shall be published in such manner as the court may direct, not less than once a week for six consecutive weeks. In case such absent defendant shall not appear, plead, answer, or demur within the time so limited, or within some further time, to be allowed by the court, in its discretion, and upon proof of the service or publication of said order and of the performance of the directions contained in the same, it shall be lawful for the court to entertain jurisdiction, and proceed to the hearing and adjudication of such suit in the same manner as if such absent defendant had been served with process within the said district; but said adjudication shall, as regards said absent defendant or defendants without appearance, affect only the property which shall have been the subject of the suit and under the jurisdiction of the court therein, within such district; and when a part of the said real or personal property against which such proceedings shall be taken shall be within another district, but within the same State, such suit may be brought in either district in said State: *Provided, however,* That any defendant or defendants not actually personally notified as above provided may at any time within one year after final judgment in any suit mentioned in this section, enter his appearance in said suit in said district court, and thereupon the said court shall make an order setting aside the judgment therein and permitting said defendant or defendants to plead therein on payment by him or them of such costs as the court shall deem just; and thereupon said suit shall be proceeded with to final judgment according to law." §

§ 36 St. at L. 1087. See § 166, *infra*.

“§ 58. Any civil cause, at law or in equity, may, on written stipulation of the parties or of their attorneys of record signed and filed with the papers in the case, in vacation or in term, and on the written order of the judge signed and filed in the case in vacation or on the order of the court duly entered of record in term, be transferred to the court of any other division of the same district, without regard to the residence of the defendants, for trial. When a cause shall be ordered to be transferred to a court in any other division, it shall be the duty of the clerk of the court from which the transfer is made to carefully transmit to the clerk of the court to which the transfer is made the entire file of papers in the cause and all documents and deposits in his court pertaining thereto, together with a certified transcript of the records of all orders, interlocutory decrees, or other entries in the cause; and he shall certify, under the seal of the court, that the papers sent are all which are on file in said court belonging to the cause; for the performance of which duties said clerk so transmitting and certifying shall receive the same fees as are now allowed by law for similar services, to be taxed in the bill of costs, and regularly collected with the other costs in the cause; and such transcript when so certified and received, shall henceforth constitute a part of the record of the cause in the court to which the transfer shall be made. The clerk receiving such transcript and original papers shall file the same and the case shall then proceed to final disposition as other cases of a like nature.”⁹

“§ 59. Whenever any new district or division has been or shall be established, or any county or territory has been or shall be transferred from one district or division to another district or division, prosecutions for crimes and offenses committed within such district, division, county, or territory prior to such transfer, shall be commenced and proceeded with the same as if such new district or division had not been created, or such county or territory had not been transferred, unless the court, upon the application of the defendant, shall order the cause to be removed to the new district or division for trial. Civil actions pending at the time of the creation of any such district or division, or the transfer of any such county or territory, and aris-

⁹ 36 St. at L. 1103, Comp. St.
§ 1040.

ing within the district or division so created or the county or territory so transferred shall be tried in the district or division as it existed at the time of the institution of the action, or in the district or division so created, or to which the county or territory is or shall be so transferred, as may be agreed upon by the parties, or as the court shall direct. The transfer of such prosecutions and actions shall be made in the manner provided in the section last preceding.”¹⁰

“The creation of a new district or division, or the transfer of any county or territory from one district or division to another district or division, shall not affect or divest any lien theretofore acquired in the circuit or district court by virtue of a decree, judgment, execution, attachment, seizure, or otherwise, upon the property situated or being within the district or division so created, or the county or territory so transferred. To enforce any such lien, the clerk of the court in which the same is acquired, upon the request and at the cost of the party desiring the same, shall make a true and certified copy of the record itself, which, when so made and certified, and filed in the proper court of the district or division in which such property is situated, or shall be, after such transfer, shall constitute the record of such lien in such court, and shall be evidence in all courts and places equally with the original thereof; and, thereafter like proceedings shall be had thereon, and with the same effect, as though the cause or proceeding had been originally instituted in such court. The provisions of this section shall apply not only in all cases where a district or division is created, or a county or any territory is transferred by this or any future Act, but also in all cases where a district or division has been created, or a county or any territory has been transferred by any law heretofore enacted.”¹¹

The Tucker Act which authorizes suits against the United States upon claims not sounding in tort, not exceeding \$10,000, provides: “The plaintiff must file a petition duly verified with the clerk of the respective Courts having jurisdiction of the case and in the district where the plaintiff resides.”¹² This provision

¹⁰ 36 St. at L. 1103, Comp. St. § 1041.

¹² 24 St. at L. 505, C. H. 359, § 5, Comp. St. 752.

¹¹ 36 St. at L. 1103, Comp. St. § 1042.

has not been repealed by the Judicial Code.¹³ An objection that such a suit is brought in an improper district is waived unless specifically made before pleading to due merits.¹⁴ A demurrer that the Court has no jurisdiction of a defendant, or subject of the action; does not raise this objection.¹⁵ Whether this requirement applies to suits where the plaintiff resides outside of the United States has been doubted.¹⁶

The Judicial Code further provides: "§ 48. In suits brought for the infringement of letters patents the District courts of the United States shall have jurisdiction, in law or in equity, in the district of which the defendant is an inhabitant, or in any district in which the defendant, whether a person, partnership, or corporation, shall have committed acts of infringement and have a regular and established place of business. If such suit is brought in a district of which the defendant is not an inhabitant, but in which such defendant has a regular and established place of business, service of process, summons, or subpoena upon the defendant may be made by service upon the agent or agents engaged in conducting such business in the district in which suit is brought." ¹⁷

The Copyright Act of March 4, 1909, provides: "That civil actions, suits, or proceedings arising under this Act may be instituted in the district of which the defendant or his agent is an inhabitant, or in which he may be found." ¹⁸ It has been said that the action may be brought in the district where there is infringement by either the principal or his agent. It seems that this authorizes the suit to be brought in any district in which defendant's agent may be found employed as defendant's representative.¹⁹ The apparent purpose of the act is to permit suits to be brought in any district where acts of infringement are being committed.²⁰

¹³ U. S. v. Hvoslef, 237 U. S. 1, 11.

¹⁴ Ibid. 237 U. S. 1, 12.

¹⁵ Ibid. 237 U. S. 1, 8.

¹⁶ U. S. v. N. Y. & O. S. S. Co., C. C. A., 216 Fed. 61.

¹⁷ 36 St. at L. 1087. See *infra*, § 62.

¹⁸ 35 St. at L. 1075, § 35; *infra*, § 62.

¹⁹ Wagner v. Wilson, 225 Fed. 912; West Pub. Co. v. Edward Thompson Co., U. S. C. C., S. D. N. Y., January 5, 1911; Mr. William B. Hale in 13 Corpus Juris, 1194.

²⁰ Ibid.; Lederer v. Rankin, 90 Fed. 449; Lederer v. Ferris, 149 Fed. 250. *Contra*, Fraser v. Barrie, 105 Fed. 787.

"Every applicant for registration of a trademark or for renewal of registration of a trademark, who is not domiciled within the United States, shall, before the issuance of the certificate of registration, as hereinafter provided for, designate, by a notice in writing, filed in the Patent Office, some person residing within the United States on whom process or notice of proceedings affecting the right of ownership of the trade-mark of which such applicant may claim to be the owner, brought under the provisions of this Act or under other laws of the United States, may be served with the same force and effect as if served upon the applicant or registrant in person. For the purposes of this Act it shall be deemed sufficient to serve such notice upon such applicant, registrant or representative by leaving a copy of such process or notice addressed to him at the last address of which the Commissioner of Patents has been notified." ²¹

A suit by the owner of a patent, trade-mark, print, label, or copyright, a license to use which is granted under the Act of October 6, 1917 against Trading with the Enemy may file a bill in equity against the licensee in the District court for the district in which the licensee resides, or, if a corporation, in which it has its principal place of business, to recover for use and enjoyment of the right granted by the license. ²²

In proceedings in equity to restrain violations of the provisions of laws of the United States to prevent the unlawful inclosure of public lands it shall be sufficient to give the court jurisdiction if service of original process be had in any civil proceeding on any agent or employee having charge or control of the inclosure. ²³

In suits by the United States for injunctions, under the "Act to protect trade and commerce against unlawful restraints and monopolies." Usually called the Sherman Act whenever it appears to the court before which the proceeding is pending that the ends of justice require that other parties shall be brought in, they may be summoned whether they reside in the district or not. ²⁴ The order may be obtained as soon as the bill is filed

²¹ Act of February 20, 1905, 33 St. at L. 724, § 3, 10 Fed. St. Ann.

²² 40 St. at L. 420; c. h. 106, § 10; Comp. St. 3115. See *infra*, §§ 87, 146.

²³ Jud. Code, § 24, subd. 21, 36 St. at L. 1087.

²⁴ Act of July 2, 1890, 26 St. at L. 209, § 5; *U. S. v. Standard Oil Co. of New Jersey*, 152 Fed. 290.

before the issue of a subpoena for the resident defendant and without notice to him.²⁵

The Act of October 15, 1914, which is known as the Clayton Act provides: "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any District court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover three fold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."²⁶

And again: "Any suit, action, or proceeding under the antitrust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business; and all process in such cases may be served in the district of which it is an inhabitant, or wherever it may be found."²⁷ When the defendant transacts business within a district it may be sued in the District court there held although it has no agent within such district, service being made at the defendant's domicile.²⁸ But it cannot be sued in a district where it is not incorporated and transacts no business; although its agent is found there, when the latter is not acting in his representative capacity.²⁹

The word "found" means that the corporation must be present in the district, or its officers or agents carrying on its business.³⁰ What constitutes such a business as will subject a corporation to service of process depends upon the facts in each case.³¹ The general rule is that the business must be of such a nature as to warrant the inference that the corporation has subjected itself to the local jurisdiction.³² The ownership of stock in local corporations, the publication of advertisements within

²⁵ U. S. v. Standard Oil Co., 152 Fed. 290. This section was not repealed by the Judicial Code. Wogan Bros., Inc., v. American Sugar Refining Co., 215 Fed. 273.

²⁶ 38 St. at L. 731, Comp. St. 8835 D.

²⁷ 38 St. at L. 736, Comp. St. 8835K; Southern Photo Material Co. v. Eastman Kodak Co., 234 Fed. 955.

²⁸ Southern Photo Material Co. v. Eastman Kodak Co., 234 Fed. 955.

²⁹ Frey & Son, Inc., v. Cudahy Packing Co., 228 Fed. 209.

³⁰ People's Tobacco Co. v. Am. Tobacco Co., 246 U. S. 79, 84; U. S. v. Am. Bell Tel. Co., 29 Fed. 17, *infra*, § 164b.

³¹ *Ibid.* See *infra*, § 164b.

³² *Ibid.* U. S. v. Am. Bell Tel. Co., 29 Fed. 17.

the district, and the presence there of agents without authority to sell, to collect, or to extend credit who solicit orders which are filled by jobbers who buy from the corporation will not subject it to the service of process there.³³

The Act of October 22, 1913, provides: "The venue of any suit hereafter brought to enforce, suspend, or set aside, in whole or in part, any order of the Interstate Commerce Commission shall be in the judicial district wherein is the residence of the party or any of the parties upon whose petition the order was made, except that where the order does not relate to transportation or is not made upon the petition of any party the venue shall be in the district where the matter complained of in the petition before the commission arises, and except that where the order does not relate either to transportation or to a matter so complained of before the commission the matter covered by the order shall be deemed to arise in the district where one of the petitioners in court has either its principal office or its principal operating office. In case such transportation relates to a through shipment the term 'destination' shall be construed as meaning final destination of such shipment."³⁴

A suit to review an order establishing rates for railroad transportation may be brought in the district in which the petitioners reside or have their principal office although the railroad company has its principal operating office in another district.³⁵

A suit by a railroad company to restrain a State official from interfering with the maintenance of intra-State rates adopted in pursuance of an order of the Interstate Commerce Commission is not brought to enforce the order within the meaning of the statute and need not be brought in the district of the residence of any of the parties upon whose petition the order was made.³⁶ Without the consent of the United States, a Federal court in a district where the petitioner does not reside cannot in a suit in aid of such an order entertain a cross bill praying that the order be set aside and the United States and the Commission enjoined

³³ Ibid.

³⁵ McLean Lumber Co. v. U. S.

³⁴ 38 St. at L. 219, Comp. St. 994.

238 Fed. 460.

This Act was not repealed by the Judicial Code. St. Louis S. W. Ry. Co. v. S. Samuels & Co., C. C. A., 211 Fed. 588.

³⁶ Illinois Central R. R. Co. v. Public Utilities Commission, 245 U. S. 493.

from its enforcement and the carrier from compliance therewith.³⁷

The Judicial Code further provides: "§ 49. All proceedings by any national banking association to enjoin the Comptroller of the Currency, under the provisions of any law relating to national banking associations, shall be had in the district where such association is located."³⁸

The statute regulating the liability of employers to their employees for injuries in their service, as amended April 5, 1910, provided: "Under this act an action may be brought in the Circuit Court of the United States in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action."³⁹

The Judicial Code provides: "That no case arising under an act entitled 'An Act relating to the liability of common carriers by railroad to their employees in certain cases,' approved April twenty-second, nineteen hundred and eight, or any amendment thereto, and brought in any State court of competent jurisdiction shall be removed to any court of the United States."⁴⁰

The District Courts can take original jurisdiction of suits in the cases above specified.⁴¹ A railway company which receives and delivers freight at piers within the district and has an office building therein is liable to suit under this statute there although none of the commerce in which the injured servant was employed took place in the district.⁴²

General Order 18 issued by the Director General of Railroads as amended April 9, 1918 provides: "All suits against carriers while under Federal control must be brought in the county or district where the plaintiff resides at the time of the accrual of the cause of action or in the county or district where the cause of action arose."⁴³

³⁷ Illinois Cent. R. R. Co. v. Public Utilities Commission, 245 U. S. 493.

³⁸ 36 St. at L. 1087.

³⁹ 36 St. at L. 291.

⁴⁰ 28, 36 St. at L. 1087.

⁴¹ Connolly v. Central R. Co. of N. J. 238 Fed. 932.

⁴² Ibid.

⁴³ See Cocker v. N. Y. O. & W. Ry. Co., 253 Fed. 676; Muir v. Louisville & N. R. Co., 247 Fed. 888; Cocker v. N. Y. & O. Ry. Co. 253 Fed. 676; Harnick v. Pennsylvania R. Co., 254 Fed. 748. See *infra*, § 96i.

The Act of August 13, 1894, concerning sureties upon government contracts, provides: "That any surety company doing business under the provisions of this Act may be sued in respect thereof in any court of the United States which has now or hereafter may have jurisdiction of actions or suits upon such recognizance, stipulation, bond, or undertaking, in the district in which such recognizance, stipulation, bond, or undertaking was made or guaranteed, or in the district in which the principal office of such company is located. And for the purposes of this Act such recognizance, stipulation, bond, or undertaking shall be treated as made or guaranteed in the district in which the office is located, to which it is returnable, or in which it is filed, or in the district in which the principal in such recognizance, stipulation, bond, or undertaking resided when it was made or guaranteed."⁴⁴

The same statute further provides: "That no such company shall do business under the provisions of this Act beyond the limits of the State or Territory under whose laws it was incorporated and in which its principal office is located, nor beyond the limits of the District of Columbia, when such company was incorporated under its laws or under the laws of the United States and its principal office is located in said District, until it shall by a written power of attorney appoint some person residing within the jurisdiction of the court for the judicial district wherein such suretyship is to be undertaken, who shall be a citizen of the State, Territory, or District of Columbia, wherein such court is held, as its agent, upon whom may be served all lawful process against such company, and who shall be authorized to enter an appearance in its behalf. A copy of such power of attorney, duly certified and authenticated, shall be filed with the clerk of the district court of the United States for such district at each place where a term of such court is or may be held, which copy, or certified copy thereof, shall be legal evidence in all controversies arising under this Act. If any such agent shall be removed, resign, or die, become insane, or otherwise incapable of acting, it shall be the duty of such company to appoint another agent in his place as

⁴⁴ 28 St. at L. 279, ch. 282, § 3,
Comp. St. § 3297.

hereinbefore prescribed, and until such appointment shall have been made, or during the absence of any agent of such company from such district, service of process may be upon the clerk of the court wherein such suit is brought, with like effect as upon the agent appointed by the company. The officer executing such process upon such clerk shall immediately transmit a copy thereof by mail to the company, and state such fact in his return. A judgment, decree, or order of a court entered or made after service of process as aforesaid shall be as valid and binding on such company as if served with process in said district.⁴⁵

“The district courts of the United States shall have original cognizance to entertain suits in equity begun by bills of interpleader where the same are filed by any insurance company or fraternal beneficiary society, duly verified, and where it is made to appear by such bill that one or more persons, being bona fide claimants against such company or society, reside within the jurisdiction of said court; that such company or society has made or issued some policy of insurance or certificate of membership providing for the payment of a sum of money of at least \$500 as insurance or benefits to a beneficiary or beneficiaries or to the heirs, next of kin, or legal representative of the person insured or member; that two or more adverse claimants, citizens of different states, are claiming or may claim to be entitled to such insurance or benefits and that such company or society deposits the amount of such insurance or benefits with the clerk of said court and abide the judgment of said court. In all such cases the court shall have the power to issue its process for said claimants, returnable at such time as the said court or a judge thereof shall determine, which shall be addressed to and served by the United States marshals for the respective districts wherein said claimants reside or may be found; to hear said bill of interpleader and decide thereon according to the practice in equity; to discharge said complainant from further liability upon the payment of said insurance or benefit as directed by the court, less complainant's actual court costs; and shall have the power to make such orders and decrees as may be suitable and proper and to issue the necessary writs usual and customary in such cases for the pur-

⁴⁵ Ibid, § 2, Comp. St. § 3294.

pose of carrying out such orders and decrees; Provided, That in all cases where a beneficiary or beneficiaries are named in the policy of insurance or certificate of membership or where the same has been assigned and written notice thereof shall have been given to the insurance company or fraternal benefit society, the bill of interpleader shall be filed in the district where the beneficiary or beneficiaries may reside."⁴⁶

The Judicial Code continues: "§ 40. The trial of offenses punishable with death shall be had in the county where the offense was committed, where that can be done without great inconvenience."⁴⁷

"§ 41. The trial of all offenses committed upon the high seas, or elsewhere out of the jurisdiction of any particular State or district, shall be in the district court where the offender is found, or into which he is first brought.

"§ 42. When any offense against the United States is begun in one judicial district and completed in another, it shall be deemed to have been committed in either, and may be dealt with, inquired of, tried, determined, and punished in either district, in the same manner as if it had been actually and wholly committed therein.

"§ 43. All pecuniary penalties and forfeitures may be sued for and recovered either in the district where they accrue or in the district where the offender is found."⁴⁸

The Judicial Code continues: "§ 44. Taxes accruing under any law providing internal revenue may be sued for and recovered either in the district where the liability for such tax occurs or in the district where the delinquent resides."⁴⁹

Prosecutions for the offense of unlawful discrimination in the transportation of property in interstate or foreign commerce or for acts therewith connected are prosecuted in the district in which the violation of the law was committed or in any district through which the transportation was conducted.⁵⁰

⁴⁶ Feb. 22, 1917, c. 113, 39 St. at L. 929, Comp. St. § 991a.

⁴⁷ See *infra*, § 525.

⁴⁸ This applies to a suit to recover the penalty for the importation of contract labor. *Tomkins v. Paterson*, 238 Fed. 879.

⁴⁹ 36 St. at L. 1100, Comp. St. §§ 1022-1026.

⁵⁰ Act of June 29, 1906, 34 St. at L. 584, 588.

Prior to the Judicial Code, it was held that the sections of the Revised Statutes limiting the jurisdiction, because of the residence of the parties, did not affect the jurisdiction in admiralty.⁵¹ Courts of admiralty have jurisdiction in proceedings in *rem* wherever the property is seized and in proceedings in *personam* wherever the person is served with process.⁵² The sections of the Judicial Code following preserve this general jurisdiction of courts of admiralty over certain proceedings in *rem*.⁵³ It has been held: that the exception of suits "of a local character," in a statute defining the territorial jurisdiction of a particular District Court, directs, by implication that such a suit must be brought in the division where the thing or property proceeded against happens to be situated; that a libel in admiralty is a suit of a local nature, and consequently must be prosecuted in the division where the vessel is seized, although her home port is in another division.⁵⁴

"§ 45. Proceedings on seizures made on the high seas, for forfeiture under any law of the United States, may be prosecuted in any district into which the property so seized was brought and proceedings instituted. Proceedings on such seizures made within any district shall be prosecuted in the district where the seizure is made, except in cases where it is otherwise provided.

"§ 46. Proceedings for the condemnation of any property captured, whether on the high seas or elsewhere out of the limits of any judicial district, or within any district, on account of its being purchased or acquired, sold or given, with intent to use or employ the same, or to suffer it to be used or employed, in aiding, abetting, or promoting any insurrection against the Government of the United States, or knowingly so used or employed by the owner thereof, or with his consent, may be prosecuted in any district where the same may be seized, or into which it may be taken and proceedings first instituted.

"§ 47. Proceedings on seizures for forfeiture of any vessel or cargo entering any port of entry which has been closed by

⁵¹ *Re Louisville Underwriters*, 134 U. S. 488, 33 L. ed. 991.

⁵⁴ *D. Washington v. The Willamette*, 53 Fed. 602.

⁵² *Ibid.*

⁵³ Jud. Code, §§ 45, 46, 47, 36 St. at L. 1087.

the President in pursuance of law, or of goods and chattels coming from a State or section declared by proclamation of the President to be in insurrection into other parts of the United States, or of any vessel or vehicle conveying such property, or conveying persons to or from such State or section, or of any vessel belonging, in whole or in part, to any inhabitant of such State or section, may be prosecuted in any district into which the property so seized may be taken and proceedings instituted; and the district court thereof shall have as full jurisdiction over such proceedings as if the seizure was made in that district."⁵⁵

Jurisdiction of a proceeding for the forfeiture of smuggled goods exists only in the district of seizure, which is the district in which the goods, if on land, are found. A collector cannot, by carrying them into another district and there making the formal seizure confer jurisdiction of the proceeding on the court in such district.⁵⁶ Whether admiralty jurisdiction remains otherwise the same as before the enactment of this Code, has not been decided.

Courts of bankruptcy are not affected by these sections. Such may "adjudge persons bankrupt who have had their principal place of business, resided, or had their domicile within their respective territorial jurisdictions for the preceding six months, or the greater portion thereof, or who do not have their principal place of business, reside, or have their domicile within the United States, but have property within their jurisdiction, or who have been adjudged bankrupts by courts of competent jurisdiction without the United States and have property within their jurisdiction,"⁵⁷ and "exercise ancillary jurisdiction over persons or property within their respective territorial limits in aid of a receiver or trustee appointed in any bankruptcy proceedings pending in any other court of bankruptcy."⁵⁸ The extent to which jurisdiction in suits by aliens is affected by the residence of the parties, is discussed in a previous section.⁵⁹ Proceedings to cancel a certificate of citizenship issued to a

⁵⁵ 36 St. at L. 1100, Comp. St. § 1030.

⁵⁶ U. S. v. Larkin, C. C. A., 153 Fed. 113. See U. S. v. Whiteomb M. R. Co., 45 Fed. 89.

⁵⁷ 30 St. at L. 544, § 2. See *infra*, § 615.

⁵⁸ *Ibid.*, as amended 36 St. at L. 838. See *infra*, § 612.

⁵⁹ *Supra*, § 45.

naturalized citizen should be brought in the district where he resides at the time the suit is brought.⁶⁰ It has been held that such proceedings may not be brought in a district where the naturalized citizen is in prison when his residence at the time of his conviction was elsewhere.⁶¹

§ 61a. Residence in suits by the United States. A suit by the United States, unless the statute authorizing the same otherwise provides, can be brought only in the district of which the defendant is an inhabitant.¹ Even when an individual is surety upon a bail bond filed in a Federal court in another State, his liability cannot be established, except by proceedings in his own State and district.² The Act of August 13, 1894, which directs the filing of bonds by contractors upon public works of the United States, for the security of laborers and material men, provides that the suit upon such bond be brought "in the Circuit Court of the United States in the district in which said contract was to be performed and executed, irrespective of the amount in controversy in such suit and not elsewhere."³ Before the Judicial Code, it was held that this authorized the Federal court in such district to obtain jurisdiction of the persons of non-resident defendants through the service upon them of its process in whatever district they might be found.⁴

§ 61b. Residence in suits arising under the Constitution or laws of the United States. Where the jurisdiction depends upon the existence of a Federal question, and is exclusive, the suit must be brought in the district of the defendants' residence;¹ except in those cases arising under the special statutes

⁶⁰ 34 St. at L. 601, Comp. St., § 4374; *infra*, § 151b.

⁶¹ U. S. v. Goodrich, 211 Fed. 548.

¹ § 61a. 1 U. S. v. No. Pac. R. Co., C. C. A., 134 Fed. 715; Kirk v. U. S., C. C. A., 137 Fed. 753; affirmed 199 U. S. 607.

² Kirk v. U. S., C. C. A., 137 Fed. 753; affirmed 199 U. S. 607, 50 L. ed. 331.

³ 28 St. at L. 278, amended 33 St. at L. 811. It was held that this

applied only to suits by claimants for labor or material supplied to the contractor and not to one brought by the Government for its own benefit. U. S. v. McGee, 171 Fed. 209. See § 5a, *supra*.

⁴ U. S. v. Congress Construction Co., 222 U. S. 199. See, also, U. S. v. Schofield Co., 182 Fed. 240.

¹ § 61b. 1 Macon Grocery Co. v. Atlantic Coast Line R. R. Co., 215 U. S. 501, 54 L. ed. 300; affirming Atlantic Coast Line R. Co. v. Ma-

which have been described in the preceding sections of this work.²

It has been said that the official residence of the commissioner of patents is in the District of Columbia and that suits against him in such capacity cannot be brought in any other district without his consent.³

Where the jurisdiction depends upon the existence of a Federal question and is concurrent with that of the State courts, the defendant must, unless a statute otherwise prescribes, be sued in the district which he inhabits;⁴ but where it depends upon citizenship in different States, the suit may be brought in the district in which either the plaintiff or the defendant resides, provided the defendant can be duly served.⁵ It has

con Grocery Co., C. C. A., 166 Fed. 206; *Sunderland Bros. v. Chicago, R. I. & P. Ry. Co.*, 158 Fed. 877; *Memphis Oil Co. v. Illinois Cent. R. Co.*, 164 Fed. 290; *Imperial Colliery Co. v. Chesapeake & Ohio Ry. Co.*, 171 Fed. 589. *Contra*, *Northern Pac. Ry. Co. v. Pacific Coast Lumber Mfrs.' Ass'n*, C. C. A., 9th Ct., 165 Fed. 1, 9, and cases cited.

² *Supra*, § 61.

³ *Barrett Co. v. Ewing*, C. C. A., 242 Fed. 506.

⁴ *McCormick H. M. Co. v. Walthers*, 134 U. S. 41, 43, 33 L. ed. 834; *St. Louis, V. & T. H. R. Co. v. Terre Haute & I. R. Co.*, 33 Fed. 385, 386; *In re Keasbey & Mattison Co.*, 160 U. S. 221; *Macon Grocery Co. v. Atlantic Coast Line R. Co.*, 215 U. S. 501, 54 L. ed. 300.

⁵ *McCormick H. M. Co. v. Walthers*, 134 U. S. 41, 33 L. ed. 833; *Pitkin Min. Co. v. Markell*, 33 Fed. 386; *St. Louis, V. & T. H. R. Co. v. Terre Haute & I. R. Co.*, 33 Fed. 385, 386; *Fales v. Chicago, M. & St. P. Ry. Co.*, 32 Fed. 673; *Short v. Chicago, M. & St. P. Ry. Co.*, 33

Fed. 114; *Gavin v. Vance*, 33 Fed. 84; *W. U. Tel. Co. v. Brown*, 32 Fed. 337; *Macon Grocery Co. v. Atlantic Coast Line R. Co.*, 215 U. S. 501, 54 L. ed. 300; affirming C. C. A., 166 Fed. 206. It was held that a suit in the Circuit Court to enjoin, pending the determination of its reasonableness by the Interstate Commerce Commission, the enforcement of a railroad rate charged to be unlawful as in violation of the interstate commerce law and anti-trust law, arose under the laws of the United States and could only be maintained against a defendant in a State of which it was an inhabitant, *Southern Pac. Co. v. Arlington Heights Fruit Co.*, C. C. A., 191 Fed. 101; and before the enactment of the Judicial Code, that a suit by a shipper against a carrier to compel the receipt and transportation of merchandise between two States did not arise under a law of the United States, and where the requisite difference of citizenship existed might be brought in the district of the residence of either plaintiff or defendant, *Danciger v. Wells, Fargo & Co.*, 154 Fed. 379.

been held that where the jurisdiction is founded upon the fact that the cause of action involves a Federal question and the requisite diversity of citizenship exists, the suit must be brought in the district where the defendant resides.⁶ Since the permission to sue in the district of either the plaintiff or the defendant is limited to cases "where the jurisdiction is founded only on the fact that the action is between citizens of different States;" where the plaintiff's pleading shows both such a difference of citizenship and that the controversy arises under the Constitution or laws of the United States—the suit must be brought in the district of the defendant's habitation,⁷ unless the case falls within one of the express statutory exceptions. Where such a suit was brought in a State where the defendant did not reside, it was held that it could not be removed.⁸ It has been held that where a count under a Federal statute, which authorizes a suit in a district different from that of the residence of either party, is joined with one arising under the common law alone; the suit cannot be maintained in a district in which neither party resides.⁹

§ 61c. Residence where jurisdiction depends upon diversity of citizenship. Where the jurisdiction depends upon citizenship in different States, the suit may be brought in the district in which either the plaintiff or the defendant resides, provided the defendant can be duly served.¹ But not in any other dis-

⁶ *Macon Grocery Co. v. Atl. Coast Line Co.*, 215 U. S. 501; *Railroad Commissioners v. Burleson*, 255 Fed. 604.

⁷ *Imperial Colliery Co. v. Chesapeake & Ohio Ry. Co.*, *Powhatan C. & Coke Co. v. Norfolk & Western Ry. Co.*, 171 Fed. 589; *Cound v. Atchison, T. & S. F. Ry. Co.*, 173 Fed. 527; *Smith v. Detroit & T. S. L. R. Co.*, 175 Fed. 506; *Whittaker v. Illinois Cent. R. Co.*, 176 Fed. 130; *Newell v. Baltimore & O. R. Co.*, 181 Fed. 698.

⁸ *Boise Commercial Club v. Oregon Short Line R. Co.*, C. C. A., 260 Fed. 769.

⁹ *Ware-Kramer Tobacco Co. v.*

Am. Tobacco Co., 178 Fed. 117. See *Sunderland Bros. v. Chicago, R. I. & P. Ry. Co.*, 158 Fed. 877; *Atlantic Coast Line R. Co. v. Macon Grocery Co.*, C. C. A., 166 Fed. 206; *Imperial Colliery Co. v. Chesapeake & Ohio Ry. Co.*, 171 Fed. 589.

§ 61c. ¹ *McCormick H. M. Co. v. Walthers*, 134 U. S. 41, 33 L. ed. 833; *Pitkin Min. Co. v. Markell*, 33 Fed. 386; *St. Louis, V. & T. H. R. Co. v. Terre Haute & I. R. Co.*, 33 Fed. 385, 386; *Fales v. Chicago, M. & St. P. Ry. Co.*, 32 Fed. 673; *Short v. Chicago, M. & St. P. Ry. Co.*, 33 Fed. 114; *Gavin v. Vance*, 33 Fed. 84; *W. U. Tel. Co. v. Brown*, 32 Fed. 337; *Marian Coal*

trict,² even by removal³ except by consent or waiver,⁴ or when service is by statute authorized in another district.⁵ When one of the plaintiffs is a resident of the district, and the other plaintiff and the defendant are citizens of different States from those of each other and of the plaintiff, and are both non-residents, the Federal court has no jurisdiction,⁶ either originally⁷ or by removal.⁸ Where plaintiffs are citizens and residents of different States, and the defendant is a citizen and resident of a third State, the suit may be brought in the district of the defendant's residence.⁹ Where the defendants are residents of different States, the suit cannot be brought in any district except that of the plaintiff's residence.¹⁰ When brought in the residence of some but not all of the defendants only the non-resident can take this objection.¹¹ And if he is not an indispensable party the suit will be retained as regards the others.¹² This will be done when an action is brought against joint debtors.¹³ The defendant can-

Co. v. Peale, C. C. A., 204 Fed. 161; Lehigh Valley Coal Co. v. Washko, C. C. A., 231 Fed. 42; Twin Lakes Land & Water Co. v. Dohner, C. C. A., 242 Fed. 399; Tate v. Baugh, 252 Fed. 317.

² Lindsay v. Chicago, B. & Q. R. Co., C. C. A., 226 Fed. 23.

³ *Ex parte* Wisner, 203 U. S. 449, 51 L. ed. 264; H. J. Decker, Jr. & Co. v. Southern Ry. Co., 189 Fed. 224; W. U. Tel. Co. v. Louisville & N. R. R. Co., 201 Fed. 932; Guaranty & Tr. Co. v. McCabe, C. C. A., 250 Fed. 699, certiorari denied, 247 U. S. 505, 38 Sup. Ct. 427, 62 L. ed. 1240; Boise Commercial Club v. Oregon Short Line R. Co., C. C. A., 260 Fed. 769, and cases cited. *Contra*, Rubber & Celluloid Harness Trimming Co. v. John L. Whiting-J. J. Adams Co., 210 Fed. 393; Louisville & Nashville R. R. Co. v. Western Union Tel. Co., 218 Fed. 91; Hohenberg & Co. v. Mobile Liners, 245 Fed. 169; James v. Ama-

rillo Light & Power Co., 251 Fed. 337. See *infra*, § 62a.

⁴ See *infra*, §§ 62a, 170.

⁵ *Supra*, § 61.

⁶ Smith v. Lyon, 133 U. S. 315, 33 L. ed. 635, Moffat v. Soley, Fed. Cas. No. 9,688, 2 Paine, 103; Elkhart Nat. Bank v. N. W. G. L. Co., 84 Fed. 76; Hubbard v. Northern Railroad Co., Fed. Cas. No. 6,818, 3 Blatchf. 84, 25 Vt. 715.

⁷ Carl Laemmle Music Co. v. Stern, 209 Fed. 129.

⁸ Poorman v. Cleveland, C., C. & St. L. Ry. Co., 255 Fed. 987.

⁹ Sweeney v. Carter Oil Co., 199 U. S. 252, 50 L. ed. 178.

¹⁰ Camp v. Gress, 250 U. S. 308, reversing C. C. A., 244 Fed. 121, and overruling a number of cases in the courts below.

¹¹ Camp v. Gress, 250 U. S. 308; Bensinger Self-Adding Cash Reg. Co. v. Nat. Cash Reg. Co., 42 Fed. 81.

¹² *Ibid.*

¹³ *Ibid.*

not remove a case to a district where neither party resides,¹⁴ and if he so attempts, the plaintiff may have the case remanded.¹⁵

It has been held that the assignee of a cause of action, when the jurisdiction is founded upon diversity of citizenship, can sue in the district of which he is a resident or in that of the defendant, irrespective of the district in which the assignor resided.¹⁶ It has been said that "the words 'inhabitant,' 'residence,' and 'resident,' as used in the statute, are synonymous. To hold otherwise is to add confusion."¹⁷ "The word inhabitant in that act was apparently used not in any larger meaning than 'citizen,' but to avoid the incongruity of speaking of a citizen of less than a State, when the intention was to cover not only a district which included a whole State, but also two districts in one State."¹⁸ The word "inhabitant" seems however, to be more limited than resident.¹⁹ Inhabitaney within the State, which is divided into two districts, is not inhabitaney in both of them.²⁰

The limitation as to residence does not apply to defendants who are served, in pursuance of the statute, by publication or without the State or district,²¹ even when they are the only

¹⁴ *Ex parte Wisner*, 203 U. S. 449, 51 L. ed. 264; *Yellow Aster Min. & Mill. Co. v. Crane Co.*, C. C. A., 150 Fed. 580; *Goldberg, Bowen & Co. v. German Ins. Co.*, 152 Fed. 831; *H. J. Decker, Jr. & Co. v. Southern Ry. Co.*, 189 Fed. 224.

¹⁵ *Ex parte Wisner*, 203 U. S. 449, 51 L. ed. 264; *H. J. Decker, Jr. & Co. v. Southern Ry. Co.*, 189 Fed. 224, 51 L. ed. 264. See *infra*, § 63.

¹⁶ *Strinson v. United Wrapping Machine Co.*, 156 Fed. 298. *Contra*, *Waterman v. Chesapeake & O. Ry. Co.*, 199 Fed. 667.

¹⁷ *Bogue v. Chicago, B. & Q. R. Co.*, 193 Fed. 728, 733, *Smith McPherson, J.*

¹⁸ *Gray, J.*, in *Shaw v. Quincy Min. Co.*, 145 U. S. 444, 447, 36 L. ed. 768, 770. See *United States v.*

Gronieh, 211 Fed. 548; *Thomas v. South Butte Mining Co.*, C. C. A., 230 Fed. 968.

¹⁹ For cases of residence, see *King v. U. S.*, 59 Fed. 9; *Rivers v. Bradley*, 53 Fed. 305; *Reckling v. McKinstry*, 185 Fed. 842.

²⁰ *Wange v. Public Service Ry. Co.*, 159 Fed. 189.

²¹ *Greeley v. Lowe*, 155 U. S. 58, 39 L. ed. 69; *Dick v. Foraker*, 155 U. S. 404, 39 L. ed. 201; *Carpenter v. Talbot*, 33 Fed. 537; *Pollitz v. Farmers' L. & Tr. Co.*, 39 Fed. 707; *Ames v. Holderbaum*, 42 Fed. 341; *U. S. v. Southern Pac. R. Co.*, 63 Fed. 481; *Wheelright v. St. Louis, N. O. & O. Canal Co.*, 50 Fed. 709; *Texas Co. v. Central Fuel Oil Co.*, C. C. A., 194 Fed. 1; *Ingersoll v. Coram*, 211 U. S. 335, 53 L. ed. 208; *Howard v. National Telephone Co.*, 182 Fed. 215, *infra*, § 166. See

defendants.²² The limitation of the jurisdiction to the place of the residence of the parties does not apply to local actions, such as ejectment,²³ or for trespass upon land.²⁴ Such actions can only be brought in the district where the land is situated; and they may there be brought, irrespective of the residence of the parties and without the procurement of an order for the service of process outside the district; provided that the necessary difference of citizenship exists and that the defendant can be found there.²⁵

When there is no Federal question involved, an action begun in the State court between two non-residents by an attachment cannot be removed, although the necessary difference of citizenship exists.²⁶

§ 61d. Residence of corporations. A corporation chartered by one of the United States cannot have a residence in another State,¹ even where it has, as a condition of doing business therein, filed a stipulation authorizing service of process upon its agents within the State and agreeing not to remove a suit to the Fed-

Kuhn v. Morrison, 75 Fed. 81; but see Detweiler v. Holderbaum (C. C.), 42 Fed. 337.

²² Dick v. Foraker, 155 U. S. 404, 39 L. ed. 201; Wheelright v. St. Louis, N. O. & O. Canal Co., 50 Fed. 709; U. S. v. Southern Pac. R. Co., 63 Fed. 481; Single v. Scott Paper Mfg. Co., 55 Fed. 553.

²³ Spencer v. Kansas City Stock Yards Co., 56 Fed. 741; Elk Garden Co. v. T. W. Thayer Co., 179 Fed. 556.

²⁴ Kentucky Coal Lands Co. v. Mineral Development Co., 191 Fed. 899. See Livingston v. Jefferson, 1 Brock 203, 4 Hughes 606, 4 Hall, L. J. 78, 11 Myers' Fed. Dec. 721, Fed. Case No. 8411; Northern Indiana Ry. Co., v. Michigan Central Ry. Co., 15 How. 233, 14 L. ed. 674; Ellenwood v. Marietta Chair Co., 158 U. S. 105, 15 Sup. Ct. 771, 39 L. ed. 913.

²⁵ Spencer v. Kansas City Stock

Yards Co., 56 Fed. 741; Kentucky Coal Lands Co. v. Mineral Development Co., 191 Fed. 899. See *infra*, § 64.

²⁶ George v. Tennessee Coal, Iron & R. Co., 184 Fed. 951.

§ 61d. 1 Shaw v. Quincy Min. Co., 145 U. S. 444, 453, 36 L. ed. 768, 772; Galveston, H. & S. A. Ry. Co. v. Gonzales, 151 U. S. 496, 38 L. ed. 248; Southern Pac. Co. v. Arlington Heights Fruit Co., C. C. A., 191 Fed. 101; Stone v. Chicago, B. & Q. R. Co., 195 Fed. 832; Thomas v. South Butte Min. Co., C. C. A., 230 Fed. 968. Adzenoska v. Erie R. Co., 210 Fed. 571; Yanuszauskas v. Mallory S. S. Co., C. C. A., 232 Fed. 132; Vitkus v. Clyde S. S. Co., 232 Fed. 288; Lukosewicz v. Phila. & Reading Coal & Iron Co., 232 Fed. 292; Best v. Great Northern Ry. Co., 243 Fed. 789; Budris v. Consolidation Coal Co., 251 Fed. 673.

eral court on the ground of difference of citizenship or non-residence.² In the absence of any provision in the charter, the principal office and the domicile of a railroad company incorporated by Congress are where the meetings of its stockholders and directors are held, and the records thereof with the registry of its stock are kept, and not where the general administrative offices of the heads of its departments are located.³ Where a State contains more than one Federal judicial district, a corporation of the State is presumed to be a resident and inhabitant of the district in which it has its principal office, as designated in its certificate or articles of incorporation in accordance with the statutory requirements.⁴ Where a State is divided into several Federal districts, it seems: that the district of the residence of a domestic corporation is fixed by the State statute,⁵ and that where jurisdiction depends upon the defendant's residence it cannot be sued in any other district in the state.⁶

The residence of a corporation is usually determined by either the location of its principal place of business or the personal residence of the party whom it has appointed as its attorney-of-fact upon whom service of process may be made.⁷ Where a domestic corporation failed to comply with the statute of West Virginia,⁸ by filing a power of attorney appointing a private individual with authority to accept service of process

² *Southern Pac. Co. v. Denton*, 146 U. S. 202, 207, 36 L. ed. 943, 945.

³ *Interstate Com. Com. v. Texas & Pac. Ry. Co.*, 57 Fed. 948, 955; *Texas & Pac. Ry. Co. v. Interstate Com. Com.*, 162 U. S. 197, 204, 40 L. ed. 940, 942. It has been held that the Texas & Pacific Ry. Co. was an inhabitant of Dallas County, Texas, where it maintained an office, which it designated as its general office, and where all the acts of the board of directors in New York were subsequently affirmed at a board meeting, the senior vice-president living in the same county. *Matter of Dunn*, 212 U. S. 374, 388, 53 L. ed. 558, 564.

⁴ *Firestone Tire & Rubber Co. v. Vehicle Equipment Co.*, 155 Fed. 676.

⁵ *Lemon v. Imperial Window Glass Co.*, 199 Fed. 927; *Stimson v. United Wrapping Mach. Co.*, 156 Fed. 298. See *Dulles v. H. D. Crippen Mfg. Co.*, 156 Fed. 706; *Cincinnati H. & D. Ry. Co. v. Orr*, 215 Fed. 261. *Contra*, *Consolidated Rubber Tire Co. v. Ferguson*, 169 Fed. 888 s. c., C. C. A., 183 Fed. 756; *Waterman v. Chesapeake & Ohio Ry. Co.*, 199 Fed. 667; *Guaranty Trust Co. v. McCabe*, C. C. A., 217 Fed. 699.

⁶ *Ibid.*

⁷ *Ibid.* See *infra*, § 164a.

⁸ *Code W. Va.*, § 2313.

and with other statutory powers, but had complied with another statute appointing the State auditor its attorney to accept such service; it was held to be liable to suit in either of the Federal districts of the State, by attachment and publication, or by serving process upon the State official in that or the other district.⁹

§ 62. Residence in patent cases. The Judicial Code provides: "§ 48. In suits brought for the infringement of letters patent the District courts of the United States shall have jurisdiction, in law or in equity, in the district of which the defendant is an inhabitant, or in any district in which the defendant, whether a person, partnership, or corporation, shall have committed acts of infringement and have a regular and established place of business. If such suit is brought in a district of which the defendant is not an inhabitant, but in which such defendant has a regular and established place of business, service of process, summons, or subpoena upon the defendant may be made by service upon the agent or agents engaged in conducting such business in the district in which suit is brought."¹

In a suit to enjoin the infringement of a patent, the defendant, even if he is an alien,² may be sued in any district where his infringement occurred, if he has a regularly established place of business there, or else in the district of which he is an inhabitant,³ but unless he is an alien, not elsewhere.⁴

It has been held that such a suit against an alien may be maintained in any district where he can be served.⁵

When the suit is brought in the district of which the de-

⁹ *Lemon v. Imperial Window Glass Co.*, 199 Fed. 927.

§ 62. 136 St. at L. 1087.

² *United Shoe Machinery Co. v. Duplessis Independent Shoe Machinery Co.*, 133 Fed. 930; *Smith v. Farbenfabriken of Elberfeld Co.*, C. C. A., 203 Fed. 476.

³ *Bowers v. Atlantic G. & P. Co.*, 104 Fed. 887; *Chicago Pneumatic Tool Co. v. Phila. Pneumatic Tool Co.*, 118 Fed. 852; *U. S. Consol. Seeded Raisin Co. v. Phoenix Raisin, S. & P. Co.*, 124 Fed. 234. But see

Noonan v. Chester Park Athletic Club Co., 75 Fed. 334.

⁴ *Feder v. A. B. Fiedler & Sons*, 116 Fed. 378; *Underwood Typewriter Co. v. Fox Typewriter Co.*, 158 Fed. 476.

⁵ *Sandusky Foundry & Machine Co. v. De Lavaud*, 251 Fed. 631. *Smith v. Farbenfabriken of Elberfeld Co.*, C. C. A., 203 Fed. 476; *Arbetter Felling Mach. Co. v. Lewis Blind Stich Mach.*, C. C. A., 230 Fed. 992. *Supra*, § 45.

fendant is not an inhabitant, he must have a regular and established place of business there, at the time when the suit is brought.⁶ Whether that was the case at the time of the commission of the acts of infringement there, is immaterial.⁷

The maintenance of "an established place of business" in the district will not give jurisdiction if no act of infringement was there committed.⁸

It has been held: that a corporation cannot be sued in a district where it has no regular and established place of business, although it has one in another district in the same State, which is the State of its incorporation, and it is charged with an infringement made jointly with other defendants residing in the district where the suit is brought and a claim of damages for conspiracy is joined with the prayer for an injunction and accounting.⁹ That where the non-residence of defendant appears in the bill, there must be averments of infringement in the district.¹⁰ But that the phrase, "maintains a regular and established place of business," need not be used where that fact appears from the allegations. That a bill against a corporation and its president and general manager, who is so described, is not insufficient when it avers joint acts of infringement within the district and the maintenance of a regular and established place of business by the corporation there, although it is silent as to the individual defendant's habitation and place of business.¹¹

That where the defendant sells the infringing articles at a fixed place within the district and also assembles different parts of the same, there the court has jurisdiction.¹² Where the

⁶ *Feder v. A. B. Fiedler & Sons*, 116 Fed. 378; *Underwood Typewriter Co. v. Fox Typewriter Co.*, 158 Fed. 476.

⁷ *Underwood Typewriter Co. v. Fox Typewriter Co.*, 158 Fed. 476.

⁸ *United Autographic Register Co. v. Egry Register Co.*, 219 Fed. 637; *U. S. Envelope Co. v. Transo Paper Co.*, 229 Fed. 576.

⁹ *Cheatham El. Switching Device Co. v. Transit Development Co.*, 191 Fed. 727.

¹⁰ *International Wireless Telegraph Co. v. Fessenden*, 131 Fed. 491; *National El. Signaling Co. v. Telefunken Wireless Teelgraph Co.*, 194 Fed. 893.

¹¹ *Thomson-Houston El. Co. v. Electrose Mfg. Co.*, 155 Fed. 543.

¹² *Am. Stoker Co. v. Underfeed Stoker Co.*, 182 Fed. 642. See *Consol. Rubber Tire Co. v. Diamond Rubber Co., C. C. A.*, 215 Fed. 106.

defendant sells through mail orders which he receives and makes the collections at his home but keeps his goods in a warehouse from which they are shipped within another district, he has a "regular and established place of business" in the latter and can there be sued for infringement of a patent.¹³ Proof that the defendant, who has constructed an infringing machine in another State, has assisted in the installation of the same for use by another defendant within the district; is sufficient to support the jurisdiction when it has an established place of business there.¹⁴

The complainant has the burden of proof to establish an infringement within the district and the maintenance by the defendant of a regular established place of business there.¹⁵ It has been held: that a foreign corporation does not have a "regular and established place of business" in a district where it has a salesagent who keeps an office there at his own expense and takes orders on commission which are filled at the principal office of the company where it also makes the collections.¹⁶ Nor where it keeps an office in the district with one stenographer and a salesman in charge who solicits orders which are filled in another district from which collections are made.¹⁷ Nor where its goods are sold by a jobber whom it agrees to protect against patent suits although its letter-heads give addresses in different places, including one in the district of the suit, and the man in charge of the jobber's office states that they are the representatives of the company in such district.¹⁸

¹³ *Smith v. Farbenfabriken of Elberfeld Co.*, C. C. A., 203 Fed. 476.

¹⁴ *Edison v. Allis-Chalmers Co.*, 191 Fed. 837.

¹⁵ *Underwood Typewriter Co. v. Fox Typewriter Co.*, 181 Fed. 541. For another case of defective proof, see *Consolidated Rubber Tire Co. v. B. F. Goodrich Co.*, 195 Fed. 764. It has been held that proof that the label, "New York," was upon infringing articles sold in another State by a corporation with a regular and established place of business in New York, is insufficient to prove that they were manufactured

in New York, *Rumford Chemical Works v. Egg Baking Powder Co.*, 145 Fed. 953. See also the note to *Bailey v. Mosher*, 11 C. C. A., 304, 313.

¹⁶ *General El. Co. v. Best El.*, 220 Fed. 347; *United Autographic Register Co. v. Egry Register Co.*, 219 Fed. 637.

¹⁷ *Amer. El. Welding Co. v. Lalance Grosjean Mfg. Co.*, 256 Fed. 34.

¹⁸ *Stryker Deflector Co., Inc., v. Perrin Mfg. Co.*, C. C. A., 256 Fed. 656.

The employment of an agent in the district who in the course of his business uses infringing articles, and who has power to make a contract in the district, is immaterial if the defendant has no regular and established place of business there.¹⁹ It has been held: that paying an agent to solicit orders to be executed at the office of its domicile, sharing the expenses of the agent, including salary and rent, with another corporation which employs him, when he merely solicits orders which are executed at the home office, is not the maintenance of a regular and established place of business.²⁰ That proof that salesmen of the defendant exhibited infringing articles within the district and that one of them said that his employer had sold many there, is insufficient to establish the jurisdiction.²¹

It is necessary to prove and allege a complete act of infringement within the district and not merely a threat or an evident purpose to infringe there.²² The contributory act within the jurisdiction must be proved to have resulted in a complete infringement.²³

The provision that service of process may be made upon the agent engaged in conducting the business within the district, is permissive only, and service may be made upon an officer of a corporation who is there found.²⁴

Under the former statute, it was held that a suit to compel the issue of a patent might be brought in any district where valid service could be made upon the defendant.²⁵

When the defendant is a non-resident, the bill must show that it had a regular and established place of business within the district when the infringement occurred.²⁶ An allegation that the defendants "are now doing business" at a designated

¹⁹ *Chicago Pneumatic Tool Co. v. Philadelphia Pneumatic Tool Co.*, 118 Fed. 852; *U. S. Envelope Co. v. Transo Paper Co.*, 229 Fed. 576.

²⁰ *W. S. Tyler Co. v. Ludlow-Saylor Wire Co.*, 236 U. S. 723.

²¹ *Gray v. Grinberg*, 147 Fed. 732. See also the note to *Bailey v. Mosher*, 11 C. C. A. 304, 313.

²² *Westinghouse El. Co. v. Stanley El. Co.* 116 Fed. 641; *Gray v. Grinberg*, 147 Fed. 732.

²³ *Consolidated Rubber Tire Co.*

v. Republic Rubber Co., 195 Fed. 768.

²⁴ *National El. Signaling Co. v. Telefunken Wireless Telegraph Co.*, 194 Fed. 893.

²⁵ *Lewis Blind Stitch Co. v. Arbetter Felling Mach. Co.*, 181 Fed. 974.

²⁶ *Internat. Wireless Tel. Co. v. Fessenden*, 131 Fed. 491; *Underwood Typewriter Co. v. Fox Typewriter Co.*, 158 Fed. 476.

place within the district is insufficient.²⁷ The denial of a motion to quash the summons or subpoena, ruling that the facts show that the person upon whom service was made was the defendant's duly authorized agent within the district, is not an adjudication that it maintained a regular and established place of business there.²⁸ Where the bill joins causes of action for tort or breach of contract with one arising under the patent laws, if brought in a district where the defendant does not reside, so much thereof as sets forth the former causes of action must be dismissed.²⁹ The objection that the suit was not brought in the proper district may be waived.³⁰ A general appearance or answer to the merits is such a waiver.³¹ Where the answer admitted that the defendant was a corporation organized under the laws of West Virginia with its principal place of business in the state of Ohio and it appeared that this was the first of several companies organized in different states under the same name and had originally had an established place of business in Illinois, it was held that this was sufficient to sustain the allegations in the bill that at the time of the infringement, it still maintained an office in Illinois, although it appeared that at some time, the date of which was not shown, this office was taken by one of the other companies.³²

Where the bill alleges infringement in the district only and this is denied by the defendant, the issue is limited to an infringement within such district.³³ The bill cannot after a general appearance then be amended so as to allege infringement beyond the district.³⁴ Where the bill alleged infringement in the district and elsewhere in the United States, a defendant

²⁷ Scheuerle v. One Piece Bifocal Lens Co., 241 Fed. 270.

²⁸ Geneva Furniture Co. v. Karpen, 238 U. S. 254.

²⁹ Cheatham El. Sw. Device Co. v. Transit Develop. Co., 191 Fed. 727.

³⁰ See § 62a.

³¹ Corrugated Paper Patents Co. v. Paper Working Mach. Co. of N. Y., 237 Fed. 380; Sandusky Foundry & Mach. Co. v. Delavaud, 251 Fed. 631; *infra*, § 170. But see Bowers v. Atlantic G. & P. Co., 104 Fed. 887; Streat v. American Rub-

ber Co., 115 Fed. 634; Westinghouse Elec. & Mfg. Co. v. Stanley Elec. Mfg. Co., 115 Fed. 641; Rumford Chemical Works v. Egg Baking Powder Co., 145 Fed. 953; Feder v. A. B. Fiedler, C. C. A., 116 Fed. 378.

³² Consol. Rubber Tire Co. v. Diamond Rubber Co., 215 Fed. 106.

³³ Gray v. Grinberg, C. C. A., 159 Fed. 138.

³⁴ Western Wheel Scraper v. Gehagen, 152 Fed. 648. See *infra*, §§ 169, 170.

who had appeared and answered to the merits without raising the objection that he was sued for foreign acts of infringement, was held to have made a waiver.³⁵

The defendant, when sued in a district where the complainant does not reside, may set up a counter-claim for infringement of other patents elsewhere.³⁶ The pendency of a suit in the district where the defendant is incorporated is no defense to another suit against it in another district; but, in such a case, the accounting in the latter suit will be limited to infringements within the district.³⁷

§ 62a. Waiver of objections as to residence. The non-resident defendant alone can object, because the suit is not brought in the proper district.¹

The objection is waived by the joinder of issue,² or, it seems, by a general appearance,³ without raising the same; even when

³⁵ Sandusky Foundry & Mach. Co. v. DeLavaud, 251 Fed. 631.

³⁶ United States Expansion Bolt Co. v. H. G. Kroncke H. Co., 316 Fed. 186.

³⁷ Warren Bros. v. Montgomery, 172 Fed. 474.

§ 62a. 1 Camp v. Gress, 250 U. S. 308; Jewett v. Bradford Sav. Bank & Tr. Co., 45 Fed. 801; Smith v. Atchison, T. & S. F. R. Co., 64 Fed. 1; Freeman v. Am. Surety Co., 116 Fed. 548; Schiffer v. Anderson, C. C. A., 146 Fed. 457; H. J. Decker, Jr. & Co. v. Southern Ry Co., 189 Fed. 224.

² Western Loan & Savings Co. v. Butte & Boston Consol. Min. Co., 210 U. S. 368, 52 L. ed. 1101; Atchison, T. & S. F. Ry. Co. v. Gilliland, C. C. A., 193 Fed. 608; Texas Co. v. Central Fuel Oil Co., C. C. A., 194 Fed. 1.

³ St. Louis & S. F. Ry. Co. v. McBride, 141 U. S. 127, 35 L. ed. 659; Texas & P. Ry. Co. v. Cox, 145 U. S. 593, 603, 36 L. ed. 829, 832; Interior Const. & I. Co. v. Gibney, 160 U. S. 217, 40 L. ed. 401; Central Trust Co. v. McGeorge, 151 U.

S. 129, 38 L. ed. 98; Fosha v. W. U. Tel. Co., 114 Fed. 704; Occidental Consol. Min. Co. v. Comstock Tunnel Co., 120 Fed. 518; U. S. Consol. Seeded Raisin Co. v. Phoenix Raisin, S. & P. Co., 124 Fed. 234; Philadelphia & Boston Face Brick Co. v. Warford, 123 Fed. 843; Corwin Mfg. Co. v. Henrici Washer Co., 151 Fed. 938; Thomson-Houston El. Co. v. Electrore Mfg. Co., 155 Fed. 543; Dulles v. H. D. Crippen Mfg. Co. et al., 156 Fed. 706; Bogue v. Chicago, B. & Q. R. Co., 193 Fed. 728. But see Chesapeake & O. Coal Agency Co. v. Fire Creek Coal & Coke Co., 119 Fed. 942.

Where the plaintiff's pleading in an action brought in the Federal court did not refer to the Employers' Liability Act, but the court submitted the case to the jury upon the theory that it was based there upon; it was held that the failure of the defendant to specify the objection that it could not be sued under such statute in that district was a submission to the jurisdiction. Erie R. Co. v. Kennedy, C. C. A., 191 Fed. 332; Simpson

neither of the parties resides within the district and the case was removed from a State court.⁴ It has been said that the service of a notice for the taking of depositions, which is entitled in the Federal court, is not such a waiver.⁵ When the facts which establish a lack of jurisdiction because of residence were not known when the defendant appeared or answered, he may move to dismiss the case upon that ground as soon as he discovers it even upon the trial.⁶ In such a case, the plaintiff is entitled to a hearing upon the question whether the defendant, when he appeared or at any time before the trial, did have sufficient information to believe that the action was brought in the wrong district.⁷

It has been held that the proper method of raising the objection after a general appearance is by a motion for leave to file a plea to the jurisdiction.⁸ If it appears by the proof, that the defendant had no knowledge nor information sufficient to form a belief, that the plaintiff's averments of citizenship and residence were untrue, until shortly before his motion was made, he has an absolute right to plead to the jurisdiction upon such discovery.⁹ The issue as to defendant's knowledge or information may be tried upon affidavits before as well as

v. Cory, 204 Fed. 507, see *infra*, §§ 169, 170.

⁴ Matter of Moore, 209 U. S. 490, 52 L. ed. 904; where it was held that the filing by the plaintiff of an amended answer and his stipulation for a continuance after the removal was an acceptance of the jurisdiction of the Circuit Court. In *Kreigh v. Westinghouse, Church, Kerr & Co.*, 214 U. S. 249, 53 L. ed. 984; it was held that such a waiver was made by a joinder of issue on the merits without such an objection. To a similar effect are the rulings in *Western Loan & Sav. Co. v. Butte & Boston Consol. Min. Co.*, 210 U. S. 368, 52 L. ed. 1101; *Corwin Mfg. Co. v. Henrici Washer Co.*, 151 Fed. 938; *Louisville & N. R. Co. v. Fisher*, C. C. A., 11 L.R.A.

(N.S.) 926, 155 Fed. 68; *Proctor Coal Co. v. United States Fidelity & Guaranty Co.*, 158 Fed. 211.

⁵ *Hubbard v. Chicago, M. & St. P. Ry. Co.*, 176 Fed. 994.

⁶ *Lehigh Valley Coal Co. v. Washko*, C. C. A., 231 Fed. 43.

⁷ *Lehigh Valley Coal Co. v. Yensavage*, C. C. A., 218 Fed. 547; *Lehigh Valley Coal Co. v. Washko*, C. C. A., 231 Fed. 42.

⁸ *Lehigh Valley Coal Co. v. Yensavage*, C. C. A., 218 Fed. 547; *Kever v. Phila. & Reading Coal & Iron Co.*, 234 Fed. 814, s. c., 241 Fed. 883; s. c., C. C. A., 260 Fed. 534.

⁹ *Lehigh Valley Coal Co. v. Washko*, C. C. A., 231 Fed. 42, 46, modifying *Lehigh Valley Coal Co. v. Yensavage*, C. C. A., 218 Fed. 547.

upon the trial,¹⁰ unless the judge directs that the issue be decided by a jury.

Where the facts concerning residence were known by the defendant but he claimed ignorance that there was a Federal question in the case, such a motion will be denied if the plaintiff's pleadings suggested this although plaintiff did not rest his cause of action squarely upon the Federal statute.¹¹ The plea to the jurisdiction should not be joined with a plea to the merits.¹² Should these be joined or a motion made to dismiss upon the jurisdiction and upon the merits the defendant will be deemed to have waived this jurisdictional objection.¹³ The court may allow the plaintiff to withdraw a juror or suspend the trial so that plaintiff may obtain witnesses to show the defendant's knowledge or information.¹⁴ When a plea to the jurisdiction was overruled, defendant was permitted to restate its answer and have a trial upon the merits provided the plea was filed in good faith although its counsel was misled by inaccurate statements by defendant's agents.¹⁵

§ 63. Suits by assignees. "No district court shall have cognizance of any suit (except upon foreign bills of exchange) to recover upon any promissory note or other chose in action in favor of any assignee, or of any subsequent holder if such instrument be payable to bearer and be not made by any corporation, unless such suit might have been prosecuted in such court to recover upon said note or other chose in action if no assignment had been made."¹ The provisions of this limitation

¹⁰ Ibid. *Kever v. Phila. & Reading Coal & Min. Co.*, 234 Fed. 814, s. c., 241 Fed. 883.

¹¹ See § 24, *supra*.

¹² *Lehigh Valley Coal Co. v. Yensavage*, C. C. A., 218 Fed. 547; *Kever v. Phila. & Reading Coal & Iron Co.*, 234 Fed. 814, s. c., 241 Fed. 883, s. c., C. C. A., 260 Fed. 334.

¹³ *Lehigh Valley Coal Co. v. Yensavage*, C. C. A., 218 Fed. 547; *Kever v. Phila. & Reading Coal & Iron Co.*, 234 Fed. 814, s. c. 241 Fed. 883; *Lehigh Valley Coal Co. v. Washko*, C. C. A., 231 Fed. 42, 47.

¹⁴ *Lehigh Valley Coal Co. v. Washko*, C. C. A., 231 Fed. 42, 47.

¹⁵ *Philadelphia & Reading Coal & Iron Co. v. Kever*, C. C. A., 260 Fed. 534, s. c., 241 Fed. 883.

§ 63. 1 Judicial Code, § 24, subd. 1, 36 St. at L. 1087. The former statute extended this limitation upon the jurisdiction to suits "to recover the contents of any promissory note or other chose in action in favor of an assignee," &c. It may be that the omission of the phrase will induce the courts to disregard some of the earlier decisions.

apply to all assignments of choses in action of the character

It seems, however, that it will be useful for the practitioner here to collect them. "The terms used, 'the contents of any promissory note or other chose in action,' were designed to embrace the rights the instrument conferred which were capable of enforcement by suit. They were not happily chosen to convey this meaning, but they have received a construction substantially to that purport in repeated decisions." *Shoecraft v. Bloxham*, 124 U. S. 730, 735, 31 L. ed. 574, 576; affirmed in *Plant Inv. Co. v. Jacksonville, T. & K. W. Ry. Co.*, 152 U. S. 71, 76, 38 L. ed. 358, 360. The phrase "suit to recover the contents of a chose in action" includes suits to recover debts, *Utah-Nevada Co. v. De Lamar*, 113 Fed. 113, 66 C. C. A. 179; or any claims for damages for breach of contract, an oral contract as well as one in writing, or for torts connected with contract, *Bushnell v. Kennedy*, 9 Wall. 387, 390, 19 L. ed. 736; *Sere v. Pitot*, 6 Cranch, 332, 335, 336, 3 L. ed. 240, 241; *Sheldon v. Gill*, 8 How. 441, 449, 450, 12 L. ed. 1147, 1151; *Tredway v. Sanger*, 107 U. S. 323, 325, 27 L. ed. 582, 583; *Mersman v. Werges*, 112 U. S. 139, 143, 28 L. ed. 641, 643; *Corbin v. County of Black Hawk*, 105 U. S. 659, 665, 666, 26 L. ed. 1136, 1138, 1139. But *not* the right of a corporation to set aside a contract made by its promoters which it had assumed, *Commonwealth S. S. Co. v. Am. Shipbuilding Co.*, 197 Fed. 780; nor a suit by the assignee of a note to recover damages against a public officer for the illegal execution of the same, *Indiana v. Glover*, 155 U.

S. 513, 39 L. ed. 243. The phrase also includes suits to foreclose mortgages, *Kolze v. Hoadley*, 200 U. S. 76, 50 L. ed. 377; *Hoadley v. Day*, 128 Fed. 302; *Ban v. Columbia Southern Ry. Co.*, 109 Fed. 499 (a lien); although the bill also prays a cancellation of a fraudulent satisfaction thereof, *Kolze v. Hoadley*, 200 U. S. 76, 50 L. ed. 377. It includes suits to enforce the specific performance of contracts for the delivery of real or personal property, *Corbin v. County of Black Hawk*, 105 U. S. 659, 665, 26 L. ed. 1136, 1138; *Shoecraft v. Bloxham*, 124 U. S. 730, 31 L. ed. 574; *Plant Inv. Co. v. Jacksonville, T. & K. W. Ry. Co.*, 152 U. S. 71, 76, 38 L. ed. 358, 360; *Jackson & S. Co. v. Pearson*, 60 Fed. 113. A suit to quiet title and to cancel tax deeds, where complainant sues as assignee of a mortgage and of a certificate of purchase, in foreclosure proceedings, without having acquired the legal title, *Farr v. Hobeley*, 173 U. S. 243, 43 L. ed. 684; *Peters Land Co., C. C. A.*, 188 Fed. 10, reversing 170 Fed. 644; and to recover upon a contract of insurance with a reformation of the policy, *Laird v. Indemnity Mut. M. Co.*, 44 Fed. 712. To enforce a partner's or agent's right to an accounting, *Brown v. Beacom, C. C. A.*, 174 Fed. 812. The phrase does *not* include an action of replevin, *Deshler v. Dodge*, 16 How. 622, 631, 14 L. ed. 1085, 1088; *Buckingham v. Dake*, 112 Fed. 258, 50 C. C. A. 492. Or ejectment, *Smith v. Kernochen*, 7 How. 198, 12 L. ed. 666; *Willitt v. Baker*, 133 Fed. 937. Or otherwise brought to recover property *taken*

therein described whether they are made in good faith or collusive.²

The words "if such instrument be payable to bearer and be not made by any corporation" do not limit the comprehensiveness of the phrase "choses in action."³ The effect of this clause is to deprive the District Courts of all jurisdiction for the recovery of promissory notes or other choses in action, except (1) suits upon foreign bills of exchange; (2) suits which might have been brought there had no assignment or transfer been made; and (3) suits upon choses in action made by corporations and payable to bearer.⁴ The restriction applies to the removal of cases.⁵

A draft drawn in one State and payable in another of the

by the defendant before the assignment of the title to the plaintiff, *Gest v. Packwood*, 39 Fed. 525. Even it has been held where the assignor was a partnership which conveyed its property to a corporation, all the stock of which was divided between the members of the firm. *Slaughter v. Mallet Land & Cattle Co.*, C. C. A., 141 Fed. 282. But see §§ 46, 47, *supra*. Nor a suit to recover damages for the conversion of personal property, *Ambler v. Epinger*, 137 U. S. 480, 34 L. ed. 765. Nor a claim against a railroad company to recover excessive overcharges for freight, *Conn v. Chicago, B. & Q. R. Co.*, 48 Fed. 177. Nor a suit in equity to compel the transfer of stock on the books of a corporation, *Jewett v. Bradford S. B. Tr. Co.*, 45 Fed. 801. Nor, it has been held a suit by the assignee of a corporate debt to enforce the individual liability of a stockholder, *Ballard v. Bell*, 1 *Mason*, 243. But the court refused to entertain a bill for the appointment of the receiver of a corporation filed by a pledgee of its stock whose pledgor was a citizen of the cor-

poration's State, *Gorman-Wright Co. v. Wright*, 134 Fed. 363, 67 C. C. A. 345. But see *Cole v. Phila. & E. Ry. Co.*, 140 Fed. 944. It has been suggested that the restriction applies only to contracts "which may be properly said to have contents," not to "mere naked rights of action founded on some wrongful act,"—some neglect of duty to which the law attaches damages, such as failure to protest a note; but to "rights of action founded on contracts which contain within themselves some promise or duty to be performed," *Barney v. Globe Bank*, 5 *Blatch.* 107. See, however, *Bushnell v. Kennedy*, 9 *Wall.* 387, 391, 19 L. ed. 736, 738; *Ambler v. Epinger*, 137 U. S. 480, 483, 34 L. ed. 765, 766.

² *Consolidated Rubber Tire Co. v. Ferguson*, C. C. A., 183 Fed. 756.

³ *Mexican Nat. R. Co. v. Davison*, 157 U. S. 201, 206, 207, 39 L. ed. 672, 674, 675.

⁴ *Newgass v. New Orleans*, 33 Fed. 196; *New Orleans v. Quinlan*, 173 U. S. 191, 43 L. ed. 664.

⁵ *Guaranty Tr. Co. v. McCabe*, C. C. A., 217 Fed. 699.

United States is a foreign bill of exchange.⁶ A check is a bill of exchange.⁷ A promissory note payable "to the order of ——" is equivalent to a promissory note payable to bearer.⁸ So is a promissory note payable to the order of the maker, when indorsed by him in blank; and if the requisite diversity of citizenship exist between him and the holder the latter may sue in the Federal Court, if the other requisites of jurisdiction exist.⁹ A promissory note payable to the order of the maker and by him indorsed in blank is payable to bearer.¹⁰ A bill of exchange or promissory note drawn payable to the order of a specified person and indorsed by him in blank is not a promissory note payable to bearer within the statutory exception.¹¹

When his citizenship differs from that of defendant, the original beneficial owner can sue in the Federal courts upon a note, although an original but nominal payee, by reason of citizenship, could not.¹² When the nominal payee was an agent for the maker and took the note to negotiate it his citizenship in a suit by his transferee is disregarded.¹³

A county warrant payable to a specified person or bearer is equivalent to one payable to bearer.¹⁴ A city,¹⁵ county,¹⁶

⁶ *Buckner v. Finley*, 2 Pet. 586, 7 L. ed. 528.

⁷ *Bull v. Bank of Kasson*, 123 U. S. 105, 31 L. ed. 97.

⁸ *Steel v. Rathburn*, 42 Fed. 390; *Lyon County v. Keene Five Cent Sav. Bank*, 100 Fed. 337, 40 C. C. A. 391; affirming 97 Fed. 159; *Reynolds v. Lyon County, Iowa*, 97 Fed. 155.

⁹ *Houck v. Bank of Brinkley*, C. C. A., 242 Fed. 881.

¹⁰ *Bank of British N. A. v. Barling*, 46 Fed. 357; s. c. in C. C. A., 56 Fed. 260; *Jones v. Shapero*, 57 Fed. 457. *Contra*, *Houck v. Bank of Brinkley*, C. C. A., 242 Fed. 881.

¹¹ *Thomson v. Town of Elton*, 100 Fed. 145.

¹² *Holmes v. Goldsmith*, 147 U. S. 150, 13 Sup. Ct. 288, 37 L. ed. 118;

Superior City v. Ripley, 138 U. S. 93, 34 L. ed. 914; *Hoadley v. Day*, 128 Fed. 302; *Kirven v. Virginia-Carolina Chemical Co.*, C. C. A., 145 Fed. 288.

¹³ *Baltimore Tr. Co. v. Screven County*, 238 Fed. 834.

¹⁴ *Gratiot County v. Aylesworth*, 159 U. S. 250, 40 L. ed. 146; *Thompson v. Searcy County*, C. C. A., 57 Fed. 1030; *Jerome v. Rio Grande County Comm'rs*, 18 Fed. 873.

¹⁵ *New Orleans v. Quinlan*, 173 U. S., 191, 43 L. ed. 664; affirming 92 Fed. 695.

¹⁶ *Leake County Comm'rs. v. Dudley*, 173 U. S. 243, 43 L. ed. 684; *Gratiot County v. Aylesworth*, 159 U. S. 250, 40 L. ed. 146; *Jerome v. Rio Grande County Comm'rs*, 18

incorporated town,¹⁷ or township,¹⁸ is held to be a corporation, and the holder of its bonds, warrants, drain orders or other written obligations payable to bearer can sue in a Federal court in a proper case irrespective of the citizenship of any previous holder. The assignee of a city warrant payable to the order of a specified person and indorsed by him cannot, if the Federal court would have had no jurisdiction of a suit by his assignor,¹⁹ but if his assignor might have sued there the assignee may do so, provided that the requisite diversity of citizenship still exists.²⁰ Jurisdiction over a suit upon coupons, executed by a municipal corporation payable to bearer, depends upon the status of the owner of the same,²¹ although they are cut from bonds payable to persons who are citizens of defendant's State.²²

The holder of a promissory note payable to bearer, which is secured by a mortgage, may foreclose in a Federal court in a case where the original holder could not.²³ Not, however, where the note is void and the mortgage valid.²⁴ The fact that a note payable to bearer and secured by a mortgage is overdue when it is assigned does not deprive the assignee of his right to seek the Federal jurisdiction.²⁵ A mortgage given by a water company covering rentals accruing to it under a contract with a city is no more than an assignment of a chose in action as to such rentals, and, in such a case, one claiming the right to enforce the contract by subrogation to the rights of the mortgagee is considered to be an assignee.²⁶ But where a

Fed. 873; *Rollins v. Chaffee County*, 34 Fed. 91; *Wilson v. Knox County*, 43 Fed. 481; *Thompson v. Searcy County*, C. C. A., 57 Fed. 1030; *Board of Comm'rs of Kearny County v. Irvine*, C. C. A., 126 Fed. 689.

¹⁷ *A New York town*, *Andes v. Ely*, 158 U. S. 312, 39 L. ed. 996.

¹⁸ *An Ohio township*, *Loeb v. Trustees of Columbia Tp.*, 91 Fed. 37.

¹⁹ *Cloud v. City of Sumas*, 52 Fed. 177; *New Orleans v. Benjamin*, 153 U. S. 411, 38 L. ed. 764, *Seymour v. Farmers' L. & Tr. Co.*, C. C. A., 128 Fed. 907.

²⁰ *Emsheimer v. New Orleans*, 186 U. S. 33, 46 L. ed. 1042.

²¹ *Reynolds v. Lyon County*, 97 Fed. 155; *Independent School Dist. of Sioux City v. Rew*, 111 Fed. 1, 49 C. C. A. 198, 55 L.R.A. 364.

²² *Reynolds v. Lyon County, Iowa*, 97 Fed. 155.

²³ *Tredway v. Sanger*, 107 U. S. 323, 27 L. ed. 582; *Cross v. Allen*, 141 U. S. 528, 35 L. ed. 843; *Hoadley v. Day*, 128 Fed. 302.

²⁴ *Mersman v. Werges*, 112 U. S. 139, 28 L. ed. 641.

²⁵ *Cross v. Allen*, 141 U. S. 528, 35 L. ed. 843.

²⁶ *American Waterworks & Guar-*

municipal ordinance directed that the rents be paid directly to the mortgagee, it was held that the previous grant of the franchise to citizens of defendant's State did not affect the jurisdiction.²⁷ It has been held: that a sale under a decree of foreclosure upon waterworks, together with the rights of all the parties in the franchise and contract under which they were constructed, does not operate merely as an assignment of the contract; that such a provision does not affect the right of the purchaser to maintain a suit in a Federal court to enforce rights under such contract; and that in such a case the conveyance vests the purchaser with rights in real property, to the full enjoyment of which the enforcement of the contract is a necessary incident.²⁸

A purchaser of warrants at a judicial sale under authority of an order of the probate court is an assignee, within the meaning of the statute.²⁹ The transfer of property which is not a chose in action does not come within the rule³⁰ nor does the prohibition apply to a suit to recover a specific thing or damages for its wrongful taking or detention.³¹ Such are suits to protect their interests by the assignee of a trust estate;³² the assignee of a distributive share in the estate of a decedent;³³ the assignee of a mining lease;³⁴ the assignee of standing timber who sues to enjoin its cutting after the assignment;³⁵ the assignee of an equity of redemption who sues to have a deed ad-

antee Co. v. Home Water Co., 115 Fed. 171; City of Eau Claire v. Payson, 107 F. 552, 46 C. C. A. 466, rehearing denied 109 Fed. 676, 48 C. C. A. 608.

²⁷ City of Seymour v. Farmers' Loan & Trust Co., 128 Fed. 907, 63 C. C. A. 633.

²⁸ Portage City Water Co. v. Portage, 102 Fed. 769.

²⁹ Glass v. Police Jury of Concordia Parish, 176 U. S. 207, 44 L. ed. 436.

³⁰ Brown v. Fletcher, 235 U. S. 589, reversing 206 Fed. 461. Not even, it has been held, if without

any reservation, when made to establish a diversity of citizenship. City of Livingston v. Monidah Trust, C. C. A., 261 Fed. 966; but see *supra*, § 47.

³¹ Brown v. Fletcher, 235 U. S. 589, reversing 206 Fed. 461.

³² Ibid.

³³ Stotesbury v. Hubert, 237 Fed. 414.

³⁴ Shaffer v. Marks, 241 Fed. 139; Aggers v. Shaffer, C. C. A., 256 Fed. 648 (both under the laws of Oklahoma).

³⁵ Crown Orchard Co. v. Dennis, 229 Fed. 652.

judged a mortgage and a cloud removed from his title,³⁶ or sues to redeem mortgaged land.³⁷

But it was held that a suit to obtain the use of certain water rights which the defendant had obtained through fraud upon the plaintiff's assignor,³⁸ and to enforce the assignor's right to recover part of the purchase price of stock under an agreement for purchase which had been rescinded,³⁹ could not be maintained in a Federal Court when such court would not have had jurisdiction of a similar suit by the plaintiff's assignor.

It has been held that when plaintiff had advanced his assignor money to pay into court as security, his suit to recover this money was brought for money had and received and that his citizenship, not that of his assignor was the test of the jurisdiction.⁴⁰

The Illinois statute giving a plaintiff in attachment the right to bring an action on a forth-coming bond taken by the sheriff, "the same as if such bond had been assigned to him," does not render him, in fact or constructively, an assignee, within the meaning of the act.⁴¹ The prohibition does not extend to a suit by a stockholder to procure the appointment of a receiver of his corporation, because of insolvency.⁴²

A suit to collect a judgment by a creditors' bill or otherwise, cannot be brought in a Federal court by an assignee, unless the assignor might have sued there.⁴³ But, it seems that, where the assignee of a chose in action has recovered in his own name, in a State court, a judgment upon the same; he can bring a suit founded upon such judgment in a Federal court, when

³⁶ *Power Irrigation Co. of Clear Lakes v. Adamson*, C. C. A., 226 Fed. 645.

³⁷ *Power & Irrigation Co. v. Capay Ditch Co.*, C. C. A., 226 Fed. 634, reversing 213 Fed. 399; *Power Irr. Co. v. Stephens*, C. C. A., 226 Fed. 642.

³⁸ *Power & Irr. Co. v. Craig*, C. C. A., 226 Fed. 998.

³⁹ *Power & Irr. Co. v. Bank of Woodland*, C. C. A., 226 Fed. 698, affirming 213 Fed. 109.

⁴⁰ *Menasha Ware Co. v. Southern Oregon Co.*, C. C. A., 244 Fed. 83.

⁴¹ *Smith v. Packard*, 98 Fed. 793, 39 C. C. A. 294.

⁴² *Re Cleland*, 218 U. S. 120, 54 L. ed. 962. As to other stockholders' bills, see *infra*, § 145.

⁴³ *Walker v. Powers*, 104 U. S. 245, 26 L. ed. 729; *Metcalf v. Wattertown*, 128 U. S. 536, 32 L. ed. 543, 9 Sup. Ct. 173; *Mississippi Mills v. Cohn*, 150 U. S. 202, 37 L. ed. 1052, 14 Sup. Ct. 75; *First Nat. Bank v. Dull County*, 74 Fed. 373; *Sullivan v. Ayer*, 174 Fed. 199.

there exists the requisite difference of citizenship between himself and the defendant, irrespective of that of his original assignor.⁴⁴ And it has been held that the citizenship of the assignor is immaterial in a suit by his assignee, to vacate the satisfaction of a judgment,⁴⁵ or to set aside a decree for fraud, although payment of the claim is incidentally requisite.⁴⁶

It seems that the holder of a municipal warrant, who seeks to recover municipal assets without a previous judgment at law, brings a suit to recover upon a chose in action within the meaning of the statute.⁴⁷

An endorsee, who is a citizen of the same State as the maker of the note, may sue his immediate endorser in a District Court of the United States, if the latter be a citizen of a different State from that of the plaintiff;⁴⁸ but when, in a suit by an endorser against the maker⁴⁹ or a prior endorser,⁵⁰ the plaintiff derives his title through a citizen of the same State as the defendant, such as in the former case, the original payee, there is no jurisdiction on account of a difference of citizenship between the defendant and the plaintiff. There is an exception in the case of accommodation paper, where a person who has advanced money upon the same can sue the maker if there is a diversity of citizenship between them, irrespective of the citizenship of the endorser;⁵¹ and under similar circumstances the payee of a bill of exchange is allowed to sue the acceptor

⁴⁴ *Ober v. Gallagher*, 93 U. S. 199, 206, 23 L. ed. 829, 831; *Bean v. Smith*, 2 Mason, 252, 269; *Hultberg v. Anderson*, 170 Fed. 657.

⁴⁵ *Hay v. Alexandria & W. R. Co.*, 20 Fed. 15. But see *Blacklock v. Small*, 127 U. S. 96, 32 L. ed. 70.

⁴⁶ *Bertha Z. & M. Co. v. Vaughn*, 88 Fed. 566.

⁴⁷ *New Orleans v. Benjamin*, 153 U. S. 411, 38 L. ed. 764.

⁴⁸ *Young v. Bryan*, 6 Wheat. 146, 5 L. ed. 228; *Manufacturing Co. v. Bradley*, 105 U. S. 175, 26 L. ed. 1034; *Parker v. Ormsby*, 141 U. S. 81, 35 L. ed. 654; *Kolze v. Hoadley*, 200 U. S. 76, 50 L. ed. 377.

⁴⁹ *State Nat. Bank of Denison v. Eureka Springs Water Co.*, 174 Fed. 827.

⁵⁰ *Turner v. Bank of N. A.*, 4 Dall. 8, 1 L. ed. 718; *Mollan v. Torrance*, 9 Wheat. 537, 538, 6 L. ed. 154. But see *Portage C. R. Co. v. Portage*, 102 Fed. 769.

⁵¹ *Blair v. Chicago*, 201 U. S. 400, 50 L. ed. 801; *Goldsmith v. Holmes*, 36 Fed. 484; s. c., *Holmes v. Goldsmith*, 147 U. S. 150, 37 L. ed. 118; *Wachusett Nat. Bank v. Sioux C. S. Works*, 56 Fed. 321; *Hoadley v. Day*, 128 Fed. 302. When the notes had been pledged as collateral.

although he could not have sued the drawer in the Federal court.⁵²

Trustees in bankruptcy,⁵³ assignees in insolvency⁵⁴ and buyers at a judicial sale⁵⁵ are included within this restriction; but receivers⁵⁶ and executors and administrators⁵⁷ are not; not even when they are administrators of the assignee.⁵⁸

A party who claims the benefit of a contract as an incident to another contract is to be considered as the assignee of the former when he sues to enforce it, although it has never been formally assigned to him.⁵⁹ The acceptance by a city of an order by a contractor directing the payment to a third person of part of the contract price was held to constitute a new contract between the city and the payee, and not to be the assignment of the original contract.⁶⁰ A party who claims by subrogation⁶¹ or by novation⁶² is not within this restriction, neither is the assignee of an executory contract when he sues to recover for work done after the assignment.⁶³ A suit to enforce specific performance of a contract to convey land which has been assigned is within the limitation.⁶⁴ Where plaintiff al-

⁵² *Superior v. Ripley*, 138 U. S. 93, 34 L. ed. 914.

⁵³ *Guaranty Trust Co. v. McCabe*, C. C. A., 217 Fed. 699. See *infra*, § 610.

⁵⁴ *Sere v. Pitot*, 6 Cranch, 332, 336, 3 L. ed. 240, 241.

⁵⁵ *Glass v. Concordia Parish Police Jury*, 176 U. S. 207, 44 L. ed. 436.

⁵⁶ *Davies v. Lathrop*, 12 Fed. 353. Nor the successor of a receiver. *Paige v. Rochester*, 137 Fed. 663. But see *U. S. Nat. Bank v. McNair*, 56 Fed. 323; *Thompson v. Pool*, 70 Fed. 725.

⁵⁷ *Sere v. Pitot*, 6 Cranch, 332, 336, 3 L. ed. 240, 241; *Chappedelaine v. Dechenaux*, 4 Cranch, 306, 2 L. ed. 629; *Childress v. Emory*, 8 Wheat. 642, 5 L. ed. 705.

⁵⁸ *Sands v. James Carruthers & Co., Ltd.*, 243 Fed. 636.

⁵⁹ *Plant Inv. Co. v. Jacksonville*,

T. & K. W. Ry. Co., 152 U. S. 71, 76, 38 L. ed. 358, 360. But see *Portage C. W. Co. v. Portage*, 102 Fed. 769.

⁶⁰ *City of Superior v. Ripley*, 138 U. S. 93, 34 L. ed. 914.

⁶¹ *New Orleans v. Caines' Adm'r*, 138 U. S. 595, 606, 34 L. ed. 1102, 1106. *Contra*, *Am. Waterworks & Guarantee Co. v. Home Water Co.*, 115 Fed. 171.

⁶² *American Colortype Co. v. Continental Colortype Co.*, 188 U. S. 104, 47 L. ed. 404; *J. I. Case Threshing Mach. Co. v. Road Improvement Dist.*, 210 Fed. 366.

⁶³ *County of Cullman v. Vincennes Bridge Co.*, C. C. A., 251 Fed. 473; *Oak Grove Const. Co. v. Jefferson County*, C. C. A., 219 Fed. 858.

⁶⁴ *State of Maine Lumber Co. v. Kingfield Co.*, 218 Fed. 902.

leged a cause of action for damages for a conspiracy charged to have been made by defendants against him after he became the assignee of a contract for the sale of real estate, it was held: that the citizenship of plaintiff's assignor of the contract was immaterial to the jurisdiction.⁶⁵

It was held under the old Judiciary Act that the jurisdiction over a suit by the heirs of a grantor of land who had been obliged to pay debts of their ancestor secured by a lien upon such land, to compel the grantee to reimburse them under his covenant with the grantor, was not affected by the citizenship of the grantor.⁶⁶

A Federal court is without jurisdiction of a suit on a cause of action existing in favor of a partnership, brought by one partner in his own right and as assignee of the interest of his copartner, unless the bill shows that the citizenship of the assignor is such that the suit might have been maintained in that court by the firm.⁶⁷

It has been held that the restriction does not apply when the only reason why the assignor could not have sued was that his claim was less in value than the jurisdictional amount.⁶⁸

If both the original promissor and the plaintiff have a citizenship different from that of the defendant, the citizenship of a mesne assignee is immaterial.⁶⁹ If the requisite diversity of citizenship and the proper residence existed in the original parties to a note or contract, and a suit between them might have been maintained in the Federal Court; any subsequent assignee may maintain such action provided he has the requisite residence and citizenship and that all the other jurisdictional requirements also exist.⁷⁰ The fact that an intermediate assignee was

⁶⁵ *Noyes v. Crawford*, 133 Fed. 796.

⁶⁶ *Weems v. George*, 13 How. 190, 14 L. ed. 108.

⁶⁷ *Ban v. Columbia Southern Ry. Co.*, 117 Fed. 21, 54 C. C. A. 407, reversing 109 Fed. 499.

⁶⁸ *Bernheim v. Birnbaum*, 30 Fed. 885, 887; *Bowden v. Burnham*, C. C. A., 59 Fed. 752; *Bergman v. Inman*, 91 Fed. 293; *Chase v. Sheldon R. M. Co.*, 56 Fed. 625; *Hartford*

Fire Ins. Co. v. Erie R. Co., 172 Fed. 899. See also *Hammond v. Cleveland*, 23 Fed. 1. But see *Woodside v. Vasey*, 142 Fed. 617.

⁶⁹ *Emsheimer v. New Orleans*, 116 Fed. 893.

⁷⁰ *Portage City Water Co. v. Portage*, 192 Fed. 769; *Bolles v. Lehigh Valley R. Co.*, 127 Fed. 884; *Farr v. Hobe-Peters Land Co.*, C. C. A., 188 Fed. 10; *Lipschitz v. Napa Fruit Co.*, C. C. A., 223 Fed. 698;

a resident and of the same State as the defendant has been held to be immaterial.⁷¹

It has been held: that where the requisite diversity of citizenship existed between the assignor and defendant, the residence of the assignor was immaterial;⁷² that where at the time of the commencement of the suit the assignor might have sued in the Federal court, but at the time of the assignment he could not, if the citizenship of the assignee and the defendant are diverse, the court may take jurisdiction in a proper case;⁷³ that where the original owner of a chose in action, who might have sued thereon in a Federal court, assigned the same, he was entitled to sue in such court on again becoming the owner by a reassignment from his assignee, without regard to the citizenship of the latter;⁷⁴ that where an assignee of a chose in action is entitled to sue thereon alone in the Federal courts, he and his assignee may sue there together as if no assignment had been made;⁷⁵ that where one of complainant's contracts is within the jurisdiction of a court, it draws to the court jurisdiction to determine the entire controversy, although others of the contracts, as to which the issues are the same, were acquired by complainant through assignments from persons who could not have sued therein.⁷⁶ The fact that the assignor is a national bank does not give jurisdiction.⁷⁷ The statute does not forbid one of the original contractors from suing in a Federal court

Wilson v. Fisher, Baldwin, 133, Fed. Cas. No. 17, 803; *Milledollar v. Bell*, 2 Wallace, Jr., 334, Fed. Cas. No. 9,549.

⁷¹ *Ibid.*

⁷² *Stimson v. United Wrapping Mach. Co. et al.*, 156 Fed. 298. See *Dulles v. H. D. Crippen Mfg. Co.*, 156 Fed. 706; *Cincinnati H. & D. Ry. Co. v. Orr*, 215 Fed. 261. *Contra*, *Consolidated Rubber Tire Co. v. Ferguson*, 169 Fed. 888, s. c., C. C. A., 183 Fed. 756; *Waterman v. Chesapeake & Ohio Ry. Co.*, 199 Fed. 667; *Guaranty Trust Co. v. McCabe*, C. C. A., 217 Fed. 699.

⁷³ *Jones v. Shapero*, C. C. A., 57 Fed. 457; *Noyes v. Crawford*, 133 Fed. 796.

⁷⁴ *Moore Bros. Glass Co. v. Drevet Mfg. Co.*, 154 Fed. 737.

⁷⁵ *Paige et al. v. Rochester*, 137 Fed. 663; *Independent School Dist. of Sioux City v. Rew*, 111 Fed. 1, 49 C. C. A. 198, 55 L.R.A. 364.

⁷⁶ *Camp v. Peacock, Hunt & West Co.*, C. C. A., 129 Fed. 1005; *Howe & Davidson Co. v. Hagan*, 140 Fed. 182; affirming 128 Fed. 1005.

⁷⁷ *George v. Wallace*, C. C. A., 135 Fed. 286.

the assignee of the other party, although the citizenship of the plaintiff is the same as that of the assignor.⁷⁸

The assignee must aver in his pleading that his assignor might have sued in the Federal court.⁷⁹

§ 64. Territorial jurisdiction of the District Courts of the United States. In general. There is a District Court in each judicial district of the United States.¹ It has been said that "jurisdiction is the power to proceed by authorized service."² In actions of a local nature, no court has jurisdiction except that in the district where the property is situated,³ for usually the execution of the judgment will require acts in a district where the officers of the court in which the judgment is entered have no authority.⁴ Actions of a transitory nature can be

⁷⁸ *Brooks v. Laurent*, 98 Fed. 647, 39 C. C. A. 201.

⁷⁹ *Parker v. Ormsby*, 141 U. S. 81, 35 L. ed. 654; *U. S. Nat. Bank v. McNair*, 56 Fed. 323; *Kolze v. Hoadley*, 200 U. S. 76, 50 L. ed. 377; *J. J. McCaskill Co. v. Dickson*, C. C. A., 159 Fed. 704; *Bison State Bank v. Billington*, C. C. A., 209 Fed. 610; *Houck v. Bank of Brinkley*, C. C. A., 242 Fed. 881. An allegation in a bill filed by an assignee of claims against a Louisiana corporation, that the assignors are and were citizens of States other than Louisiana, and competent as such to sue the defendant in the Circuit Court, if no assignment had been made, was held to be insufficient to confer jurisdiction on the Circuit Court because the State or States of which the assignors were citizens were not specifically designated. *Benjamin v. New Orleans*, C. C. A., 74 Fed. 417. Where it appeared in the record that the assignor was domiciled and resided in a State other than that of which the defendant was a citizen and no question concerning his citizenship was raised in the court of first instance,

the court of review refused to dismiss the case for want of jurisdiction. *First Nat. Bank of Canyon. Texas v. Crowley*, C. C. A., 183 Fed. 578.

§ 64. ¹ *Infra*, § 66.

² *Kentucky Coal Lands Co. v. Mineral Development Co.*, 219 Fed. 45.

³ *Mississippi & M. R. R. Co. v. Ward*, 2 Black, 485, 17 L. ed. 311; *Coquitlam v. U. S.*, 163 U. S. 346, 16 Sup. Ct. 117, 41 L. ed. 184; *Ladew v. Tennessee Copper Co.*, 218 U. S. 357, 54 L. ed. 1069, affirming 179 Fed. 245; *McGowan v. Columbia River Packers' Ass'n*, 245 U. S. 352; *Ferguson v. Babcock Lumber & Land Co.*, C. C. A., 252 Fed. 705; *Matarazzo v. Hustis*, 256 Fed. 882.

⁴ *McGowan v. Columbia River Packers' Ass'n*, 245 U. S. 352; *Miller v. Dows*, 94 U. S. 444, 449, 24 L. ed. 207, 209; *Fall v. Eastin*, 215 U. S. 1, 54 L. ed. 65, affirming *Fall v. Fall*, 75 Neb. 104, 120, 113 N. W. 175; *MacGregor v. Macgregor*, 9 Iowa, 65; *Glen v. Gibson*, 9 Barb. (N. Y.) 634; *Story's Eq. Jur.*, § 1292; 2 *Spence*, 8, n. (d); *Smith's Eq.* 30; *Bispham's Eq.* § 7.

maintained in any district, the court of which can obtain jurisdiction over the person of the parties.⁵ Where a transitory cause of action is united with one which is local the court cannot obtain jurisdiction *in personam invitam* over a defendant who is served in another district.⁶ Where a suit was brought in a Federal court to recover land in another district, together with the rent of the same; it was held that there was jurisdiction to award judgment for the value of the rents.⁷ Jurisdiction of local actions cannot be obtained by the consent of the parties.⁸ It has been said, that in determining whether an action is of a local or transitory nature the court should be guided by the law of the forum.⁹

Where the court which originally entertained a suit had no jurisdiction of the same because of the locality of the property affected no other court can take ancillary jurisdiction in aid of the judgment and orders therein.¹⁰ The fact that a suit relates to land lying within the jurisdiction does not give jurisdiction to the Federal court when there is no difference of citizenship, nor Federal question involved.¹¹ A District Court of the United States cannot serve process beyond its district except in the cases specified by statute which have been hereinbefore described.¹²

Amongst these exceptions are the following: "In suits of a local nature, where the defendant resides in a different district, in the same State, from that in which the suit is brought, the plaintiff may have original and final process against him, directed to the marshal of the district in which he resides."¹³ The subpoena must be directed and issued to the marshal and the marshal and his deputies are the only persons who can serve it.¹⁴ A *subpoena ad testificandum* may be served upon a wit-

⁵ Potomac Milling & Ice Co. v. Steel Corp., 254 Fed. 454, 463. Baltimore & O. R. Co., 217 Fed. 665.

⁶ *Supra*, §§ 61b, 62; *infra*, § 166a.

⁷ Healey v. Humphrey, C. C. A., 81 Fed. 990.

⁸ Matarazzo v. Hustis, 256 Fed. 882; Primos Chemical Co. v. Fulton Steel Corp., 255 Fed. 427.

⁹ Primos Chemical Co. v. Fulton Steel Corp., 254 Fed. 454, 463.

¹⁰ Primos Chemical Co. v. Fulton

¹¹ Pooley v. Luco, 72 Fed. 561;

Toland v. Sprague, 12 Peters, 300, 328, 9 L. ed. 1093, 1104.

¹² Toland v. Sprague, 12 Pet. 300, 328, 9 L. ed. 1093, 1104. See *infra*, § 163.

¹³ § 54, 36 St. at L. 1087; copied from U. S. R., § 741, 4 Fed. St. Ann. 555.

¹⁴ Kuzma v. Witherbee, Sherman

ness in a civil case anywhere within the district and beyond the same within one hundred miles of the place of trial, and in a criminal case in any part of the United States.¹⁵ The Judicial Code provides: "Any suit of a local nature, at law or in equity, where the land or other subject-matter of a fixed character lies partly in one district and partly in another, within the same State, may be brought in the district court of either district; and the court in which it is brought shall have jurisdiction to hear and decide it, and to cause ~~meane~~ or final process to be issued and executed, as fully as if the said subject-matter were wholly within the district for which such court is constituted." ¹⁶

"Where in any suit in which a receiver shall be appointed the land or other property of a fixed character, the subject of the suit, lies within different States in the same judicial circuit, the receiver so appointed shall, upon giving bond as required by the court, immediately be vested with full jurisdiction and control over all the property, the subject of the suit, lying or being within such circuit; subject, however, to the disapproval of such order, within thirty days thereafter, by the circuit court of appeals for such circuit, or by a circuit judge thereof, after reasonable notice to adverse parties and an opportunity to be heard upon the motion for such disapproval; and subject, also, to the filing and entering in the district court for each district of the circuit in which any portion of the property may lie or be, within ten days thereafter, of a duly certified copy of the bill and of the order of appointment. The disapproval of such appointment within such thirty days, or the failure to file such certified copy of the bill and order of appointment within ten days, as herein required, shall divest such receiver of jurisdiction over all such property except that portion thereof lying or being within the State in which the suit is brought. In any case coming within the provisions of this section, in which a receiver shall be appointed, process may issue and be executed within any district of the circuit in the same manner and to the same extent as if the property were wholly within the same

& Co., 232 Fed. 286; Vitkus v. Clyde 16 55, 36 St. at L. 1087; copied
S. S. Co., 232 Fed. 288. from U. S. R. S., § 742, 4 Fed. St.

¹⁵ U. S. R. S., § 876; *infra*, Ann. 555.
§§ 342, 523.

district; but orders affecting such property shall be entered of record in each district in which the property affected may lie or be.¹⁷

“When in any suit commenced in any district court of the United States to enforce any legal or equitable lien upon or claim to, or to remove any incumbrance or lien or cloud upon the title to real or personal property within the district where such suit is brought, one or more of the defendants therein shall not be an inhabitant of or found within the said district, or shall not voluntarily appear thereto, it shall be lawful for the court to make an order directing such absent defendant or defendants to appear, plead, answer, or demur by a day certain to be designated, which order shall be served on such absent defendant or defendants, if practicable, wherever found, and also upon the person or persons in possession or charge of said property, if any there be; or where such personal service upon such absent defendant or defendants is not practicable, such order shall be published in such manner as the court may direct, not less than once a week for six consecutive weeks. In case such absent defendant shall not appear, plead, answer, or demur within the time so limited, or within some further time to be allowed by the court, in its discretion, and upon proof of the service or publication of said order and of the performance of the directions contained in the same, it shall be lawful for the court to entertain jurisdiction, and proceed to the hearing and adjudication of such suit in the same manner as if such absent defendant had been served with process within the said district; but said adjudication shall, as regards said absent defendants without appearance, affect only the property which shall have been the subject of the suit and under the jurisdiction of the court therein, within such district; and when a part of the said real or personal property against which such proceedings shall be taken shall be within another district, but within the same State, such suit may be brought in either district in said State; Provided, however, That any defendant or defendants not actually personally notified as above provided may, at any time within one year after final judgment in any suit mentioned in this section, enter his appearance in said suit

¹⁷ § 56, 36 St. at L. 1087.

in said district court, and thereupon the said court shall make an order setting aside the judgment therein and permitting said defendant or defendants to plead therein on payment by him or them of such costs as the court shall deem just; and thereupon said suit shall be proceeded with to final judgment according to law."¹⁸

A lease of land for a term of years is in the State of New York personal property; and not land, the location of which determines the jurisdiction.¹⁹

When the service of process is made within the district or the defendant voluntarily appears, the court may make a decree which directs the performance of, or abstention from, an act, or directs a transfer of, or otherwise affects the title to, property beyond the territorial jurisdiction;²⁰ or grants an injunction against an act within the jurisdiction, such as an interference with the flow of water, which injuriously affects lands beyond it.²¹ But not of a suit where the decree directs the defendant to remove certain structures.²² Where the defendant is within the jurisdiction of the court, it may decree specific performance of a contract,²³ or the administration of a

¹⁸ Jud. Code § 57, 36 St. at L. 1102, Comp. St. § 1039. See *infra*, § 166.

¹⁹ *Primos Chem. Co. v. Fulton Steel Corp.*, 254 Fed. 471.

²⁰ *Arglasse v. Muschamp*, 1 Vern. 75; *Carron I. Co. v. Maclaren*, 5 H. L. C. 416; *Muller v. Dows*, 94 U. S. 444, 24 L. ed. 207; *Dull v. Blackman*, 169 U. S. 243, 246, 42 L. ed. 733, 734; *Selover, Bates & Co. v. Walsh*, 226 U. S. 112, 57 L. ed. 69; *Wheeler v. McCormack*, 4 Fish. Pat. Cas. 433; s. c., 8 Blachf. 267; *Lynde v. Columbus, C. & I. C. Ry. Co.*, 57 Fed. R. 993, 996. For an excellent review of the authorities, see the learned opinion of Davies, J., in *Gardner v. Ogden*, 22 N. Y. 327. See also *Carpenter v. Strange*, 141 U. S. 87, 35 L. ed. 640.

²¹ *Morris v. Bean*, 146 Fed. 423;

Vacuum Oil Co. v. Eagle Oil Co., 154 Fed. 867. *Contra*, *Northern Indiana R. Co. v. Michigan Cent. R. Co.*, 15 How. Pr. 233, affirming 5 McLean, 444.

²² *Mississippi & M. R. R. Co. v. Ward*, 2 Black, 485, 17 L. ed. 311; *Ladew v. Tennessee Copper Co.*, 218 U. S. 357, 54 L. ed. 1069, affirming 179 Fed. 245; *McGowan v. Columbia River Packers' Ass'n*, 245 U. S. 352.

²³ *Selover, Bates & Co. v. Walsh*, 226 U. S. 112, 57 L. ed. where it was held that specific performance of a contract made in one State for the sale of land in another, can be decreed by the courts of the former State, and that the courts of the latter will be bound to give effect to the judgment thus obtained; *Western Union Tel. Co. v. Pittsburgh, C.*,

trust,²⁴ or the cancellation of a conveyance,²⁵ which affects land without the jurisdiction; but under the former practice if the defendant refused to obey the directions of the court, the judgment had no force elsewhere, even when a State statute provided that the order directing a conveyance should have the same effect as if the conveyance were made in obedience thereto.²⁶ An equity rule authorizes the court to appoint a person to execute a mandatory order, injunction, or decree for specific performance, and provides that the act, when so performed, shall have like effect as if done by the defendant.²⁷

An action to recover damages for a personal injury is of a transitory and not a local nature.²⁸ A State statute which creates a new cause of action of this nature will sustain a suit thereupon in a district in another State although the statute provides that such actions must be brought in the State of its enactment.²⁹ A Federal court may entertain a suit to set aside a release of a judgment of a court held in another State,³⁰ or a suit to obtain subrogation to the rights of a judgment creditor where the judgment was entered in the court of another State,³¹ and to substitute a new trustee under a will which has been probated in another State.³² A suit to abate a nuisance existing beyond the jurisdiction cannot be maintained.³³ It has been held that a Federal court can maintain an action for injuries

C. & St. L. Ry. Co., 137 Fed. 435; *Robin v. Long*, 60 How. Pr. (N. Y.) 200.

²⁴ *Memphis Sav. Bank v. Houchens*, C. C. A., 115 Fed. 96, 108; affecting land situation outside the jurisdiction. *Dunlap v. Byers*, 110 Mich. 109 (a decree directing the conveyance of land upon the winding up of a corporation).

²⁵ *Jones v. Byrne*, 149 Fed. 457, 469.

²⁶ *Fall v. Eastin*, 215 U. S. 1, 54 L. ed. 65; affirming *Fall v. Fall*, 75 Neb. 104, 120, 113 N. W. 175. *Contra*, *Burnley v. Stevenson*, 24 Ohio St. 474, 15 Am. Rep. 621.

²⁷ Eq. Rule 8: See § 441, *infra*.

²⁸ *Keane Wonder Min. Co. v.*

Cunningham, 222 Fed. 821; *Kuzma v. Witherbee*, *Sherman & Co.*, 232 Fed. 286.

²⁹ *Tennessee Coal, Iron & R. R. Co. v. George*, 233 U. S. 354.

³⁰ *Williams v. Miller*, 249 Fed. 495.

³¹ *Cooper v. Jewett*, 233 Fed. 618.

³² *Harrison v. Washington Loan & Tr. Co.* Ct. App., D. C., 258 Fed. 273.

³³ *Mississippi & M. R. R. Co. v. Ward*, 2 Black, 485, 17 L. ed. 311; *Ladew v. Tennessee Copper Co.*, 218 U. S. 357, 54 L. ed. 1069, affirming 179 Fed. 245; *McGowan v. Columbia River Packers' Ass'n*, 245 U. S. 352.

caused to lands in another State by a canal within its jurisdiction.³⁴ An action for a trespass on land such as a suit for the destruction of buildings, is of a local nature and cannot be maintained in a district in which the land is not situated.³⁵ Ordinarily, a court in equity cannot direct a sale of land situated in another State.³⁶ Accordingly, the court will not decree a partition of land beyond the jurisdiction, since no commissioner by it could have authority to act there,³⁷ and it cannot adjudge that a deed of land in another State is void;³⁸ nor in a suit for a divorce award to a married woman a dower right in land elsewhere, which will be valid until a conveyance thereof has been executed by her husband.³⁹ Where a corporation was domiciled and carried on its principal business in another district, it was held that the fact, that it had a small bank account and had leased offices in another district, did not give the court of the latter jurisdiction to appoint a receiver of its property.⁴⁰ The court of one State or district will usually not interfere with the internal management of a foreign corporation by a suit for an accounting or otherwise.⁴¹ Such it has been held is a suit by the holder of a tontine or semi-tontine policy for an account.⁴² The courts will refuse jurisdiction of a suit to enjoin the administration by the courts of another State of personal property including notes and bonds there located at the time of the

³⁴ *Rundle v. Delaware & R. Canal*, 1 Wall. Jr. 275 (Fed. Cas. No. 12,139), *aff'd* 14 Howard, 80, 14 L. ed. 335.

³⁵ *Potomac Milling & Ice Co. v. Baltimore & O. R. Co.*, 217 Fed. 665.

³⁶ *Lynde v. Columbus, C. & I. C. Tr. Co. v. Postal Tel. Co.*, 55 Conn. 334; 3 Am. St. Rep. 53, 11 Atl. 184; *Carpenter v. Strange*, 141 U. S. 87, 106, 35 L. ed. 640, 647; *Mercantile Tr. Co. v. Kanawha & O. Ry. Co.*, 39 Fed. 337; *Re Anderson*, 94 Fed. 487; *York County Sav. Bank v. Abbot*, 139 Fed. 988.

³⁷ *Spence*, 8, n. (d); *Story's Eq. Jur.*, § 1292; *Smith's Eq.* 30; *Bispham's Eq.* § 47.

³⁸ *Carpenter v. Strange*, 141 U. S. Fed. Prac. Vol. I—18

87, 35 L. ed. 640; *State ex rel. Hunt v. Grimm* (S. Ct. Mo., June 1912) 148 S. W. 868, where the deed was within the jurisdiction, but it had been recorded in another jurisdiction, where the land was situated.

³⁹ *Fall v. Eastin*, 215 U. S. 1, 54 L. ed. 65 affirming *Fall v. Fall*, 75 Neb. 104, 120, 113 N. W. 175. *Contra*, *Burnley v. Stevenson*, 24 Ohio St. 474.

⁴⁰ *Primos Chemical Co. v. Fulton Steel Corp.*, 254 Fed. 454, 463.

⁴¹ *Eberhard v. N. W. Mutual Life Ins. Co.*, 210 Fed. 520; *Costagnino v. Mutual Reserve Fund Life Ass'n, C. C. A.*, 157 Fed. 29, 84 C. C. A. 533.

⁴² *Costagnino v. Mutual Reserve*

owner's death,⁴³ and of a suit to recover damages for acts committed in a foreign court under the authority of the sovereign thereof.⁴⁴

§ 65. Terms of the District Courts of the United States. In general. No action, suit, proceeding, or process in any district court shall abate or be rendered invalid by reason of any act changing the time of holding such court, but the same shall be deemed to be returnable to, pending, and triable in the terms established next after the return day thereof."¹ "District courts shall hold monthly adjournments of their regular terms, for the trial of criminal causes, when their business requires it to be done, in order to prevent undue expenses and delays in such cases."²

Ordinarily, when one term begins, the preceding term, which is held in the same place, ends; unless it was the evident intention of the statute that the term should be concurrent in whole or in part.³ "When the trial or hearing of any cause, civil or criminal, in a District Court, has been commenced and is in progress before a jury or the court, it shall not be stayed or discontinued by the arrival of the time fixed by law for another session of said court; but the court may proceed therein and bring it to a conclusion, in the same manner and with the same effect as if another stated term of the court had not intervened."⁴ A special term of a court may be held while a regular term is in session at another place in the same district, where there are two judges, each having authority to hold court in said district.⁵ The term of a District Court may be extended to a period subsequent to the opening of the succeeding statutory term, for the purpose of a particular case.⁶ A term of a District Court may be

Fund Life Ass'n, C. C. A., 157 Fed. 29, 84 C. C. A. 533; Eberhard v. N. W. Mutual Life Ins. Co., 210 Fed. 520.

⁴³ See *supra*, § 54.

⁴⁴ See *infra*, § 102a.

§ 65. ¹ Jud. Code § 7, 36 St. at L. 1087.

² Jud. Code § 10, 36 Stat. at L. 1087.

³ Ex parte Friday, 43 Fed. 916, 918.

⁴ Jud. Code § 8, 36 St. at L. 1087.

⁵ East Tennessee Iron & Coal Co. v. Wiggin, C. C. A., 68 Fed. 446; U. S. v. Louisville & N. R. Co., 177 Fed. 780.

⁶ Alder v. Edenborn, 198 Fed. 928.

See Guaranty Tr. Co. v. Metropolitan St. Ry. Co., C. C. A., 177 Fed. 925.

adjourned to, and its regular continuous session may be resumed as a part of the same term, upon, a distant day; although another term of the court has been held during the adjournment at another place.⁷ Unless sooner adjourned, a term of a court of the United States may extend from the beginning thereof to the opening of the succeeding statutory term.⁸ It does not necessarily end at the opening of a term, held pursuant to a statute, in another place in the same district.⁹

The term does not expire until the limit set by law for its continuance;¹⁰ except when it has been formally adjourned without a day,¹¹ or when there has been no attendance at the opening of the term and no instruction to the marshal to adjourn for a subsequent day.¹²

If the judge of any district court is unable to attend at the commencement of any regular, adjourned, or special term, or any time during such term, the court may be adjourned by the marshal, or clerk, by virtue of a written order directed to him by the judge, to the next regular term, or to any earlier day, as the order may direct."¹³

"When any district judge is prevented, by any disability, from holding any stated or appointed term of his district court, and that fact is made to appear by the certificate of the clerk, under the seal of the court, to any circuit judge of the circuit in which the district lies, or, in the absence of all the circuit judges, to the circuit justice of the circuit in which the district lies, any such circuit judge or justice may, if in his judgment the public interests so require, designate and appoint the judge of any other district in the same circuit to hold said court, and to

⁷ *Florida v. Charlotte Harbor Phosphate Co.*, C. C. A., 70 Fed. 883.

⁸ *Harlan v. McGourin*, 218 U. S. 442, 450, 31 Sup. Ct. Rep. 44, 21 Ann. Cas. 849, 54 L. ed. 1101, 1106, affirming *Ex parte Harlan*, 180 Fed. 119; *East Tennessee Iron & Coal Co. v. Wiggins*, C. C. A., 68 Fed. 446.

⁹ *Ibid.*

¹⁰ *Schofield v. Horse Springs Cattle Co.*, 65 Fed. 433.

¹¹ *Harlan v. McGourin*, 218 U. S. 442, 450, 54 L. ed. 1101, 1106, 31 Sup. Ct. Rep. 44, 21 Ann. Cas. 849; affirming *Ex parte Harlan*, 180 Fed. 119.

¹² *Ex parte Harlan*, 180 Fed. 119; *aff'd*, as *Harlan v. McGourin*, 218 U. S. 442, 450, 54 L. ed. 1101, 1106, 31 Sup. Ct. Rep. 44, 21 Ann. Cas. 849.

¹³ Jud. Code § 12, 36 St. at L. 1087.

discharge all the judicial duties of the judge so disabled, during such disability. Whenever it shall be certified by any such circuit judge or, in his absence, by the circuit judge of the circuit in which the district lies, that for any sufficient reason it is impracticable to designate and appoint a judge of another district within the circuit to perform the duties of such disabled judge, the chief justice may, if in his judgment the public interests as require, designate and appoint the judge of any district in another circuit to hold said court and to discharge all the judicial duties of the judge so disabled, during such disability. Such appointment shall be filed in the clerk's office, and entered on the minutes of the said district court, and a certified copy thereof, under the seal of the court, shall be transmitted by the clerk to the judge so designated and appointed."¹⁴

After the term has been regularly opened and adjourned, the failure of the judge to appear upon the adjourned day to appoint a time when the court will be resumed, does not forfeit the right to resume sittings at any time.¹⁵

§ 66. Specific territorial jurisdiction and terms of the different District Courts of the United States. There is a District Court in each of the judicial districts of the United States.¹ The Judicial Code provides: "§ 69. The United States are divided into judicial districts as follows:

"§ 70. The State of *Alabama* is divided into three judicial districts, to be known as the *northern*, *middle*, and *southern districts* of Alabama. The *northern* district shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Cullman, Jackson, Lawrence, Limestone, Madison, and Morgan, which shall constitute the *north-middle* division of said district; also the territory embraced on the date last mentioned in the counties of Colbert, Franklin, and Lauderdale, which shall constitute the northwestern division of said district; also the territory embraced on the date last mentioned in the counties of Cherooffee, De Kalb, Etowah, Marshall, and Saint Clair, which shall constitute the *eastern* division of said district; also the territory embraced

¹⁴ Jud. Code § 13, 36 St. at L. Sup. Ct. Rep. 44, 21 Ann. Cas. 849. 1087. § 66. 138 St. at L. 580, Comp.

¹⁵ Ex parte Harlan, 180 Fed. 119; St. § 968; Jud. Code § 1 as amended. aff'd as Harlan v. Gourin, 218 U. S. 442, 450, 54 L. ed. 1101, 1106, 31

on the date last mentioned in the counties of Blount, Jefferson, and Shelby, which shall constitute the *southern division* of said district; also the territory embraced on the date last mentioned in the counties of Walker, Winston, Marion, Fayette, and Lamar, which shall constitute the *Jasper division* of said district; also the territory embraced on the date last mentioned in the counties of Calhoun, Clay, Cleburne, and Talladega, which shall constitute the *eastern division* of said district; also the territory embraced on the date last mentioned in the counties of Bibb, Greene, Pickens, Sumter, and Tuscaloosa, which shall constitute the *western division* of said district. Terms of the district court for the *northeastern division* shall be held at Huntsville on the first Tuesday in April and the second Tuesday in October; for the *northwestern division*, at Florence on the second Tuesday in February and the third Tuesday in October: *Provided*, That suitable rooms and accommodations for holding court at Florence shall be furnished free of expense to the Government; for the middle division, at Gadsden on the first Tuesdays in February and August: *Provided*, That suitable rooms and accommodations for the holding court at Gadsden shall be furnished free of expense to the Government; for the *southern division*, at Birmingham on the first Mondays in March and September, which courts shall remain in session for the transaction of business at least six months in each calendar year; for the *Jasper division*, at Jasper on the second Tuesdays in January and June: *Provided*, That suitable rooms and accommodations for holding court at Jasper shall be furnished free of expense to the Government; for the *eastern division*, at Anniston on the first Mondays in May and November; and for the western division, at Tuscaloosa on the first Tuesdays in January and June. The clerk of the court for the *northern district* shall maintain an office in charge of himself or a deputy at Anniston, at Florence, at Jasper, and at Gadsden, which shall be kept open at all times for the transaction of the business of said court. The district judge for the northern district shall reside at Birmingham. The *middle district* shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Autauga, Barbour, Bullock, Butler, Chilton, Coosa, Covington, Crenshaw, Elmore, Lowndes, Montgomery and Pike, which shall constitute the *northern division* of said district; also the territory embraced on the date last

mentioned in the counties of Coffee, Dale, Geneva, Henry, and Houston, which shall constitute the *southern division* of said district also the territory embraced on the date last mentioned in the counties of Chambers, Lee, Macon, Randolph, Russell and Tallapoosa, which shall constitute the *eastern division* of said middle judicial district. Terms of the district court for the *northern division* shall be held at Montgomery" on the first Tuesdays in May and December; for the *southern division*, at Dothan on the first Mondays in June and December and for the *eastern division* at Opelika on the first Mondays in April and November: "Provided, that suitable rooms and accommodations for holding court at Opelika shall be furnished free of expense to the Government. The clerk of the court for the middle district shall maintain an office, in charge of himself or a deputy, at Dothan, and shall maintain an office in charge of himself or a deputy, at Opelika, which said offices at Dothan and Opelika shall be kept open at all times for the transaction of the business of said divisions."

"The *southern district* shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Baldwin, Choctaw, Clarke, Conecuh, Escambia, Mobile, Monroe, and Washington, which shall constitute the *southern division* of said district; also the territory embraced on the date last mentioned in the counties of Dallas, Hale, Marengo, Perry, and Wilcox, which shall constitute the *northern division* of said district. Terms of the district court for the *southern division* shall be held at Mobile on the fourth Mondays in May and November, and for the *northern division*, at Selma on the first Mondays in May and November." 2

"There is hereby established a district court for the district of

2 U. S. R. S., § 532, 36 St. at L. 1105, am'd Act of Feb'y 28, 1913, 37 St. at L. 698, Comp. St. § 1052. Under the Act of February 25, 1907, ch. 1198, 34 St. at L. 931; Comp. St. Supp. 1907, p. 187, which authorized the appointment of a separate district judge for the northern district, it was held that he and the judge previously appointed for the middle and northern districts, under Act of

Aug. 2, 1886, ch. 842, § 2, 24 St. at L. 213, Comp. St. 1901, p. 449, had co-ordinate powers, and that each could appoint and remove a referee in bankruptcy within the northern district, 37 St. at L. 698, Comp. St. § 1052. *Birch v. Steele*, C. C. A., 165 Fed. 577; affirming *Re Steele*, 156 Fed. 853, and overruling *Ex parte Steele*, 161 Fed. 886, 162 Fed. 694.

Alaska, with the jurisdiction of circuit and district courts of the United States and with general jurisdiction in civil, criminal, equity, and admiralty causes; and four district judges shall be appointed for the district, each at an annual salary of seven thousand five hundred dollars, who shall during their terms of office reside in the divisions of the district to which they may be respectively assigned by the President. The court shall consist of four divisions, which shall also be recording divisions. *Division* numbered *one* shall consist of all that part of the district of Alaska lying east of the one hundred and forty-first meridian of west longitude. *Division* number *two* shall consist of all that territory lying west of a line commencing on the Arctic coast at the one hundred and forty-eighth meridian; thence extending south along the easterly watershed of the Colville River to a point on the Rocky Mountain divide between the headwaters of Colville River on the north and west and the waters of the Chandler on the south; thence southwesterly along the divide between the waters of the Colville River, the Kotzebue Sound, and the Norton Sound on the north and west and the waters of the Yukon on the south to the one hundred and sixty-first meridian of west longitude; thence along said meridian to the Kuskokwim River; thence southwesterly along the center of the channel of said Kuskokwim River; then southwesterly along the center of the channel of said Kuskokwim River to Bering Sea the said division to include all the islands lying north of the fifty-ninth parallel of north latitude. *Division* numbered *three* shall consist of all that territory lying south and west of the line starting on the coast of the Gulf of Alaska at the one hundred and forty-first meridian of west longitude; thence northerly along said meridian to a point due east from Mount Kimball; thence west to the summit of Mount Kimball; thence southwesterly along the southerly watershed of the headwaters of Tanana River; thence westerly along the divide between the waters of the Gulf of Alaska on the south and the waters of the Yukon on the north to the summit of Mount McKinley; thence continuing westerly along the divide between the waters of the Gulf of Alaska and Bristol Bay on the south and the waters of the Yukon and Kuskokwim on the north to the one hundred and fifty-ninth meridian of west longitude; thence northwesterly to the Kuskokwim River on the one hundred and sixty-first meridian of west

longitude; thence southwesterly along the center of said river to Bering Sea; said division to include the Alaska peninsula, the Aleutian Islands, and all islands along the coast of this district south and west of the said district and all lying south of the fifty-ninth parallel of north latitude. *Division* numbered *four* shall consist of all that part of the district of Alaska lying east of the second division and north of the third division. One general term of court shall be held each year at Juneau, and such additional terms at other places in the first division as the Attorney-General may direct. One general term of court shall be held each year at Nome, and such additional terms at other places in the second division as the Attorney-General may direct. One general term of court shall be held each year at Valdez, and such additional terms at other places in the third division as the Attorney-General may direct. One general term of court shall be held each year at Fairbanks, and such additional terms at other places in the fourth division as the Attorney-General may direct. Each of the judges is authorized and directed to hold such special terms of court at such times and places in their respective district as any of them, respectively, may deem expedient, or as the Attorney-General may direct. Each of the judges is authorized and directed to hold such special terms of court as may be necessary for the public welfare or for the dispatch of the business of the court at such times and places in their respective districts as any of them, respectively, may deem expedient, or as the Attorney-General may direct; and each shall have authority to employ interpreters and to make allowances for the necessary expenses of his court, and to employ an official court stenographer at such compensation as shall be fixed by the Attorney-General. At least thirty days' notice shall be given by the judge, or the clerk, of the time and place of holding the several terms of the court." ³

"The jurisdiction of each division of the court shall extend over the district of Alaska, but the court in which the action is pending may, on motion, change the place of trial in any action, civil or criminal, from one place to another place in the same

³ 35 St. at L. 839, Comp. St.
§ 3564.

division or to a designated place in another division in either of the following cases:

First. When there is reason to believe that an impartial trial can not be had therein;

Second. When the convenience of witnesses and the ends of justice would be promoted by the change;

Third. When from any cause the judge is disqualified from acting; but in such event, if the judge of another division will appear and try the action, no change of place of trial must be made;

Fourth. By the court, on its own motion, when, considering available means of travel, it appears that the defendant will be put to unnecessary expense and inconvenience if summoned to defend in the place or division in which an action has been commenced; and when it appears to the satisfaction of the court, or judge thereof, that an action has been commenced in a place or division remote from the residence of the defendant for the purpose of causing unnecessary expense or inconvenience, the place of the trial shall be changed at the cost of the plaintiff, and such costs shall not be recovered from the defendant.

In any criminal prosecution the court shall change the place of trial where it appears to the satisfaction of the court that the defendant will not be prejudiced thereby and that the United States will be put to unnecessary expense in such criminal prosecution if the transfer is not made."⁴

The courts of Alaska have no power to punish a defendant arrested within the district, charged with the commission of an offense on board an American vessel on the high seas; and consequently, such an offender is tried in the First District of the United States, to which he is brought after his arrest in Alaska.⁵ The judge of each division is required to divide his division into precincts, and is authorized to alter the same and establish new precincts from time to time, as public convenience may require. He is also required to appoint commissioners, who are ex-officio probate judges, with probate and certain other jurisdiction within their respective precincts, and to remove such commissioners at pleasure.⁶ It was held: that an order abolishing a precinct, pro-

⁴ 31 St. at L. 323; Comp St. § 3565.

⁵ U. S. v. Newth, 149 Fed. 302.
⁶ 31 St. at L. 323.

viding that the territory embraced therein should become a part of another precinct, accepting the resignation of the commissioner for the precinct abolished, and directing him to "deliver the records and property pertaining to his office" to the commissioner of the new district, with which the former one was consolidated; constituted the commissioner of the latter precinct the successor in office of the former commissioner of that abolished, and transferred to him all the probate cases pending in the former precinct, with power to proceed in the same.⁷

The State of *Arizona* constitutes one district, with one district judge, and is attached to the ninth circuit. Terms of the district court shall be held in Tucson on the first Mondays in May and November; at Phoenix on the first Mondays in April and October; at Prescott on the first Mondays in March and September; and at Globe on the first Mondays in June and December. Causes, civil and criminal, may be transferred by the court or judge thereof from any of the aforesaid places where court shall be held in said district to any of the places hereinabove mentioned in said district when the convenience of the parties or the ends of justice would be promoted by the transfer; and any interlocutory order may be made by the court or judge thereof in any of the hereinabove mentioned places.⁸

"§ 71. The State of *Arkansas* is divided into two districts, to be known as the *eastern* and *western* districts of Arkansas. The *western district* shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Sevier, Howard, Little River, Pike, Hempstead, Miller, Lafayette, Columbia, Nevada, Ouachita, Union, and Calhoun, which shall constitute the *Texarkana* division of said district; also the territory embraced on the date last mentioned in the counties of Polk, Scott, Yell, Logan, Sebastian, Franklin, Crawford, Washington, Benton, and Johnson, which shall constitute the *Fort Smith division* of said district; also the territory embraced on the date last mentioned in the counties of Baxter, Boone, Carroll, Madison, Marion, Newton, and Searcy, which shall constitute the *Harrison division* of said district. Terms of the District court for the

⁷ *Cheney v. Alaska Treadwell Gold Min. Co.*, C. C. A., 148 Fed. 203. ⁸ 36 St. at L. 576, 38 St. at L. 808. See *infra*, § 67.

Texarkana division shall be held at Texarkana on the second Mondays in May and November; for the *Fort Smith Division*, at Fort Smith on the second Mondays in January and June; and for the *Harrison division*, at Harrison on the second Mondays in April and October. The *eastern district* shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Lee, Phillips, Saint Francis, Cross, Monroe, Woodruff, Desha, and Chicot, which shall constitute the *eastern division* of said district; also the territory embraced on the date last mentioned in the counties of Independence, Cleburne, Stone, Izard, Sharp; Jackson, which shall constitute the *northern division* of said district; also the territory embraced on the date last mentioned in the counties of Crittenden, Clay, Craighead, Greene, Mississippi, Poinsett, Fulton, Randolph, and Lawrence, which shall constitute the *Jonesboro division* of said district; and also the territory embraced on the date last mentioned in the counties of Arkansas, Ashley, Bradley, Clark, Cleveland, Conway, Dallas, Drew, Faulkner, Garland, Grant, Hot Spring, Jefferson, Lincoln, Lonoke, Montgomery, Perry, Pope, Prairie, Pulaski, Saline, Van Buren, and White," and Yell, "which shall constitute the *western division* of said district. Terms of the District court for the *eastern division* shall be held at Helena on the second Monday in March and the first Monday in October; for the *northern division*, at Batesville on the fourth Monday in May and the second Monday in December;" for the *Jonesboro division*, at Jonesboro on the first Monday in May and the fourth Monday in November, "and for the *western division*, at Little Rock on the first Monday in April and the third Monday in October. The clerk of the court for the *eastern district* shall maintain an office in charge of himself or a deputy at Little Rock, at Helena, at Jonesboro, and at Batesville, which shall be kept open at all times for the transaction of the business of the court. And the clerk of the court for the *western district* shall maintain an office in charge of himself or a deputy at Fort Smith, at Harrison, and at Texarkana, which shall be kept open at all times for the transaction of the business of the court." 9

936 St. at L. 1106, as
203, Comp. St. § 1055; as amended,
38 St. at L. 1193; St. §§ 1056,
1056a, 1056b, 1056c.

For the special jurisdiction of
courts held in the western district
over controversies affecting the Gulf,
Colorado & Santa Fe Railroad Com-

“§ 72. The State of *California* is divided into two districts, to be known as the *northern* and *southern* districts of California. The *southern district* shall include the territory embraced, on the first day of July, nineteen hundred and ten, in the counties of Fresno, Inyo, Kern, Kings, Madera, Mariposa, Merced, and Tulare, which shall constitute the *northern division* of said district; also the territory embraced, on the date last mentioned, in the counties of Imperial, Los Angeles, Orange, Riverside, San Bernardino, San Diego; San Luis Obispo, Santa Barbara, and Ventura, which shall constitute the *southern division* of said district. Terms of the district court for the *northern division* shall be held at Fresno on the first Monday in May and the second Monday in November; and for the *southern division* of Los Angeles on the second Monday in January and the second Monday in July, and at San Diego on the second Monday in March and September. The *northern district* shall include the territory embraced, on the first day of July, nineteen hundred and ten, in the counties of Del Norte, Siskiyou, Modoc, Humboldt, Trinity, Shasta, Lassen, Tehama, Plumas, Mendocino, Lake, Colusa, Glenn, Butte, Sierra, Sutter, Yuba, Nevada, Sonoma, Mapa, Yolo, Placer, Solano, Sacramento, El Dorado, San Joaquin, Amador, Calaveras, Stanislaus, Tuolumne, Alpine, and Mono, which shall constitute the *northern division* of said district; also the territory embraced, on the date last mentioned, in the counties of San Francisco, Marin, Contra Costa, Alameda, San Mateo, Santa Clara, Santa Cruz, Monterey, and San Benito, which shall constitute the *southern division* of said district. Terms of the district court for the *northern division* of the *northern district* shall be held at Sacramento on the second Monday in April and the first Monday in October, and at Eureka on the third Monday in July; and for the *southern division* of the *northern district*, at San Francisco on the first Monday in March, the second Monday in July, and the first Monday in November. The clerk of the district court for the *northern district* shall maintain an office at

pany, and the Southern Kansas Railway Company, see 23 St. at L. § 8, p. 72; 23 St. at L. § 8, p. 75; Briscoe v. Southern Kan. Ry. Co., 40 Fed. 273; s. c., 144 U. S. 133, 36 L. ed. 377. As to Indian Territory, see 25 St. at L. 786; Gowen v. Harley, 56 Fed. 973.

Sacramento, in charge of himself or a deputy, which shall be kept open at all times for the transaction of the business of the court." ¹⁰

"§ 73. The State of *Colorado* shall constitute one judicial district, to be known as the district of Colorado. Terms of the district court shall be held at Denver on the first Tuesday in May and November; at Pueblo on the first Tuesday in April; at Grand Junction on the second Tuesday in September; at Montrose on the third Tuesday in September; and at Durango on the fourth Tuesday in September." ¹¹

"That the Secretary of the Treasury, in constructing the public buildings heretofore authorized to be constructed at the cities of Grand Junction and Durango, be, and he is hereby, authorized and empowered to provide accommodations in each of said buildings for post office, United States court, and other governmental offices, and the existing authorizations for said buildings be and the same are hereby respectively amended accordingly; and the unexpended balance of all appropriations heretofore made for the construction of said buildings and all appropriations which may be provided in any pending legislation, or that hereafter may be made for the construction of said buildings, are hereby made available for the purpose stated in this paragraph: Provided, That if at the time the holding of the terms of said court in any year in either of said cities of Grand Junction and Durango there is no business to be transacted by said court, the term may be adjourned or continued by order of the judge of said court in chambers at Denver, Colorado, And provided further, That the marshal and clerk of said court shall each respectively appoint at least one deputy to reside at and who shall maintain an office at each of the four said places where said court is to be held by the terms of this Act." ¹²

"There shall be in the *Canal Zone* one district court with two divisions one including Balboa and the other including Cristobal, and one district judge of the said district who shall hold his

¹⁰ 24 St. at L. 308, 36 St. at L. 1107, 39 St. at L. 122, Comp. St. § 1057. ¹¹ 19 St. at L. 61, §§ 73, 76, 36 St. at L. 1107, Comp. St. § 1058.

¹² Ibid.

court in both divisions at such time as he may designate by order, at least once a month in each division." ¹³

"§ 74. The State of *Connecticut* shall constitute one judicial district, to be known as the district of Connecticut. Terms of the District court shall be held at New Haven on the fourth Tuesdays in February and September, and at Hartford on the fourth Tuesday in May and the first Tuesday in December.¹⁴

"§ 75. The State of *Delaware* shall constitute one judicial district, to be known as the district of Delaware. Terms of the district court shall be held at Wilmington on the second Tuesdays in March, June, September, and December.¹⁵

"§ 76. The State of *Florida* is divided into two districts to be known as the *northern* and *southern* districts of Florida. The *southern district* shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Baker, Bradford, Brevard, Citrus, Clay, Columbia, Dade, De Soto, Duval, Hamilton, Hernando, Hillsboro, Lake, Lee, Madison, Manatee, Marion, Monroe, Nassau, Orange, Osceola, Palm Beach, Pasco, Polk, Putnam, Saint John, Sumter, Suwanee, Saint Lucie, and Volusia. Terms of the district court for the southern district shall be held at Ocala on the third Monday in January; at Tampa on the second Monday in February; at Key West on the first Mondays in May and November; at Jacksonville on the first Monday in December; at Fernandina on the first Monday in April; and at Miami on the fourth Monday in April. The district court for the southern district shall be open at all times for the purpose of hearing and deciding causes of admiralty and maritime jurisdiction. The *northern district* shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Alachua, Calhoun, Escambia, Franklin, Gadsden, Holmes, Jackson, Jefferson, Lafayette, Leon, Levy, Liberty, Santa Rosa, Taylor, Wahulla, Walton, and Washington. Terms of the District court for the northern district shall be held at Tallahassee on the second Monday in January; at Pensacola on the first Mondays in May and November; at Marianna on the

¹³ 37 St. at L. 565, § 8, Comp. St. § 10044. See *infra*, § 70a.

¹⁵ 36 St. at L. 1108, Comp. St. § 1060.

¹⁴ 36 St. at L. 1108, Comp. St. § 1059.

first Monday in April; and at Gainesville on the second Mondays in June and December.¹⁶

“§ 77. The State of *Georgia* is divided into two districts, to be known as the *northern* and *southern* districts of Georgia. The *northern district* shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Campbell, Carroll, Clayton, Cobb, Coweta, Cherokee, DeKalb, Douglas, Dawson, Fannin, Fayette, Fulton, Forsyth, Gilmer, Gwinnett, Hall, Henry, Lumpkin, Milton, Newton, Pickens, Rockdale, Spalding, Towns, and Union, which shall constitute the *northern division* of said district; also the territory embraced on the date last mentioned in the counties of Banks, Clarke, Elbert, Franklin, Greene, Habersham, Hart, Jackson, Morgan, Madison, Oglethorpe, Oconee, Rabun, Stephens, Walton, and White,” and Barrow “which shall constitute the *eastern division* of said district; also the territory embraced on the date last mentioned in the counties of Chattahoochee, Clay, Early, Harris, Heard, Meriwether, Marion, Muscogee, Quitman, Randolph, Schley, Stewart, Talbot, Taylor, Terrell, Troup, and Webster, which shall constitute the *western division* of said district; also the territory embraced on the date last mentioned in the counties of Bartow, Chattooga, Catoosa, Dade, Floyd, Gordon, Haralson, Murray, Paulding, Polk, Walker, and Whitfield, which shall constitute the *northwestern division* of said district. Terms of the district court for *northern division* of said district shall be held at Atlanta on the second Monday in March and the first Monday in October; and at Gainesville on the fourth Monday in April and November, and it shall be the duty of the judge to assign such cases both civil and criminal, as may in his judgment be most convenient to the parties to said cases and as may be in the interest of economical expenditures by the Government; for the *eastern division* at Athens on the second Monday in April and the first Monday in November for the *western division*, at Columbus on the first Mondays in May and December; and for the *northwestern division* at Rome on the third Mondays in May and November. The clerk of the court for the *northern district* shall maintain an office in charge of himself or a deputy at Athens, at Columbus, and at Rome, which

¹⁶ 36 St. at L. 1108, Comp. St.
§ 1061.

shall be kept open at all times for the transaction of the business of the court. The *southern district* shall include the territory embraced on the said first day of July, nineteen hundred and ten, in the counties of Appling, Bulloch, Bryan, Camden, Chatham, Emanuel, Effingham, Glynn, Jeff Davis, Liberty, Montgomery, McIntosh, Screven, Tatnall, Toombs, and Wayne," Candler, Jenkins, and Evans, "which shall constitute the *eastern division* of said district; also the territory embraced on the date last mentioned in the counties of Baldwin, Bibb, Butts, Crawford, Dodge, Dooly, Hancock, Houston, Jasper, Jones, Laurens," "Monroe, Pike, Pulaski, Putnam, Sumter, Telfair, Twiggs, Upson, Wilcox, and Wilkinson, which shall constitute the *western division*; also the territory embraced on the date last mentioned in the counties of Burke, Columbia, Glascock, Jefferson, Jenkins, Johnson, Lincoln, McDuffie, Richmond, Taliaferro, Washington, Wilkes, and Warren, which shall constitute the *northeastern division*; also the territory embraced on the date last mentioned in the counties of Berrien, Brooks, Charlton, Clinch, Coffee, Decatur, Echols, Grady, Irwin, Lowndes, Pierce, and Ware," the counties of Macon and Thomas, "which shall constitute the *southwestern division*; and also the territory embraced on the date last mentioned in the counties of Baker, Ben Hill, Calhoun, Crisp, Colquitt, Dougherty, Lee, Miller, Mitchell." Tift, Turner and Worth, "which shall constitute the *Albany division*. Terms of the district court for the *western division* shall be held at Macon on the first Mondays in May and October; for the *eastern division*, at Savannah on the second Tuesdays in February, May, August, and November; for the *northeastern division*, at Augusta on the first Monday in April and the third Monday in November; for the *southwestern division* at Valdosta on the second Mondays in June and December; and for the *Albany division*, at Albany on the third Mondays in June and December." 17

"§ 78. The State of *Idaho* shall constitute one judicial district, to be known as the district of Idaho. It is divided into four divisions, to be known as the *northern*, *central*, *southern*, and *eastern divisions*. The territory embraced on the first day

17 36 St. at L. 1107, 37 St. at L.
1017, Comp. St. § 1062, as amended.

of July, nineteen hundred and ten, in the counties of Bommer, Kootenai, and Shoshone, shall constitute the *northern division* of said district; and the territory embraced on the date last mentioned in the counties of Idaho, Latah, and Nez Perce, shall constitute the *central division* of said district; and the territory embraced on the date last mentioned in the counties of Ada, Boise, Blaine, Cassia, Twin Falls, Canyon, Elmore, Lincoln, Owyhee, and Washington, shall constitute the *southern divisions* of said district; and the territory embraced on the date last mentioned in the counties of Bannock, Bear Lake, Bingham, Custer, Fremont, Lemhi, and Oneida, shall constitute the *eastern division* of said district. Terms of the District court for the *northern division* of said district shall be held at Coeur d'Alene City on the fourth Monday in May and the third Monday in November; for the *central division*, at Moscow on the second Monday in May and the first Monday in November; for the *southern division*, at Boise City on the second Mondays in February and September; and for the *eastern division*, at Pocatello on the second Mondays in March and October. The clerk of the court shall maintain an office in charge of himself or a deputy at Coeur d'Alene City, at Moscow, at Boise City, and at Pocatello, which shall be open at all times for the transaction of the business of the court.¹⁸

“§ 79. The State of *Illinois* is divided into three districts to be known as the *northern*, *southern*, and *eastern district* of *Illinois*. The *northern district* shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Cook, Dekalb, Dupage, Grundy, Kane, Kendall, Lake, Lasalle, McHenry, and Will, which shall constitute the *eastern division*; also the territory embraced on the date last mentioned in the counties of Boone, Carroll, Jo Daviess, Lee, Ogle, Stephenson, Whiteside, and Winnebago, which shall constitute the *western division*. Terms of the district court for the *eastern division* shall be held at Chicago on the first Mondays in February, March, April, May, June, July, September, October, and November, and the third Monday in December; and for the *western division*, at Freeport on the third Mondays in April and October. The clerk of the court for the *northern district* shall maintain an office in

¹⁸ 26 St. at L. 217, 27 St. at L. 1062b, 36 St. at L. 927, 1109, Comp. 72, 28 St. at L. 5, 30 St. at L. 423, St. § 1063.

charge of himself or a deputy at Chicago and at Freeport, which shall be kept open at all times for the transaction of the business of the court. The marshal for the northern district shall maintain an office in the division in which he himself does not reside and shall appoint at least one deputy who shall reside therein. The *southern district* shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Bureau, Fulton, Henderson, Henry, Knox, Livingston, McDonough, Marshall, Mercer, Putnam, Peoria, Rock Island, Stark, Tazewell, Warren, and Woodford, which shall constitute the *northern division*; also the territory embraced on the date last mentioned in the counties of Adams, Bond, Brown, Calhoun, Cass, Christian, Dewitt, Greene, Hancock, Jersey, Logan, McLean, Macon, Macoupin, Madison, Mason, Menard, Montgomery, Morgan, Pike, Sangamon, Schuyler, and Scott, which shall constitute the *southern division*. Terms of the district court for the *northern division* shall be held at Peoria on the third Mondays in April and October; for the *southern division*, at Springfield on the first Mondays in January and June, and at Quincy on the first Mondays in March and September. The clerk of the court for the *southern district* shall maintain an office in charge of himself or a deputy at Peoria, at Springfield, and at Quincy, which shall be kept open at all times for the transaction of the business of the court. The marshal for said southern district shall appoint at least one deputy residing in the said northern division, who shall maintain an office at Peoria. The *eastern district* shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Alexander, Champaign, Clark, Clay, Clinton, Coles, Crawford, Cumberland, Douglas, Edgar, Edwards, Effingham, Fayette, Ford, Franklin, Gallatin, Hamilton, Hardin, Iroquois, Jackson, Jasper, Jefferson, Johnson, Kankakee, Lawrence, Marion, Massac, Monroe, Moultrie, Perry, Piatt, Pope, Pulaski, Randolph, Richland, Saint Clair, Saline, Shelby, Union, Vermilion, Wabash, Washington, Wayne, White, and Williamson. Terms of the district court for the eastern district shall be held at Danville on the first Mondays in March and September; at Cairo on the first Mondays in April and October; and at East St. Louis on the first Mondays in May and November. The clerk of the court for the eastern district shall maintain an office in charge of himself or a deputy at Danville, at Cairo, and

at East Saint Louis, which shall be kept open at all times for the transaction of the business of the court, and shall there keep the records, files, and documents pertaining to the court at that place.¹⁹

"§ 80. The State of *Indiana* shall constitute one judicial district, to be known as the district of Indiana. Terms of the district court shall be held at Indianapolis on the first Tuesdays in May and November; at New Albany on the first Mondays in January and July; at Evansville on the first Mondays in April and October; at Fort Wayne on the second Tuesdays in June and December; and at Hammond on the third Tuesdays in April and October. The clerk of the court shall appoint four deputy clerks, one of whom shall reside and keep his office at New Albany, one at Evansville, one at Fort Wayne, and one at Hammond. Each deputy shall keep in his office full records of all actions and proceedings of the district court held at that place.²⁰

"§ 81. The State of *Iowa* is divided into two judicial districts, to be known as the *northern* and *southern* districts of Iowa. The *northern district* shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Allamakee, Dubuque, Buchanan, Clayton, Delaware, Fayette, Winneshiek, Howard, Chickasaw, Bremer, Blackhawk, Floyd, Mitchell, and Jackson, which shall constitute the *eastern division* of said district; also the territory embraced on the date last mentioned in the counties of Jones, Cedar, Linn, Johnson, Iowa, Benton, Tama, Grundy, and Hardin, which shall constitute the *Cedar Rapids division*; also the territory embraced on the date last mentioned in the counties of Emmet, Palo Alto, Pocahontas, Calhoun, Carroll, Kossuth, Humboldt, Webster, Winnebago, Hancock, Wright, Hamilton, Worth, Cerro Gordo, Franklin and Butler, which shall constitute the *central divi-*

¹⁹ 36 St. at L. 1110, Comp. St. § 1064. A court sitting in one division has jurisdiction to hear and determine a motion for a new trial in a criminal case tried in another division. *Dwyer v. U. S., C. C. A.*, 170 Fed. 160. The additional district judge, appointed for the northern district of Illinois under the Act March 3, 1905, ch. 1427,

§§ 2, 3, 23, 33 St. at L. 992, 997, Comp. St. Supp. 1909, pp. 123, 130, has jurisdiction to try offenses committed before the creation of his office as well as those committed subsequently. *Walsh v. U. S., C. C. A.*, 174 Fed. 615, Comp. St. § 1065.

²⁰ 36 St. at L. 1110, Comp. St. § 1065.

sion; also the territory embraced on the date last mentioned in the counties of Dickinson, Clay, Buena Vista, Sac, Osceola, O'Brien, Cherokee, Ida, Lyon, Sioux, Plymouth, Woodbury, and Monona, which shall constitute the *western division*. Terms of the district court for the *eastern division* shall be held at Dubuque on the fourth Tuesday in April and the first Tuesday in December, and at Waterloo on the second Tuesdays in May and September; for the *Cedar Rapids division*, at Cedar Rapids on the first Tuesday in April and the fourth Tuesday in September; for the *central division*, at Fort Dodge on the second Tuesdays in June and November; and for the *western division*, at Sioux City on the fourth Tuesday in May and the third Tuesday in October. The *southern district* shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Louais, Henry, Des Moines, Lee, and Van Buren, which shall constitute the *eastern division* of said district; also the territory embraced on the date last mentioned in the counties of Marshall, Story, Boone, Greene, Guthrie, Dallas, Polk, Jasper, Poweshiek, Marion, Warren, and Madison, which shall constitute the *central division* of said district; also the territory embraced on the date last mentioned in the counties of Crawford, Harrison, Shelby, Audubon, Cass, Pottawattamie, Mills, and Montgomery, which shall constitute the *western division* of said district; also the territory embraced on the date last mentioned in the counties of Adair, Adams, Clarke, Decatur, Freemont, Lucas, Page, Ringgold, Taylor, Union and Wayne, which shall constitute the *southern division* of said district; also the territory embraced on the date last mentioned in the counties of Scott, Muscatine, Washington, Johnson and Clinton, which shall constitute the *Davenport division* of said district; also the territory embraced on the date last mentioned in the counties of Davis, Appanoose, Mahaska, Keokuk, Jefferson, Monroe, and Wapello, which shall constitute the *Ottumwa division* of said district. Terms of the district court for the *eastern division* shall be held at Keokuk on the sixth Tuesday after the fourth Tuesday in February and the eighth Tuesday after the third Tuesday in September; for the *central division*, at Des Moines on the tenth Tuesday after the fourth Tuesday in February and the fifteenth Tuesday after the third Tuesday in September; for the *western division*, at Council Bluffs on the

fourth Tuesday in February and the sixth Tuesday after the third Tuesday in September; for the *southern division*, at Creston on the fourth Tuesday after the fourth Tuesday in February and the third Tuesday in September; for the *Davenport division*, at Davenport on the eighth Tuesday after the fourth Tuesday in February and the second Tuesday after the third Tuesday in September; and for the *Ottumwa division*, at Ottumwa on the second Tuesday after the fourth Tuesday in February and the fourth Tuesday after the third Tuesday in September. The clerk of the court for said district shall maintain an office in charge of himself or a deputy at Davenport and at Ottumwa, for the transaction of the business of said division."²¹

Under the Act of June 1, 1900,²² it was provided that all grand and petit jurors for the southern district should be selected from citizens residing therein. It was held that jurors drawn for service in the central division need not reside therein, provided they reside within the district.²³

"§ 82. The State of *Kansas* shall constitute one judicial district, to be known as the *district of Kansas*. It is divided into three divisions, to be known as the *first*, *second*, and *third* divisions of the *district of Kansas*. The *first division* shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Atchison, Brown, Chase, Cheyenne, Clay, Cloud, Decatur, Dickinson, Doniphan, Douglas, Ellis, Franklin, Geary, Gove, Graham, Jackson, Jefferson, Jewell, Johnson, Leavenworth, Lincoln, Logan, Lyon, Marion, Marshall, Mitchell, Morris, Nemaha, Norton, Osage, Osborne, Ottawa, Phillips, Pottawatomie, Rawlins, Republic, Riley, Rooks, Russell, Saline, Shawnee, Sheridan, Sherman, Smith, Thomas, Trego, Wabaunsee, Wallace, Washington, and Wyandotte. The *second division* shall include the territory embraced on the date last mentioned in the counties of Barber, Barton, Butler, Clark, Comanche, Cowley, Edwards, Ellsworth, Finney, Ford, Grant, Gray, Greeley, Hamilton, Harper, Harvey, Hodgeman, Haskell, Kingman, Kiowa, Kearny, Lane, McPherson, Morton, Meade, Ness, Pratt, Pawnee, Reno, Rice, Rush, Scott, Sedgwick, Staf-

²¹ 36 St. at L. 1087, 1111, am'd Act of Mar. 3, 1913, 37 St. at L. 734, 39 St. at L. 12, 55; Comp. St. § 1066.

²² § 5, Ch. 601, 31 St. at L. 249, Comp. St. 1901, p. 353.

²³ *Spencer v. U. S., C. C. A.*, 169 Fed. 562.

ford, Stevens, Seward, Sumner, Stanton, and Wichita. The *third division* shall include the territory embraced on the said date last mentioned in the counties of Allen, Anderson, Bourbon, Cherokee, Coffey, Chautauqua, Crawford, Elk, Greenwood, Labette, Linn, Miami, Montgomery, Neosho, Wilson, and Woodson. Terms of the district court for the *first division* shall be held at Leavenworth on the second Monday in October; at Topeka on the second Monday in April; at Kansas City on the second Monday in January and the first Monday in October; and at Salina on the second Monday in May; terms of the district court for the *second division* shall be held at Wichita on the second Monday in March and September; and for the *third division*, at Fort Scott on the first Monday in May and the second Monday in November. The clerk of the district court shall appoint three deputies, one of whom shall reside and keep his office at Fort Scott, one at Wichita, and the other at Salina, and the marshal shall appoint a deputy who shall reside and keep his office at Kansas City."²⁴

§ 83. The State of *Kentucky* is divided into two districts, to be known as the *eastern* and *western* districts of *Kentucky*. The *eastern district* shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Carroll, Trimble, Henry, Shelby, Anderson, Mercer, Boyle, Gallatin, Boone, Kenton, Campbell, Pendleton, Grant, Owen, Franklin, Bourbon, Scott, Woodford, Fayette, Jessamine, Garrard, Madison, Lincoln, Rockcastle, Pulaski, Wayne, Whitley, Bell, Knox, Harlan, Laurel, Clay, Leslie, Letcher, Perry, Owsley, Jackson, Estill, Lee, Breathitt, Knox, Pike, Floyd, Magoffin, Martin, Johnson, Lawrence, Boyd, Greenup, Carter, Elliott, Morgan, Wolfe, Powell, Menifee, Clark, Montgomery, Bath, Rowan, Lewis, Fleming, Mason, Bracken, Robertson, Nicholas, and Harrison, with the waters thereof. Terms of the district court for the eastern district shall be held at Frankfort on the second Monday in March and the fourth Monday in September;

²⁴ 36 St. at L. 1112, as amended, 39 St. at L. 725, Comp. St. § 1067. See *McGlashern v. U. S.*, 71 Fed. 434. For special jurisdiction of the courts held in this district over controversies affecting the Gulf,

Colorado & Santa Fe Railroad Company, and the Southern Kansas Railway Company, see 23 St. at L. 72, 75; *Briscoe v. Southern Kan. Ry. Co.*, 40 Fed. 273.

at Covington on the first Monday in April and the third Monday in October; at Richmond on the fourth Monday in April and the second Monday in November; at London on the second Monday in May and the fourth Monday in November; at Catlettsburg on the fourth Monday in May and the second Monday in December; and at Jackson on the first Monday in March and the third Monday in September: *Provided*, That suitable rooms and accommodations are furnished for holding court at Jackson free of expense to the Government until such time as a public building shall be erected there. "At Lexington: Beginning on the second Monday in January, and the second Monday in June in each year. *Provided*, That suitable rooms and accommodations for holding court at Lexington shall be furnished without expense to the United States." The *western district* shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Oldham, Jefferson, Spencer, Bullitt, Nelson, Washington, Marion, Larue, Taylor, Casey Green, Adair, Russell, Clinton, Cumberland, Monroe, Metcalf, Allen, Barren, Simpson, Logan, Warren, Butler, Hart, Edmonson, Brayson, Hardin, Meade, Breckenridge, Hancock, Daviess, Ohio, McLean, Muhlenberg, Todd, Christian, Trigg, Lyon, Caldwell, Livingston, Crittenden, Hopkins, Webster, Henderson, Union, Marshall, Calloway, McCracken, Graves, Ballard, Carlisle, Hickman, and Fulton, with the waters thereof. Terms of the district court for the western district shall be held at Louisville on the second Mondays in March and October; at Owensboro on the first Monday in May and the fourth Monday in November; at Paducah on the third Mondays in April and November; and at Bowling Green on the third Monday in May and the second Monday in December. "The clerk of the court for the eastern district of Kentucky shall maintain an office in charge of himself or a deputy or a clerical assistant at each of the places of holding court within said district." "The clerk for the western district shall maintain an office in charge of himself or a deputy at Louisville, at Owensboro, at Paducah, and at Bowling Green, each of which offices shall be kept open at all times for the transaction of the business of said court. The clerks of the courts for the eastern and western districts, upon issuing original process in a civil action, shall make it returnable to the court nearest to the county of the residence of the

defendant, or of that defendant whose county is nearest to a court, and shall, immediately upon payment by the plaintiff of his fees accrued, send the papers filed to the clerk of the court to which the process is made returnable; and whenever the process is not thus made returnable, any defendant may, upon motion, on or before the calling of the cause, have it transferred to the court to which it should have been sent had the clerk known the residence of the defendant when the action was brought." ²⁵

"§ 84. The State of *Louisiana* is divided into two judicial districts, to be known as the *eastern* and *western* districts of Louisiana. The *eastern district* shall include the territory embraced on the first day of July, nineteen hundred and ten, in the parishes of Assumption, Iberia, Jefferson, Lafourche, Orleans, Plaquemines, Saint Bernard, Saint Charles, Saint James, Saint John the Baptist, Saint Mary, Saint Tammany, Tangipahoa, Terrebonne, and Washington, which shall constitute the *New Orleans division*; also the territory embraced on the date last mentioned in the parishes of Ascension, East Baton Rouge, East Feliciana, Livingston, Pointe Coupee, Saint Helena, West Baton Rouge, Iberville, and West Feliciana, which shall constitute the *Baton Rouge division* of said district. Terms of the district court for the *New Orleans division* shall be held at New Orleans on the third Mondays in February, May, and November; and for the *Baton Rouge division*, at Baton Rouge on the second Mondays in April and November. The clerk of the court for the *eastern district* shall maintain an office in charge of himself or a deputy at New Orleans and at Baton Rouge which shall be kept open at all times for the transaction of the business of the court. The *western district* shall include the territory embraced on the first day of July, nineteen hundred and ten, in the parishes of Saint Landry, Evangeline, Saint Martin, Lafayette, and Vermilion, which shall constitute the *Opelousas division* of said district; also the territory embraced on the date last mentioned in the

²⁵ 36 St. at L. 1087, 1112, Comp. St. § 1068, Act of Jan. 19, 1920. Under the former law, 31 St. at L. 781, Comp. St. 1901, p. 360, it was held that a term held in Louisville

did not lapse by reason of the commencement of intervening terms elsewhere. *U. S. v. Louisville & N. R. Co.*, 177 Fed. 780.

parishes of Rapides, Avoyelles, Catahoula, La Salle, Grant, and Winn, which shall constitute the *Alexandria division* of said district; also the territory embraced on the said date last mentioned in the parishes of Caddo, De Soto, Bossier, Webster, Claiborne, Bienville, Natchitoches, Sabine, and Red River, which shall constitute the *Shreveport division* of said district; also the territory embraced on the date last mentioned in the parishes of Ouachita, Franklin, Richland, Morehouse, East Carroll, West Carroll, Madison, Tensas, Concordia, Union, Caldwell, Jackson, and Lincoln, which shall constitute the *Monroe division* of said district; also the territory embraced on the date last mentioned in the parishes of Acadia, Calcasieu, Cameron, and Vernon, which shall constitute the *Lake Charles division* of said district. Terms of the district court for the *Opelousas division* shall be held at Opelousas on the first Mondays in January and June; for the *Alexandria division*, at Alexandria on the fourth Mondays in January and June; for the *Shreveport division*, at Shreveport on the third Mondays in February and October; for the *Monroe division*, at Monroe on the first Mondays in April and October; and for the *Lake Charles division*, at Lake Charles on the third Mondays in May and December. The clerk of the court for the western district shall maintain an office in charge of himself or a deputy at Opelousas, at Alexandria, at Shreveport, at Monroe, and at Lake Charles, which shall be kept open at all times for the transaction of the business of the court."²⁶ Prior to the Judicial Code it was held, that in a suit in admiralty in personam, where two or more of the defendants were citizens of different districts of the State of Louisiana, the suit might be brought in either district.²⁷

"§ 85. The State of *Maine* shall constitute one judicial district to be known as the district of Maine." It is "divided into two divisions, to be known, respectively, as the *northern* and *southern divisions*. The counties of Aroostook, Penobscot, Piscataquis, Washington, Hancock, Waldo, and Somerset shall be known as the *northern division*, the court for which shall be held in the said city of Bangor. The remaining counties in said

²⁶ 36 St. at L. 1087, 1113, Comp. St. 1069.

²⁷ *Downs v. Wall*, C. C. A., 176 Fed. 657.

State and district of Maine shall constitute the *southern division*, the court for which shall be held in the said city of Portland.”²⁸

“For the purpose of determining the jurisdiction and venue of all causes, suits, actions, bills, petitions, matters, libels, proceedings, prosecutions, indictments, complaints, informations, and other judicial business, whether civil or criminal, or whether in equity, in admiralty, in prize, in forfeiture, or in condemnation, in rem, in personam, or mixed, whatsoever, cognizable in the United States district court, each of said divisions shall be as if it were a separate and distinct judicial district of the United States. There shall be but one judge, one clerk, one marshal, and one district attorney for said district of Maine. United States commissioners in either of said divisions, until otherwise provided by law, shall be appointed and have jurisdiction and cognizance through said district of Maine in the same manner and to the same extent and effect that they now have under existing law.”²⁹

“Any cause, suit, action, bill, petition, matter, libel, proceeding, prosecution, indictment, complaint, information, or other judicial business, whether civil or criminal, or whether in equity, in admiralty, in prize, in forfeiture, or in condemnation, in rem, in personam, or mixed, whatsoever, pending in either of said divisions, when all the parties thereto so stipulate in writing, and where the ends of justice or the convenience of the parties will be promoted thereby, may, at the discretion of the court or judge, be transferred wholly or specially for the hearing, trial, or determination of any single proceeding, matter, step, or motion therein from one of said divisions to the other. On request of all accused in any criminal prosecution and of all claimants in any cause, proceeding, libel, information, or other matter in rem, the same may be transferred, at the discretion of the court or judge from one of said divisions to the division in which a term of said court is next to be held, without the joinder in such request of the United States when the Government is the only other party thereto not joining in such request.”³⁰

“All ex parte, of course, default and pro confesso, proceedings and matters, and all interlocutory matters in which all interested

²⁸ § 3, 39 St. at L. 850, Comp. St. 1070c.

³⁰ § 5, 39 St. at L. 851, Comp. St. 1070e.

²⁹ § 4, 39 St. at L. 851, Comp. St. 1070d.

parties are present and consenting that such hearing may be had, in whichever of said divisions the same may be cognizable or pending, may be heard and determined by the court or judge and all findings, orders, judgments, and decrees be made, and all mesne and final process therein be tested, sealed, issued, and renewed in either of said divisions, in term time, vacation, or chambers." ³¹

"Nothing in this Act contained shall be construed to deprive the court or judge of the power to grant a change of venue or continuance in any cause, proceeding, or matter whatsoever according to law and the requirements of justice." ³²

"All Acts and parts of Acts inconsistent with this Act are hereby repealed." ³³

"The clerk of said district court for said district of Maine and the marshal of said district shall each at all times maintain by himself or by deputy an office in charge of himself or deputy, both at said city of Bangor and at said city of Portland. The deputy clerk in charge of the office in the division in which the clerk does not reside himself shall reside in the city where the office of which he has charge is located. That said marshal shall appoint a field deputy, who shall have charge of the office in the division in which the marshal does not reside himself, who shall reside in the city where the office of which he has charge is located, and who, within and for said division, in the absence of the marshal, shall have all the powers of the marshal, and who shall also, throughout said district of Maine, have all the powers of other deputy marshals. And such field deputy, before he enters on the duties of his office, shall give bond before the judge of said district of like tenor, effect, and amount and of similar form and condition, with like sureties, and to be approved in like manner, as now or may hereafter be required by law of the marshal of said district." ³⁴

"Hereafter, and until otherwise provided by law, two sessions of the United States District Court for the District of Maine, shall be held in each and every year in the city of Bangor, in said district, beginning respectively, on the first Tuesday of February

³¹ § 6, 39 St. at L. 851, Comp. St. 1070f.

³² § 7, 39 St. at L. 851, Comp. St. 1070g.

³³ § 8, 39 St. at L. 851, Comp. St. 1070h.

³⁴ § 2, 39 St. at L. 850, Comp. St. 1070b.

and the first Tuesday of June, and three sessions of said court shall be held in each and every year in the city of Portland, in said district, beginning, respectively, on the first Tuesday of April, on the third Tuesday of September, and on the second Tuesday in December."³⁵

"§ 86. The State of *Maryland* shall constitute one judicial district, to be known as the district of Maryland. Terms of the district court shall be held at Baltimore on the first Tuesdays in March, June, September, and December; and at Cumberland on the second Monday in May and the last Monday in September. The clerk of the court shall appoint a deputy who shall reside and maintain an office at Cumberland, unless the clerk shall himself reside there; and the marshal shall also appoint a deputy, who shall reside and maintain an office at Cumberland, unless he shall himself reside there."³⁶

"§ 87. The State of *Massachusetts* shall constitute one judicial district, to be known as the district of Massachusetts. Terms of the district court shall be held at Boston on the third Tuesday in March, the fourth Tuesday in June, the second Tuesday in September, and the first Tuesday in December; and at Springfield, on the second Tuesdays in May and December: *Provided*, That suitable rooms and accommodations for holding court at Springfield shall be furnished free of expense to the Government until such time as a Federal building shall be erected there for that purpose. The marshal and the clerk for said district shall each appoint at least one deputy, to reside in Springfield and to maintain an office at that place."³⁷

"§ 88. The State of *Michigan* is divided into two judicial districts, to be known as the *eastern* and *western* districts of Michigan. The *eastern district* shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Alcona, Alpena, Arenac, Bay, Cheboygan, Clare, Crawford, Genesee, Gladwin, Gratiot, Huron, Iosco, Isabella, Midland, Montmorency, Ogemaw, Oscoda, Otsego, Presque Isle, Roscommon, Saginaw, Shiawassee, and Tuscolo, which shall constitute the *northern division*; also the territory embraced on the

³⁵ § 1, 39 St. at L. 850, Comp. St. 1070a.

³⁶ St. at L. 1114, Comp. St. § 1071.

³⁷ 36 St. at L. 1114, Comp. St. § 1072.

date last mentioned in the counties of Branch, Calhoun, Clinton, Hillsdale, Ingham, Jackson, Lapeer, Lenawee, Livingston, Macomb, Monroe, Oakland, St. Clair, Sanilac, Washtenaw, and Wayne, which shall constitute the *southern division* of said district. Terms of the district court for the *southern division* shall be held at Detroit on the first Tuesdays in March, June, and November; for the *northern division*, at Bay City on the first Tuesdays in May and October, and at Port Huron in the discretion of the judge of said court and at such times as he shall appoint therefor. There shall also be held a special or adjourned term of the district court at Bay City for the hearing of admiralty causes, beginning in the month of February in each year. The *western district* shall include the "territory embraced on the first day of July, nineteen hundred and ten, in the counties of Alger, Baraga, Chippewa, Delta, Dickinson, Gogebic, Houghton, Iron, Keweenaw, Luce, Mackinac, Marquette, Menominee, Ontonagon, and Schoolcraft, which shall constitute the *northern division*; also the territory embraced on the said date last mentioned in the counties of Allegan, Antrim, Barry, Benzie, Berrien, Cass, Charlevoix, Eaton, Emmet, Grand Traverse, Ionia, Kalamazoo, Kalkaska, Kent, Lake, Leelanau, Manistee, Mason, Mecosta, Missaukee, Montcalm, Muskegon, Nwaygo, Oceana, Osceola, Ottawa, St. Joseph, Van Buren, and Wexford, which shall constitute the *southern division* of said district." "The terms of the district courts for the *western district* of Michigan for the *southern division* shall be held at Grand Rapids, commencing on the first Tuesdays in March, June, October and December and for the *northern division* at Marquette, commencing on the second Tuesday of April and September; and at Sault Saint Marie, commencing on the second Tuesdays in January and July."³⁸ "All issues of fact shall be tried at the terms held in the division where such suit shall be commenced. Actions in rem and admiralty may be brought in whichever division of the eastern district service can be had upon the res. Nothing herein contained shall prevent the district court of the western division from regulating, by general rule, the venue of transitory actions either at law or in equity, or from changing the same for cause. The clerk of the court for the *western district* shall reside and

³⁸ 36 St. at L. 1114, 37 St. at L. 190, Comp. St. §§ 1073, 1074.

keep his office at Grand Rapids, and shall also appoint a deputy clerk for said court held at Marquette, who shall reside and keep his office at that place. The marshal for said western district shall keep an office and a deputy marshal at Marquette. The clerk of the court for the *eastern district* shall keep his office at the city of Detroit, and shall appoint a deputy for the court held at Bay City, who shall reside and keep his office at that place. The marshal for said district shall keep an office and a deputy marshal at Bay City and mileage on service of process in said northern division shall be computed from Bay City.³⁸

"§ 89. The State of *Minnesota* shall constitute one judicial district, to be known as the district of Minnesota. It is divided into six divisions, to be known as the *first, second, third, fourth, fifth, and sixth divisions*. The *first division* shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Winona, Wabasha, Olmsted, Dodge, Steele, Mower, Fillmore, and Houston. The *second division* shall include the territory embraced on the date last mentioned in the counties of Freeborn, Faribault, Martin, Jackson, Nobles, Rock, Pipestone, Murray, Cottonwood, Watonwan, Blue Earth, Waseca, Lesueur, Nicollet, Brown, Redwood, Lyon, Yellow Medicine, Sibley, and Lac qui Parle. The *third division* shall include the territory embraced on the date last mentioned in the counties of Chicago, Washington, Ramsey, Dakota, Goodhue, Rice, and Scott. The *fourth division* shall include the territory embraced on the date last mentioned in the counties of Hennepin, Wright, Meeker, Kandiyohi, Swift, Chippewa, Renville, McLeod, Carver, Anoka, Sherburne, and Isanti. The *fifth division* shall include the territory embraced on the date last mentioned in the counties of Cook, Lake, Saint Louis, Itasca, Koochiching, Cass, Crow Wing, Aitkin, Carlton, Pine, Kanabec, Mille Lacs, Morrison, and Benton. The *sixth division* shall include the territory embraced on the date last mentioned in the counties of Stearns, Pope, Stevens, Bigstone, Traverse, Grant, Douglas, Todd, Ottertail, Roseau, Wilkin, Clay, Becker, Walden, Norman, Polk, Red Lake, Marshall, Kittson, Beltrami,³⁹ Clear-

³⁸ Kelliher, in the county of Beltrami, state of Minnesota, which is within the exterior boundaries of the territory ceded to the United

States by the Chippewa Treaty of February 22, 1855 (10 Stat. 1165), is Indian territory. *Harris v. U. S. (C. C. A.)*, 249 F. 41, certiorari

water, Mahnomen, and Hubbard. Terms of the district court for the *first division* shall be held at Winona on the third Tuesdays in May and November; for the *second division*, at Mankato on the fourth Tuesdays in April and October; for the *third division*, at Saint Paul on the first Tuesdays in June and December; for the *fourth division*, at Minneapolis on the first Tuesdays in April and October; for the *fifth division*, at Duluth on the second Tuesdays in January and July; and for the *sixth division*, at Fergus Falls on the first Tuesday in May and second Tuesday in November. The clerk of the court shall appoint a deputy clerk at each place where the court is now required to be held at which the clerk shall not himself reside, who shall keep his office and reside at the place appointed for the holding of said court.⁴⁰

“§ 90. The State of *Mississippi* is divided into two judicial districts, to be known as the *northern* and *southern* districts of Mississippi. The *northern district* shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Alcorn, Attala, Chickasaw, Choctaw, Clay, Itawamba, Lee, Lowndes, Monroe, Oktibbeha, Pontotoc, Prentiss, Tishomingo, and Winston, which shall constitute the *eastern division* of said district also the territory embraced on the date last mentioned in the counties of Benton, Calhoun, Carroll, De Soto, Grenada, Lafayette, Marshall, Montgomery, Panola, Tate, Tippah, Union, Webster, and Yalobusha, which shall constitute the *western division* of said district; also the territory embraced on the date last mentioned in the counties of Bolivar, Coahoma, Leflore, Quitman, Sunflower, Tallahatchie, and Tunica, which shall constitute the *Delta division* of said district. The terms of the district court for the *eastern division* shall be held at Aberdeen on the first Mondays in April and October; and for the *western division*, at Oxford on the first Mondays in June and December; and for the *Delta division*, at Clarksdale on the fourth Mondays in January and July; *Provided*, That suitable rooms and accommodations for holding court at Clarksdale are

denied, 38 St. at L. 425. Crim. Law, 742(1), 1130(2); Indians, 35, 38(1).

⁴⁰ 36 St. at L. 1087, 1115, Comp. St. § 1075. See *Clement v. U. S.*,

C. C. A., 149 Fed. 305. For the power to execute process upon the open waters of the Great Lakes, see *The Lindsay*, 62 Fed. 851.

furnished free of expense to the United States. The *southern district* shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Adams, Amite, Copiah, Covington, Franklin, Hinds, Holmes, Jefferson, Jefferson Davis, Lawrence, Lincoln, Madison, Pike, Rankin, Simpson, Smith, Scott, Wilkinson, and Yazoo, which shall constitute the *Jackson division*; also the territory embraced on the date last mentioned in the counties of Claiborne, Issaquena, Sharkey, Warren, and Washington, which shall constitute the *western division*; also the territory embraced on the date last mentioned in the counties of Clarke, Jones, Jasper, Kemper, Lauderdale, Leake, Neshoba, Newton, Noxubee, and Wayne, which shall constitute the *eastern division*; also the territory embraced on the date last mentioned in the counties of Forrest, Greene, Hancock, Harrison, Jackson, Lamar, Marion, Perry, and Pearl River, which shall constitute the *southern division* of said district. Terms of the district court for the *Jackson division* shall be held at Jackson on the first Mondays in May and November; for the *western division*, at Vicksburg on the first Mondays in January and July; for the *eastern division*, at Meridian on the second Mondays in March and September; and for the *southern division*, at Biloxi on the third Mondays in February and August. The clerk of the court for each district shall maintain an office in charge of himself or a deputy at each place in his district at which court is now required to be held at which he shall not himself reside, which shall be kept open at all times for the transaction of the business of the court. The marshal for each of said districts shall maintain an office in charge of himself or a deputy at each place of holding court in his district.⁴¹

“§ 91. The State of *Missouri* is divided into two judicial districts, to be known as the *eastern* and *western* districts of *Missouri*. The *eastern district* shall include the territory embraced on the first day of July, nineteen hundred and ten, in the city of Saint Louis and the counties of Audrian, Crawford, Dent, Franklin, Gasconade, Iron, Jefferson, Lincoln, Maries, Montgomery, Phelps, Saint Charles, Saint Francois, Sainte Genevieve, Saint Louis, Warren, and Washington, which shall constitute the *east-*

⁴¹ Jud. Code, 36 St. at L. 1087, ch. 136, 37 St. at L. 118, 59 Comp. 1116, as am'd Act of May 27, 1912. St. § 1076.

ern division of said district; also the territory embraced on the date last mentioned in the counties of Adair, Chariton, Clark, Knox, Lewis, Linn, Macon, Marion, Monroe, Pike, Ralls, Randolph, Schuyler, Scotland, and Shelby, which shall constitute the *northern division* of said district; also the territory embraced on the date last mentioned in the counties of Bollinger, Butler, Cape Girardeau, Carter, Dunklin, Madison, Mississippi, New Madrid, Pemiscot, Perry, Reynolds, Ripley, Scott, Shannon, Stoddard, and Wayne, which shall constitute the *southeastern division* of said district. Terms of the district court for the *eastern division* shall be held at Saint Louis on the third Mondays in March and September, and at Rolla on the second Mondays in January and June: *Provided*, That suitable rooms and accommodations for holding court at Rolla are furnished free of expense to the United States; for the *northern division* at Hannibal on the fourth Monday in May and the first Monday in December; and for the *southeastern division* at Cape Girardeau on the second Mondays in April and October. The *western district* shall include the territory embraced on the first day of July, nineteen hundred and ten in the counties of Bates, Caldwell, Carroll, Cass, Clay, Grundy, Henry, Jackson, Johnson, Lafayette, Livingston, Mercer, Putnam, Ray, Saint Clair, Saline, and Sullivan, which shall constitute the *western division*; also the territory embraced on the date last mentioned in the counties of Barton, Barry, Jasper, Lawrence, McDonald, Newton, Stone, and Vernon, which shall constitute the *southwestern division*; also the territory embraced on the date last mentioned in the counties of Andrew, Atchison, Buchanan, Clinton, Daviess, Dekalb, Gentry, Holt, Harrison, Nodaway, Platte, and Worth, which shall constitute the *Saint Joseph division*; also the territory embraced on the date last mentioned in the counties of Benton, Boone, Callaway, Cooper, Camden, Cole, Hickory, Howard Miller, Moniteau, Morgan, Osage, and Pettis, which shall constitute the *central division*; also the territory embraced on the date last mentioned in the counties of Christian, Cedar, Dade, Dallas, Douglas, Greene, Howell, Leclède, Oregon, Ozark, Polk, Pulaski, Taney, Texas, Webster, and Wright, which shall constitute the *southern division*. Terms of the district court for the *western division* shall be held at Kansas City on the fourth Monday in April and the first Mon-

day in November, and at Chillicothe on the fourth Monday in May and the first Monday in December: *Provided*, That suitable rooms and accommodations for holding court at Chillicothe are furnished free of expense to the United States; for the *southwestern division*, at Joplin on the second Mondays in June and January; for the *Saint Joseph division*, at Saint Joseph on the first Monday in March and the third Monday in September; for the *central division*, at Jefferson City on the third Mondays in March and October; and for the *southern division*, at Springfield on the first Mondays in April and October. The clerk of the court at Saint Louis, in the eastern district, shall maintain an office in charge of himself or a deputy at Saint Louis and Hannibal and at such other places of holding court in said district as may be deemed necessary by the judge, which shall be kept open at all times for the transaction of the business of the court. The clerk of the court for the western district shall maintain an office in charge of himself or a deputy at Kansas City, at Jefferson City, at Saint Louis, at Chillicothe, at Joplin, and at Springfield, which shall be kept open at all times for the transaction of the business of the court. The marshal for each district shall also maintain an office in charge of himself or a deputy at each place at which court is now held in his district.⁴²

§ 92. The State of *Montana* shall constitute one judicial district, to be known as the district of Montana. Terms of the district court shall be held at Helena on the first Mondays in April and November; at Butte on the first Tuesdays in February and September; at Great Falls on the first Mondays in May and October; at Missoula on the first Mondays in January and June; and at Billings on the first Mondays in March and August. Causes, civil and criminal, may be transferred by the court or judge thereof from Helena to Butte or from Butte to Helena, or from Helena or Butte to Great Falls, or from Great Falls to Helena or Butte, in said district, when the convenience of the parties or the ends of justice would be promoted by the transfer; and any interlocutory order may be made by the court or judge thereof in either place."⁴³

⁴² Jud. Code, 36 St. at L. 1087, ⁴³ 25 St. at L. 682, 36 St. at L. 1117, as am'd Act of Dec. 22, 1911, 1118, Comp. St. § 1078.
37 St. at L. 51, Comp. St. § 1077.

"The provisions of the act of the Legislature of the State of Montana, approved February seventeenth, nineteen hundred and eleven, ceding to the United States exclusive jurisdiction over the territory embraced within the Glacier National Park, are hereby accepted, and sole and exclusive jurisdiction is hereby assumed by the United States over such territory, saving, however, to the said State the right to serve civil or criminal process within the limits of the aforesaid park in suits or prosecution for or on account of rights acquired, obligations incurred, or crimes committed in said State but outside of said park, and saving further to the said State the right to tax persons and corporations, their franchises and property, on the lands included in said park. All the laws applicable to places under the sole and exclusive jurisdiction of the United States shall have force and effect in said park. All fugitives from justice taking refuge in said park shall be subject to the same laws as refugees from justice found in the State of Montana.⁴⁴

"Said park shall constitute a part of the United States judicial district of Montana, and the district court of the United States in and for said district shall have jurisdiction of all offenses committed within said boundaries.⁴⁵

"If any offense shall be committed in the Glacier National Park, which offense is not prohibited or the punishment is not specifically provided for by any law of the United States, the offender shall be subject to the same punishment as the laws of the State of Montana in force at the time of the commission of the offense may provide for a like offense in said State; and no subsequent repeal of any such law of the State of Montana shall affect any prosecution for said offense committed within said park.⁴⁶

"The United States district court for the district of Montana shall appoint a commissioner, who shall reside in the park, and who shall have jurisdiction to hear and act upon all complaints made of any violations of law or of the rules and regulations made by the Secretary of the Interior for the government of the park and for the protection of the animals, birds,

⁴⁴ 38 St. at L. 798, Comp. St. ⁴⁵ Ibid., Comp. St. § 5249c.
§ 5249a.

⁴⁶ 38 St. at L. 800, Comp. St.
§ 5249b.

and fish, and objects of interest therein, and for other purposes authorized by this Act.

"Such commissioner shall have power, upon sworn information, to issue process in the name of the United States for the arrest of any person charged with the commission of any misdemeanor, or charged with a violation of the rules and regulations, or with a violation of any of the provisions of this Act prescribed for the government of said park and for the protection of the animals, birds, and fish in said park, and to try the person so charged, and, if found guilty, to impose punishment and to adjudge the forfeiture prescribed.

"In all cases of conviction an appeal shall lie from the judgment of said commissioner to the United States district court for the district of Montana, and the United States district court in said district shall prescribe the rules of procedure and practice for said commissioner in the trial of cases and for appeal to said United States district court.⁴⁷

"Any such commissioner shall also have power to issue process as hereinbefore provided for the arrest of any person charged with the commission, within said boundaries, of any criminal offense not covered by the provisions of section four of this Act, to hear the evidence introduced, and if he is of opinion that probable cause is shown for holding the person so charged for trial, shall cause such person to be safely conveyed to a secure place of confinement within the jurisdiction of the United States district court for the district of Montana, and certify a transcript of the record of his proceedings and the testimony in the case to said court, which court shall have jurisdiction of the case: *Provided*, That the said commissioner shall grant bail in all cases bailable under the laws of the United States or of said State.⁴⁸

"All process issued by the commissioner shall be directed to the marshal of the United States for the district of Montana, but nothing herein contained shall be so construed as to prevent the arrest by any officer or employee of the Government, or any person employed by the United States in the policing of said reservation, within said boundaries, without process, of any per-

⁴⁷ 39 St. at L. 444, Comp. St. § 5249f. ⁴⁸ *Ibid.*, Comp. St. § 5249g.

son taken in the act of violating the law or this Act, or the regulations prescribed by said Secretary as aforesaid.”⁴⁰

“§ 93. The State of *Nebraska* shall constitute one judicial district to be known as the district of Nebraska. Said district is divided into *eight divisions*. The territory embraced on the first day of July, nineteen hundred and ten, in the counties of Douglas, Sarpy, Washington, Dodge, Colfax, Platte, Nance, Boone, Wheeler, Burt, Thurston, Dakota, Cuming, Cedar, and Dixon, shall constitute the *Omaha division*; the territory embraced on the date last mentioned in the counties of Madison, Antelope, Knox, Pierce, Stanton, Wayne, Holt, Boyd, Rock, Brown, and Keya Paha, shall constitute the *Norfolk division*; the territory embraced on the date last mentioned in the counties of Cherry, Sheridan, Dawes, Box Butte, and Sibus, shall constitute the *Chadron division*; the territory embraced on the date last mentioned in the counties of Hall, Merrick, Howard, Greeley, Garfield, Valley, Sherman, Buffalo, Custer, Loup, Blaine, Thomas, Hooker, and Grant, shall constitute the *Grand Island division*; the territory embraced on the date last mentioned in the counties of Lincoln, Dawson, Logan, McPherson, Keith, Deuel, Garden, Morrill, Cheyenne, Kimball, Banner, and Scott’s Bluff, shall constitute the *North Platte division*; the territory embraced on the date last mentioned in the counties of Cass, Otoe, Johnson, Nemaha, Pawnee, Richardson, Gage, Lancaster, Saunders, Butler, Seward, Saline, Jefferson, Thayer, Fillmore, York, Polk, and Hamilton, shall constitute the *Lincoln division*; the territory embraced on the date last mentioned in the counties of Clay, Nuckolls, Webster, Adams, Kearney, Franklin, Harlan, and Phelps, shall constitute the *Hastings division*; and the territory embraced on the date last mentioned in the counties of Gosper, Furnas, Red Willow, Frontier, Hayes, Hitchcock, Dundy, Chase, and Perkins, shall constitute the *McCook division*. Terms of the district court for the *Omaha division* shall be held at Omaha on the first Monday in April and the fourth Monday in September; for the *Norfolk division*, at Norfolk on the third Monday in September; for the *Chadron division*, at Chadron on the second Monday in September; for the *Grand Island division*, at Grand Island on the second Monday in

⁴⁰ Ibid., Comp. St. § 5249h.

January; for the *North Platte division*, at North Platte on the second Monday in June; for the *Lincoln division*, at Lincoln on the second Monday in May and the first Monday in October; for the *Hastings division*, at Hastings on the second Monday in March; and for the *McCook division* at McCook on the first Monday in March: *Provided*, That where provision is made herein for holding court at places where there are no Federal buildings, a suitable room in which to hold court, together with light and heat, shall be provided by the city or county where such court is held, without any expense to the United States. The clerk of the court shall appoint a deputy for each division of the district in which he does not himself reside, who shall keep his office and reside at the place of holding court in the division for which he is appointed.⁵⁰

“§ 94. The State of *Nevada* shall constitute one judicial district, to be known as the district of Nevada. Terms of the district court shall be held at Carson City on the first Mondays in February, May, and October.⁵¹

“§ 95. The State of *New Hampshire* shall constitute one judicial district, to be known as the district of New Hampshire. Terms of the district court shall be held at Portsmouth on the last Tuesday in October; at Concord on the last Tuesday in April and the second Tuesday in December; and at Littleton on the third Tuesday in September.⁵²

“§ 96. The State of *New Jersey* shall constitute one judicial district, to be known as the district of New Jersey. Terms of the District Court shall be held at Newark on the first Tuesday in April and the first Tuesday in November, and at Trenton on the third Tuesday in January and the second Tuesday in September of each year. The clerk of the court for the district of New Jersey shall maintain an office in charge of himself or a deputy, at Newark and at Trenton, each of which offices shall be kept open at all times for the transaction of the business of the court; and the marshal shall also maintain an office, in charge of himself or a deputy, at Newark and at Trenton, each of which offices shall be kept open at all times for the transaction of the

⁵⁰ 36 St. at L. 1118, Comp. St. 1079.

⁵² Jud. Code, 36 St. at L. 1087, 1119, as am'd Act of Aug. 23, 1912,

⁵¹ 36 Stat. at L. 1118, Comp. St. § 1080. 37 St. at L. 357, Comp. St. § 1081.

business of the court.”⁵³ By an agreement made between the States of New Jersey and New York on September 6, 1833, of which Congress approved by the Act of June 28, 1834,⁵⁴ the boundary line between the two States was fixed “from a point in the middle of Hudson river, opposite the point on the western shore thereof, in the forty-one degree of north latitude, as heretofore ascertained and marked, to the main sea, shall be the middle of the said river, of the Bay of New York, of the waters between Staten Island and New Jersey, and of Raritan Bay, to the main sea.” The boundary of the respective jurisdictions of the Federal courts sitting in New York and New Jersey is the same as that fixed in this agreement.⁵⁵ The District Court of the United States for the District of New Jersey when sitting in admiralty has exclusive jurisdiction of a vessel fastened to the New Jersey shore, although below the low water line.⁵⁶ It was so held when a tug was afloat in the Kill Von Kull, between Staten Island and New Jersey, fastened at the end of a dock at Bayonne, about three hundred feet below low water mark and about half a mile from the entrance of the Kill Von Kull into the Bay of New York;⁵⁷ and when a vessel was lying afloat at anchor on the Hudson River, between Jersey City and Manhattan Island, on the westerly side of the middle of the Hudson River, several hundred feet east of the Morris Street Pier of Jersey City; and when made fast to a wharf in the Morris Canal basin in Jersey City.⁵⁸

The State of *New Mexico* constitutes one district, with one District Judge. It is attached to the Eighth Circuit. The regular terms of the district court are held at the capital of that State, Santa Fe, on the first Mondays of April and October in each year.⁵⁹

“§ 97. The State of *New York* is divided into four judicial districts, to be known as the *northern*, *eastern*, *southern*, and *west-*

⁵³ 36 St. at L. 1087, 1119, am'd Act of Feb'y 14, 1913, 37 St. at L. 265, 37 St. at L. 674, Comp. St. § 1082.

⁵⁴ 4 St. at L. 708.

⁵⁵ *Re Devoe Mfg. Co.*, 108 U. S. 401, 2 Sup. Ct. 894, 27 L. ed. 764; s. c., 14 Fed. 183; *The Sarah E.*

Kennedy, 25 Fed. 569; *The Norma*, 32 Fed. 411.

⁵⁶ *Ibid.*

⁵⁷ *The Sarah E. Kennedy*, 25 Fed. 569.

⁵⁸ *The Norma*, 32 Fed. 411.

⁵⁹ 36 St. at L. 557, 565, § 13, Comp. St. § 1083.

ern districts of New York. The *northern district* shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Albany, Broome, Cayuga, Chenango, Clinton, Cortland, Delaware, Essex, Franklin, Fulton, Hamilton, Herkimer, Jefferson, Lewis, Madison, Montgomery, Oneida, Onondaga, Oswego, Otsego, Rensselaer, Saint Lawrence, Saratoga, Schenectady, Schoharie, Tioga, Tompkins, Warren, and Washington, with the waters thereof. Terms of the district court for said district shall be held at Albany on the second Tuesday in February; at Utica on the first Tuesday in December; at Binghamton on the second Tuesday in June; at Auburn on the first Tuesday in October; at Syracuse on the first Tuesday in April; and in the discretion of the judge of the court, one term annually at such time and place within the counties of Rensselaer, Saratoga, Onondaga, Saint Lawrence, Clinton, Jefferson, Oswego, and Franklin, as he may from time to time appoint. Such appointment shall be made by notice of at least twenty days published in a newspaper published at the place where said court is to be held. The *eastern district* shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Richmond, Kings, Queens, Nassau, and Suffolk, with the waters thereof. Terms of the district court for said district shall be held at Brooklyn on the first Wednesday in every month. The *southern district* shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Columbia, Dutchess, Greene, New York, Orange, Putnam, Rockland, Sullivan, Ulster, and Westchester, with the waters thereof. Terms of the district court for said district shall be held at New York City on the first Tuesday in each month. The district courts of the southern and eastern districts shall have concurrent jurisdiction over the waters within the counties of New York, Kings, Queens, Nassau, Richmond, and Suffolk, and over all seizures made and all matters done in such waters; all processes or orders issued within either of said courts or by any judge thereof shall run and be executed in any part of said waters."⁶⁰ The District Court of the Southern District of New York, in admiralty, has no jurisdiction on the westerly side of the middle

⁶⁰ 36 St. at L. 1087, 1119; Comp.

St. § 1084. Act of January 21, 1920.

of the Hudson River.⁶¹ "The *western district* shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Allegany, Cattaraugus, Chautauqua, Chemung, Erie, Genesee, Livingston, Monroe, Niagara, Ontario, Orleans, Schuyler, Seneca, Steuben, Wayne, Wyoming, and Yates, with the waters thereof. Terms of the district court for said district shall be held at Elmira on the second Tuesday in January; at Buffalo on the second Tuesdays in March and November; at Rochester on the second Tuesday in May; at Jamestown on the second Tuesday in July; at Lockport on the second Tuesday in October; and at Canandaigua on the second Tuesday in September. The regular sessions of the district court for the western district for the hearing of motions, and for proceedings in bankruptcy and the trial of causes in admiralty shall be held at Buffalo at least two weeks in each month of the year, except August, unless the business is sooner disposed of. The times for holding the same and such other special sessions as the court shall deem necessary shall be fixed by rules of the court. All process in admiralty causes and proceedings shall be made returnable at Buffalo. The judge of any district in the State of New York may perform the duties of the judge of any other district in such State upon the request of any resident judge entered in the minutes of his court; and in such cases such judge shall have the same powers as are vested in the resident judge.⁶²

"§ 98. The State of North Carolina is divided into two districts, to be known as the *eastern* and *western* districts of North Carolina. The *eastern district* shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Beaufort, Bertie, Bladen, Brunswick, Camden, Chatham, Cumberland, Currituck, Craven, Columbus, Chowan, Carteret, Dare, Duplin, Durham, Edgecombe, Franklin, Gates, Granville, Greene, Halifax, Harnett, Hertford, Hyde, Johnston, Jones, Lenoir, Lee, Martin, Moore, Nash, New Hanover, Northampton, Onslow, Pamlico, Pasquotank, Pender, Perquimans, Person, Pitt,

⁶¹ The Norma, 32 Fed. 411. See, also, *Re Devoe Mfg. Co.*, 108 U. S. 401, 2 Sup. Ct. 894, 27 L. ed. 764; *The Sarah E. Kennedy*, 25 Fed. 569; *V. S. Town-*

send, 219 Fed. 761, *infra*, § 525; and *supra* under New Jersey.

⁶² 36 St. at L. 1119, Comp. St. § 1084; Act of Jan. 2, 1920.

Robeson, Richmond, Sampson, Scotland, Tyrrell, Vance, Wake, Warren, Washington, Wayne, and Wilson. Terms of the district court for the *eastern district* shall be held at Laurinburg on the last Mondays in March and September; at Wilson on the first Mondays in April and October; at Elizabeth City on the second Mondays in April and October; at Washington on the third Mondays in April and October; at Newbern on the fourth Mondays in April and October; at Wilmington on the second Monday after the fourth Mondays in April and October; and at Raleigh on the fourth Monday after the fourth Mondays in April and October: Provided, That the city of Washington, the city of Laurinburg, and the city of Wilson shall each provide and furnish at its own expense a suitable and convenient place for holding the district court at Washington, at Laurinburg, and at Wilson until a courthouse shall be constructed by the United States. The clerk of the court for the eastern district shall maintain an office in charge of himself for a deputy at Raleigh, at Wilmington, at Newbern, at Elizabeth City, at Washington, at Laurinburg, and at Wilson, which shall be kept open at all times for the transaction of the business of the court.

The *western district* shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Alamance, Alexander, Ashe, Alleghany, Anson, Buncombe, Burke, Caswell, Cabarrus, Catawba, Cleveland, Caldwell, Clay, Cherokee, Davidson, Davie, Forsyth, Guilford, Gaston, Graham, Henderson, Haywood, Iredell, Jackson, Lincoln, Montgomery, Mecklenburg, Mitchell, McDowell, Madison, Macon, Orange, Polk, Randolph, Rockingham, Rowan, Rutherford, Stanly, Stokes, Surry, Swain, Transylvania, Union, Wilkes, Watauga, Yadkin, and Yancey. Terms of the district court for the *western district* shall be held in Greensboro on the first Mondays in June and December; at Statesville on the third Mondays in April and October; at Salisbury on the fourth Mondays in April and October; at Asheville on the first Mondays in May and November; at Charlotte on the first Mondays in April and October; and at Wilkesboro on the fourth Mondays in May and November. The clerk of the court for the *western district* shall maintain an office in charge of himself or a deputy at Greensboro, at Asheville, at Statesville, and at Wilkesboro, which shall be kept open at all times for the transaction of the business of the court.

Two additional terms of the district court for the trial of civil cases, for the *eastern district* of North Carolina shall be held at Raleigh, North Carolina, on the first Monday in March and the first Monday in September.⁶³

“§ 99. The State of *North Dakota* shall constitute one judicial district, to be known as the district of North Dakota. The territory embraced on the first day of January, nineteen hundred and sixteen, in the counties of Burleigh, Logan, McIntosh, Emmons, Kidder, McLean, Adams, Bowman, Dunn, Hettinger, Morton, Stark, Golden Valley, Slope, Sioux, Oliver, Mercer, Billings, and McKenzie shall constitute the *southwestern division* of said district; and the territory embraced on the date last mentioned in the counties of Cass, Richland, Barnes, Sargent, Ransom, and Steele shall constitute the *southeastern division*; and the territory embraced on the date last mentioned in the counties of Grand Forks, Traill, Walsh, Pembina, Cavalier, and Nelson shall constitute the *northeastern*; and the territory embraced on the date last mentioned in the counties of Ramsey, Benson, Towner, Rolette, Bottineau, Pierce and McHenry shall constitute the *northwestern division*; and the territory embraced on the date last mentioned in the counties of Ward, Williams, Divide, Mount-rail, Burke, and Renville shall constitute the *western division*; and the territory embraced on the date last mentioned in the counties of Griggs, Foster, Eddy, Wells, Sheridan, Stutsman, Lamoure, and Dickey shall constitute the *central division*. The several Indian reservations and parts thereof within said State shall constitute a part of the several divisions within which they are respectively situated. Terms of the district court for the *southwestern division* shall be held at Bismarck on the first Tuesday in March; for the *southeastern division*, at Fargo on the third Tuesday in May; for the *northeastern division*, at Grand Forks, on the second Tuesday in November; for the *northwestern division*, at Devils Lake on the first Tuesday in July; for the *western division*, at Minot on the second Tuesday in October; and for the *central division*, at Jamestown on the second Tuesday in April. The clerk of the court shall maintain an office in charge

⁶³ 36 St. at L. 1120, 38 St. at L. 56, Comp. St. § 1085a. Act L. 728, Comp. St. § 1085. (Jud. of March 17, 1920, Code § 98, as amended) 39 St. L.

of himself or a deputy at each place at which court is held in his district.⁶⁴ This part of the statute becomes operative in so far as any particular reservation is concerned upon the extinguishment of the Indian title.⁶⁵ A prosecution for felonious homicide alleged to have been committed on an Indian reservation cannot be maintained in this court where the indictment does not allege that either the defendant or the person killed is an Indian."⁶⁶

"§ 100. The State of *Ohio* is divided into two judicial districts, to be known as the *northern* and *southern* districts of Ohio. The *northern district* shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Ashland, Ashtabula, Cuyahoga, Carroll, Columbiana, Crawford, Geauga, Holmes, Lake, Lorain, Medina, Mahoning, Portage, Richland, Summit, Stark, Tuscarawas, Trumbull, and Wayne which shall constitute the eastern division; also the territory embraced on the date last mentioned in the counties of Auglaize, Allen, Defiance, Erie, Fulton, Henry, Hancock, Hardin, Huron, Lucas, Mercer, Marion, Ottawa, Paulding, Putnam, Seneca, Sandusky, Van Wert, Williams, Wood, and Wyandot, which shall constitute the western division of said district. Terms of the district court for the *eastern division* shall be held at Cleveland on the first Tuesdays in February, April, and October, and at Youngstown on the first Tuesday after the first Monday in March; and for the *western division*, at Toledo on the last Tuesdays in April and October. Grand and petit jurors summoned for service at a term of court to be held at Cleveland may, if in the opinion of the court the public convenience so requires, be directed to serve also at the term then being held or authorized to be held at Youngstown. Crimes and offenses committed in the eastern division shall be cognizable at the terms held at Cleveland or at Youngstown, as the court may direct. Any suit brought in the eastern division may, in the discretion of the court, be tried at the term held at Youngstown. The *southern district* shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Adams, Brown, Butler, Champaign, Clark, Clermont, Clinton, Darke,

⁶⁴ 36 St. at L. 1121, 37 St. at L.

⁶⁵ U. S. v. La Plant, 200 Fed. 92.

⁶⁶ 39 St. at L. 386, Comp. St.

⁶⁶ Ibid.

§ 1086, as amended.

Greene, Hamilton, Highland, Lawrence, Miami, Montgomery, Preble, Scioto, Shelby, and Warren, which shall constitute the *western division*; also the territory embraced on the date last mentioned in the counties of Athens, Belmont, Coshocton, Delaware, Fairfield, Fayette, Franklin, Gallia, Guernsey, Harrison, Hocking, Jackson, Jefferson, Knox, Licking, Logan, Madison, Meigs, Monroe, Morgan, Morrow, Muskingum, Noble, Perry, Pickaway, Pike, Ross, Union, Vinton, and Washington, which shall constitute the *eastern division* of said district. Terms of the district court for the *western division* shall be held at Cincinnati on the first Tuesdays in February, April, and October; and for the *eastern division* at Columbus on the first Tuesdays in June and December, and at Steubenville on the first Tuesdays of March and September. Grand and petit jurors summoned for service at a term of court being held at Columbus may, if in the opinion of the court the public convenience so requires, be directed to serve also at the term being held or authorized to be held at Steubenville. Crimes and offenses committed in the *eastern division* shall be cognizable at the terms held at Columbus, or at Steubenville, as the court may direct. Any suit brought in the *eastern division* may, in the discretion of the court, be tried at the term held at Steubenville: *Provided*, That suitable rooms and accommodations for holding court at Steubenville shall be furnished free of expense to the Government until the completion of the Federal building: And *provided further*, That terms of the district court for the *southern districts* shall be held at Dayton on the first Mondays in May and November. Prosecutions for crimes and offenses committed in any part of said district shall also be cognizable at the terms held at Dayton. All suits which may be brought within the *southern district*, or either division thereof, may be instituted, tried, and determined at the terms held at Dayton.”⁶⁷

“§ 101. The State of *Oklahoma* is divided into two judicial districts, to be known as the *eastern* and the *western* districts of *Oklahoma*. The *eastern district* shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Adair, Atoka, Bryan, Craig, Cherokee, Creek, Choctaw, Coal, Carter, Delaware, Garvin, Grady, Haskell, Hughes,

⁶⁷ 36 St. at L. 1121, 38 St. at L.

1187, Comp. St. § 1087, as amended.

Johnston, Jefferson, Latimer, LeFlore, Love, McClain, Mayes, Muskogee, McIntosh, McCurtain, Murray, Marshall, Nowata, Ottawa, Okmulgee, Ofuskee, Pittsburg, Pushmataha, Pontotoc Rogers, Stephens, Sequoyah, Seminole, Tulsa, Washington, and Wagoner. Terms of the district court for the *eastern district* shall be held at Muskogee on the first Monday in January; at Vinita on the first Monday in March; at Tulsa on the first Monday in April; at South McAlester on the first Monday in June; at Ardmore on the first Monday in October; and at Chickasha on the first Monday in November in each year," and at Hugo, on the second Monday in May.⁶⁸ "Provided, That suitable quarters for holding said court shall be furnished without expense to the government. The *western district* shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Alfalfa, Beaver, Beckham, Blaine, Caddo, Canadian, Cimarron, Cleveland, Comanche, Custer, Dewey, Ellis, Garfield, Grant, Greer, Harmon, Harper, Jackson, Kay, Kingfisher, Kiowa, Lincoln, Logan, Majors, Noble, Oklahoma, Osage, Pawnee, Payne, Pottawatomie, Roger Mills, Texas, Tillman, Washita, Woods, and Woodward. Terms of the district court for the *western district* shall be held at Guthrie on the first Monday in January; at Oklahoma City on the first Monday in March; at Enid on the first Monday in June; at Lawton on the first Monday in September; and at Woodward on the first Monday in November: *Provided*, That suitable rooms and accommodations for holding court at Woodward are furnished free of expense to the United States. The clerk of the district court for the *eastern district* shall keep his office at Muskogee, and the clerk for the *western district* at Guthrie, and shall maintain an office in charge of himself or a deputy at Oklahoma City."⁶⁹

"§ 102. The State of *Oregon* shall constitute one judicial district, to be known as the district of Oregon. Terms of the district court shall be held at Portland on the first Mondays in March, July, and November; at Pendleton on the first Tuesday in April; and at Medford on the first Tuesday in October. The marshal and the clerk for said district shall each appoint in the manner provided by law, at least one deputy at Pendle-

⁶⁸ 34 St. at L. 275, 36 St. at L. 1122, 40 St. at L. 1184; Comp. St. §§ 1088, 1088a. ⁶⁹ Ibid.

ton and one at Medford, who shall reside and maintain an office at each of said places." ⁷⁰ The State courts of Oregon have "jurisdiction in civil and criminal cases upon the Columbia River and Snake River, concurrently with States and Territories of which those rivers form a boundary in common with this State." ⁷¹ The District Court of Oregon has the same territorial jurisdiction. ⁷² This concurrent jurisdiction does not extend to permanent structures attached to the river-bed within the boundary of the other State. ⁷³ It has been held that the district court of Washington has concurrent jurisdiction over floating structures used in connection with fishnets in the river, although anchored by means of weights, ⁷⁴ and that the district court of Oregon has jurisdiction in admiralty over a vessel moored at a wharf on the Washington shore. ⁷⁵

"The State of *Pennsylvania* is divided into three judicial districts, to be known as the *eastern*, *middle*, and *western districts* of Pennsylvania. The *eastern district* shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Berks, Bucks, Chester, Delaware, Lancaster, Lehigh, Montgomery, Northampton, Philadelphia, and Schuylkill. Terms of the district court shall be held at Philadelphia on the second Mondays in March and June, the third Monday in September, and the second Monday in December, each term to continue until the succeeding term begins. The *middle district* shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Adams, Bradford, Cameron, Carbon, Center, Clinton, Columbia, Cumberland, Dauphin, Franklin, Fulton, Huntingdon, Juniata, Lackawanna, Lebanon, Luzerne, Lycoming, Mifflin, Monroe, Montour, Northumberland, Perry, Pike, Potter, Snyder, Sullivan, Susquehanna, Tioga, Union, Wayne, Wyoming, and York. Terms of the district court shall be held at Scranton on the second Monday in March and the third Monday in October; at Harrisburg on the

⁷⁰ 36 St. at L. 1087, 1122, Comp. St. § 1089.

⁷¹ Organic Act of Feb'y 14, 1859, ch. 33, 11 St. at L. 383.

⁷² *Nielsen v. Oregon*, 212 U. S. 315, 316, 29 Sup. Ct. 383, 53 L. ed. 528; *Columbia River Packers'*

Ass'n v. McGowan, 172 Fed. 991.

⁷³ *Columbia River Packers' Ass'n v. McGowan*, 172 Fed. 991.

⁷⁴ *Ibid.*

⁷⁵ *The Annie M. Smull*, 2 Sawyer 226, Fed. Cas. No. 423. See, also, *State v. Mullen*, 35 Iowa 199.

first Mondays in May and December; at Sunbury on the second Monday in January; and at Williamsport on the first Monday in June. The clerk of the court for the *middle district* shall maintain an office, in charge of himself or a deputy, at Harrisburg; the civil suits instituted at that place shall be tried there, if either party resides nearest that place of holding court, unless by consent of parties they are removed to another place for trial. The *western district* shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Allegheny, Armstrong, Beaver, Bedford, Blair, Butler, Cambria, Clarion, Clearfield, Crawford, Elk, Erie, Fayette, Forest, Greene, Indiana, Jefferson, Lawrence, McKean, Mercer, Somerset, Venango, Warren, Washington, and Westmoreland. Terms of the district court shall be held at Pittsburgh on the first Monday of May and the second Monday of November, and terms of the court shall be held at Erie on the third Monday of March and the third Monday of September. The clerk and marshal of said district shall have their principal offices at Pittsburgh, and shall maintain, by themselves or by their deputies, offices at Erie.

“The clerk shall place all cases in which the defendants reside in the counties of said district nearest Erie upon the trial list for trial at Erie, where the same shall be tried, unless the parties thereto stipulate that the same may be tried at Pittsburgh.⁷⁶

In *Porto Rico* there is one district. Regular terms of the court are held at San Juan beginning on the second Mondays of April and October, and also at Ponce on the second Monday in January in each year, and special terms are also held at Mayaguez at such other stated times as the district judge deems expedient.⁷⁷ At the special terms held at Mayaguez, jury cases may be tried; and section 670 of the Revised Statutes of the United States does not apply to such terms of the District Court of Porto Rico.⁷⁸

“The judicial power shall be vested in the courts and tribunals of Porto Rico now established and in operation under and by virtue of existing laws. The jurisdiction of said courts

⁷⁶ 36 St. at L. 1123, 37 St. at L. 730, 38 St. at L. 385, 38 St. at L. 713, 38 St. at L. 283, Comp. St. § 1090. Comp. St. § 968a (c. 20, § 1) as amended. ⁷⁷ 31 St. at L. 84, 85, Comp. St. §§ 3784, 3785. ⁷⁸ Am. Railroad Co. v. Castro, 204 U. S. 453, 51 L. ed. 564.

and the form of procedure in them, and the various officers and attachés thereof, shall also continue to be as now provided until otherwise provided by law: *Provided, however,* That the chief justice and associate justices of the supreme court shall be appointed by the President, by and with the advice and consent of the Senate of the United States, and the Legislature of Porto Rico shall have authority, from time to time as it may see fit, not inconsistent with this Act, to organize, modify, or rearrange the courts and their jurisdiction and procedure, except the District Court of the United States for Porto Rico.

“Porto Rico shall constitute a judicial district to be called ‘the district of Porto Rico.’ The President, by and with the advice and consent of the Senate, shall appoint one district judge, who shall serve for a term of four years and until his successor is appointed and qualified and whose salary shall be \$5,000 per annum. There shall be appointed in like manner a district attorney, whose salary shall be \$4,000 per annum, and a marshal for said district, whose salary shall be \$3,500 per annum, each for a term of four years unless sooner removed by the President. The district court for said district shall be called ‘the District Court of the United States for Porto Rico,’ and shall have power to appoint all necessary officials and assistants, including the clerk, interpreter, and such commissioners as may be necessary, who shall be entitled to the same fees and have like powers and duties as are exercised and performed by United States commissioners. Such district court shall have jurisdiction of all cases cognizable in the district courts of the United States, and shall proceed in the same manner. In addition said district court shall have jurisdiction for the naturalization of aliens and Porto Ricans, and for this purpose residence in Porto Rico shall be counted in the same manner as residence elsewhere in the United States. Said district court shall have jurisdiction of all controversies where all of the parties on either side of the controversy are citizens or subjects of a foreign State or States, or citizens of a State, Territory, or District of the United States not domiciled in Porto Rico, wherein the matter in dispute exceeds, exclusive of interest or cost, the sum or value of \$3,000, and of all controversies in which there is a separable controversy involving such jurisdictional amount and in which all of the parties on either

side of such separable controversy are citizens or subjects of the character aforesaid: *Provided*, That nothing in this Act shall be deemed to impair the jurisdiction of the District Court of the United States for Porto Rico to hear and determine all controversies pending in said court at the date of the approval of this Act. Upon the taking effect of this Act and the salaries of the judge and officials of the District Court of the United States for Porto Rico, together with the court expenses, shall be paid from the United States revenues in the same manner as in other United States district courts. In case of vacancy or of the death, absence, or other legal disability on the part of the judge of the said District Court of the United States for Porto Rico, the President of the United States is authorized to designate one of the judges of the Supreme Court of Porto Rico to discharge the duties of judge of said court until such absence or disability shall be removed, and thereupon such judge so designated for said service shall be fully authorized and empowered to perform the duties of said office during such absence or disability of such regular judge, and to sign all necessary papers and records as the acting judge of said court without extra compensation.

“The laws of the United States relating to appeals, writs of error and certiorari, removal of causes, and other matters or proceedings as between the courts of the United States and the courts of the several States shall govern such matters and proceedings as between the district court of the United States and the courts of Porto Rico. Regular terms of said United States district court shall be held in San Juan, commencing on the first Monday in May and November of each year, and also at Ponce on the second Monday in February of each year, and special terms may be held at Mayaguez at such stated times as said judge may deem expedient. All pleadings and proceedings in said court shall be conducted in the English language. The said district court shall be attached to and included in the first circuit of the United States, with the right of appeal and review by said circuit court of appeals in all cases where the same would lie from any district court to a circuit court of appeals of the United States, and with the right of appeal and review directly by the Supreme Court of the United States in all cases where a direct appeal would lie from such district courts.

"Writs of error and appeals from the final judgments and decrees of the Supreme Court of Porto Rico may be taken and prosecuted to the Circuit Court of Appeals for the First Circuit and to the Supreme Court of the United States, as now provided by law." ⁷⁹

"The State of *Rhode Island* shall constitute one judicial district, to be known as the *district of Rhode Island*. Terms of the district court shall be held at Providence on the fourth Tuesday in May and the third Tuesday in November." ⁸⁰

The State of *South Carolina* is divided into two districts, to be known as the *eastern* and *western* districts of South Carolina. The *western district* includes the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Abbeville, Anderson, Cherokee, Chester, Edgefield, Fairfield, Greenville, Greenwood, Lancaster, Laurens, Newberry, Oconee, Pickens, Saluda, Spartanburg, Union, and York. Terms of the District court for the western district are held at Greenville on the third Tuesdays in April and October, at Rock Hill, the second Tuesday in March and September; at Greenwood, the first Tuesday in February and November; and at Anderson, the fourth Tuesday in May and November. "The *eastern district* includes the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Aiken, Bamberg, Barnwell, Beaufort, Berkeley, Calhoun, Charleston, Chesterfield, Clarendon, Colleton, Darlington, Dillon, Dorchester, Florence, Georgetown, Hampton, Horry, Kershaw, Lee, Lexington, Marion, Marlboro, Orangeburg, Richland, Sumter, and Williamsburg. Terms of the District court for the eastern district shall be held at Charleston on the first Tuesdays in June and December; at Columbia on the third Tuesday in January and first Tuesday in November, the latter term to be solely for the trial of civil cases; at Florence on first Tuesday in March; and at Aiken, on the first Tuesdays in April and October." ⁸¹

The office of the clerks of the district court for the *western dis-*

⁷⁹ 39 St. at L. 965, Comp. St. § 3803q.

⁸⁰ Jud. Code, 36 St. at L. 1087, 1123, as am'd Act of Feb'y 1, 1912.

See § 70, *infra*, 37 St. at L. 59, Comp. St. § 1090.

⁸¹ Jud. Code, 36 St. at L. 1087, 1123, as am'd Act of Feb'y 5, 1912, 37 St. at L. 60, Comp. St. § 1092.

riety shall be held at Greenville, and the office of the clerk of the district court for the *eastern district* shall be at Charleston.⁸²

"There shall be a district judge for the *eastern district* of South Carolina and a district judge for the *western district* of South Carolina, who shall be appointed as district judges are appointed in other judicial districts of the United States: *Provided*, That the President, previous to appointing said judge, shall make public all indorsements of the applicants for said position. The present district judge, who is a resident of the *eastern district* of South Carolina, is hereby assigned to said *eastern district* as the district judge thereof.

"All causes of a civil nature and motions therein submitted and all causes and proceedings of a civil nature, including proceedings in bankruptcy, in the *western district* of South Carolina in which the evidence has been taken in whole or in part before the present district judge for the *eastern* and *western* districts of South Carolina, or taken in whole or in part and submitted to and passed upon by the said district judge, shall be retained by said judge and proceeded with and disposed of by said judge, who may for that purpose continue to exercise jurisdiction in the said *western district*."⁸³

"§ 106. The State of *South Dakota* shall constitute one judicial district, to be known as the district of South Dakota. The territory embraced on the first day of July, nineteen hundred and ten, in the counties of Aurora, Beadle, Bon Homme, Brookings, Brule, Charles Mix, Clay, Davison, Douglas, Gregory, Hansan, Hutchinson, Kingsbury, Lake, Lincoln, McCook, Miner, Minnehaha, Moody, Sonborn, Turner, Union, and Yankton, and in the Yankton Indian reservation, shall constitute the *southern division* of said district; the territory embraced on the date last mentioned in the counties of Brown, Campbell, Clark, Codington, Corson, Day, Deuel, Edmunds, Grant, Hamlin, McPherson, Marshall, Roberts, Schnasse, Spink, and Walworth, and in the Sisseton and Wahpeton Indian reservation, and in that portion of the Standing Rock Indian reservation lying in South Dakota, shall constitute the *northern division*; the territory embraced on the date last mentioned in the counties of Armstrong, Buffalo,

⁸² 38 St. at L. 961, as amended, ⁸³ 38 St. at L. 961, Comp. St.
39 St. at L. 721, Comp. St. § 1092a. §§ 968e, 968f, as amended.

Dewey, Faulk, Hand, Hughes, Hyde, Jeraul, Lyman, Potter, Stanley, and Sully, and in the Cheyenne River, Lower Brule, and Crow Creek Indian reservations, shall constitute the *central division*; and the territory embraced on the date last mentioned in the counties of Bennett, Butte, Custer, Fall River, Harding, Lawrence, Meade, Mellette, Pennington, Perkins, Shannon, Todd, Tripp, Washabaugh, and Washington, and in the Rosebud and Pine Ridge Indian reservations, shall constitute the *western division*. Terms of the district court for the *southern division* shall be held at Sioux Falls on the first Tuesday in April and the third Tuesday in October; for the *northern division*, at Aberdeen on the first Tuesday in May and the second Tuesday in November; for the *central division*, at Pierre on the second Tuesday in June and the first Tuesday in October; and for the *western division*, at Deadwood on the third Tuesday in May and the first Tuesday in September. The clerk of the District court shall maintain an office in charge of himself or a deputy at Sioux Falls, at Pierre, at Aberdeen, and at Deadwood, which shall be kept open for the transaction of the business of the court.”⁸⁴

“The District court of the United States for the district of *South Dakota* shall have jurisdiction to hear, try, and determine all actions and proceedings in which any person shall be charged with the crime of murder, manslaughter, rape, assault with intent to kill, arson, burglary, larceny, or assault with a dangerous weapon, committed within the limits of any Indian reservation in the State of South Dakota.”⁸⁵ The District court of the United States for South Dakota is the same court, whether held in one division or another; and where a recognizance bound an accused to appear at a term to be held in one division; it was held, that he might be subsequently ordered to appear for trial in another division, without relieving the sureties upon his recognizance.⁸⁶

“§ 107. The State of *Tennessee* is divided into three districts, to be known as the *eastern*, *middle* and *western* districts of Tennessee. The *eastern district* shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Bledsoe, Bradley, Hamilton, James, McMinn, Marion, Meigs,

⁸⁴ 36 St. at L. 1087, 1123.

⁸⁵ Ibid., Comp. St. § 1093.

⁸⁶ Hollister v. U. S., C. C. A., 145 Fed. 773.

Polk, Rhea, and Sequatchie, which shall constitute the *southern division* of said district; also the territory embraced on the date last mentioned in the counties of Anderson, Blount, Campbell, Claiborne, Grainger, Jefferson, Knox, Loudon, Monroe, Morgan, Roans, Sevier, Scott, and Union, which shall constitute the *northern division* of said district; also the territory embraced on the date last mentioned in the counties of Carter, Cocke, Greene, Hamblen, Hancock, Hawkins, Johnson, Sullivan, Unicoi, and Washington, which shall constitute the *northeastern division* of said district. Terms of the district court for the *southern division* of said district shall be held at Chattanooga on the fourth Monday of April and the second Monday in November; for the *northern division*, at Knoxville on the fourth Monday in May and the first Monday in May and the first Monday in December; and for the *northeastern division*, at Greeneville on the first Monday in March and the third Monday in September. The *middle district* shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Bedford, Cannon, Cheatham, Coffee, Davidson, Dickson, Franklin, Giles, Grundy, Hickman, Humphreys, Houston, Lawrence, Lewis, Lincoln, Marshall, Maury, Montgomery, Moore, Robertson, Rutherford, Stewart, Sumner, Trousdale, Warren, Wayne, Williamson, and Wilson, which shall constitute the *Nashville division* of said district; also the territory embraced on the date last mentioned in the counties of Clay, Cumberland, DeKalb, Fentress, Jackson, Macon, Overton, Pickett, Putnam, Smith, Van Buren, and White, which shall constitute the *northeastern division* of said district. Terms of the district court for the *Nashville division* of said district shall be held at Nashville on the second Monday in March and the fourth Monday in September; at Winchester on the first Monday in April and the third Monday in November; "and for the *northeastern division*, at Cookeville on the third Monday in April and the first Monday in November: *Provided*, That suitable accommodations for holding court at Cookeville shall be provided by the county or municipal authorities without expense to the United States. The *western district* shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Dyer, Fayette, Haywood, Lauderdale, Shelby, and Tipton, which shall constitute the *western division* of said district: also the territory embraced

on the date last mentioned in the counties of Benton, Carroll, Chester, Crockett, Decatur, Gibson, Hardeman, Hardin, Henderson, Henry, Lake, McNairy, Madison, Obion, Perry, and Weakley including the waters of the Tennessee River to low water mark on the eastern shore thereof wherever such river forms the boundary line between the western and middle districts of Tennessee, from the north line of the State of Alabama north to the point in Henry County, Tennessee, where the south boundary line of the State of Kentucky strikes the east bank of the river, which shall constitute the *eastern division* of said district. Terms of the district court for the *western division* of said district shall be held at Memphis on the fourth Mondays in May and November; and for the *eastern division*, at Jackson on the fourth Mondays in April and October. The clerk of the court for the *western district* shall appoint a deputy who shall reside at Jackson. The marshal for the *western district* shall appoint a deputy who shall reside at Jackson. The marshal for the *eastern district* shall appoint a deputy who shall reside at Chattanooga. The clerk of the court for the *eastern district* shall maintain an office in charge of himself or a deputy at Knoxville, at Chattanooga, and at Greenville, which shall be kept open at all times for the transaction of the business of the court.⁸⁷

“§ 108. The State of *Texas* is divided into four districts, to be known as the *northern*, *eastern*, *western*, and *southern* districts of *Texas*. The *northern district* shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Dallas, Ellis, Hunt, Johnson, Kaufman, Navarro, and Rockwall, which shall constitute the *Dallas division*; also the territory embraced on the date last mentioned in the counties of Comanche, Erath, Hardeman, Hood, Jack, Palo Pinto, Parker, Tarrant, and Wise which shall constitute the *Fort Worth division*; also the territory embraced on the date last mentioned in the counties of Armstrong, Bailey, Briscoe, Carson, Castro, Childress, Cochran, Collingsworth, Crosby, Dallam, Deaf Smith, Dickens, Donley, Floyd, Gray, Hale, Hall, Hansford, Hartley, Hemphill, Hockley, Hutchinson, King, Lamb,

⁸⁷ Jud. Code, 36 St. at L. 1087, as at L. 232, § 1094a Jud. Code, as am'd Act of Aug. 20, 1912, 37 St. amended.
at L. 314, Comp. St. § 1094, 39 St.

Lipscomb, Lubbock, Moore, Motley, Ochiltree, Oldham, Parmer, Potter, Randall, Roberts, Sherman, Swisher, and Wheeler, which shall constitute the *Amarillo division*; also the territory embraced on the date last mentioned in the counties of Andrews, Borden, Callahan, Dawson, Eastland, Fisher, Gaines, Garza, Haskell, Howard, Jones, Kent, Lynn, Midland, Mitchell, Nolan, Scurry, Shackelford, Stephens, Stonewall, Taylor, Terry, Throckmorton, and Yoakum, which shall constitute the *Abilene division*; also the territory embraced on the date last mentioned in the counties of Brown, Coke, Coleman, Coneho, Crockett, Glasscock, Irion, Manard, Mills, Runnels, Schleicher, Sterling, Sutton, Tom Green, and 'Upton,' which shall constitute the *San Angelo division* of the said district;" also the counties of Archer, Baylor, Clay, Cottle, Foard, Montague, King, Knox, Wichita, Wilbarger, and Young, which constitute the *Wichita Falls division*. "Terms of the district court for the *Dallas division* shall be held at Dallas on the second Monday in January and the first Monday in May; for the *Fort Worth division*, at Fort Worth on the first Monday in November and the second Monday in March; for the *Amarillo division*, at Amarillo on the third Monday in April" and the third Monday in September; "for the *Abilene division*, at Abilene on the first Monday in October and the second Monday in April; for the *San Angelo division*, at San Angelo on the third Monday in October and the fourth Monday in April," and for the *Wichita Falls division*, at the city of Wichita Falls, in Wichita county, twice each year, on the fourth Monday in March and the third Monday in November. The clerk of the court for the *northern* district shall maintain an office in charge of himself or a deputy at Dallas, at Fort Worth, at Amarillo, at Abilene, at San Angelo, and at Wichita Falls which shall be kept open at all times for the transaction of the business of the court. "The *eastern district* shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Anderson, Angelina, Cherokee, Gregg, Henderson, Houston, Nacogdoches, Panola, Rains, Rusk, Smith, Van Zandt, and Wood, which shall constitute the *Tyler division*; also the territory embraced on the date last mentioned in the counties of Hardin, Jasper, Jefferson, Liberty, Newton, Orange, Sabine, San Augustine, Shelby, and Tyler, which shall constitute the *Beaumont division*; also the territory embraced on the date last mentioned in the

counties of Collin, Cook, Denton, Grayson," "which shall constitute the *Sherman division*; also the territory embraced on the date last mentioned in the counties of Camp, Cass, Harrison, Hopkins, Marion, Morris, and Upshur, which shall constitute the *Jefferson division*; also the territory embraced on the last mentioned in the counties of Delta, Fannin, Red River, and Lamar, which shall constitute the *Paris division*; also the territory embraced on the date last mentioned in the counties of Bowie, Franklin and Titus, which shall constitute the *Texarkana division*. Terms of the District court for the *Tyler division* shall be held at Tyler on the fourth Mondays in January and April; for the *Jefferson division* at Jefferson on the first Monday in October and the third Monday in February; for the *Beaumont division*, at Beaumont on the third Monday in November and the first Monday in April; for the *Sherman division*, at Sherman on the first Monday in January and the third Monday in May; for the *Paris division*, at Paris on the third Monday in October and the first Monday in March; and for the *Texarkana division* at Texarkana on the third Monday in March and the first Monday in November. The clerk of the court for the *eastern district* shall maintain an office in charge of himself or a deputy at Sherman at Beaumont, and at Texarkana, which shall be kept open at all times for the transaction of the business of said court. The *western district* shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Bastrop, Blanco, Burleson, Burnet, Caldwell, Gillespie, Hays, Kimble, Lampasas, Lee, Llano, Mason, McCulloch, San Saba, Travis, Washington, and Williamson, which shall constitute the *Austin division*; also the territory embraced on the date last mentioned in the counties of Atascosa, Bandera, Bexar, Comal, Dimmit, Edwards, Frio, Gonzales, Guadalupe, Karnes, Kendall, Kerr, Medina, and Wilson, which shall constitute the *San Antonio division*; also the territory embraced on the date last mentioned in the county of Brewster; also the counties of El Paso and Presidio" which shall constitute the *El Paso division*; "and also the territory embraced on the date last mentioned in the counties of Bell, Basque, Coryell, Falls, Hamilton, Freestone, Hill, Leon, Limestone, McLennan, Milam, Robertson, and Somervell which shall constitute the *Waco division*; also the territory embraced on the date last mentioned in the counties of Kinney,

Maverick, Pecos, Terrell, Uvalde, Valverde, and Zavalla, which shall constitute the *Del Rio division*. Terms of the district court for the *Austin division* shall be held at Austin on the fourth Monday in January and the second Monday in June; for the *Waco division* on the fourth Monday in February and the second Monday in November; for the *San Antonio division*, at San Antonio on the first Monday in May and the third Monday in December; for the *El Paso division*, at El Paso on the first Monday in April and the first Monday in October; and for the *Del Rio division*, at Del Rio on the third Monday in March and the fourth Monday in October. The clerk of the court for the *western district* shall maintain an office in charge of himself or a deputy at Austin, El Paso, and at Del Rio, which shall be kept open at all times for the transaction of business. The *southern district* shall include the territory embraced on the first of July, nineteen hundred and ten, in the counties of" La Salle, McMullen, "Webb, and Zapata, which shall constitute the *Laredo division*; also the territory embraced on the date last mentioned in the counties of Cameron, Hidalgo, and Starr, which shall constitute the *Brownsville division*; also the territory embraced on the date last mentioned in the counties of Austin, Brazoria, Chambers, Galveston, Fort Bend, Matagorda, and Wharton, which shall constitute the *Galveston division*; also the territory embraced on the date last mentioned, in the counties of Brazos, Colorado, Fayette, Grimes, Harris, Lavaca, Madison, Montgomery, Polk, San Jacinto, Trinity, Walker, and Waller, which shall constitute the *Houston division*; also the territory embraced on the date last mentioned, in the counties of Calhoun, Dewitt, Goliad, Jackson, Refugio, and Victoria, which shall constitute the *Victoria division*. Terms of the district court for the *Galveston division* shall be held at Galveston on the second Monday in January and the first Monday in June; for the *Houston division*, at Houston on the fourth Mondays in February and September; for the *Laredo division*, at Laredo on the third Monday in April and the second Monday in November; for the *Brownsville division*, at Brownsville on the second Monday in May and the first Monday in December; and for the *Victoria division*, at Victoria on the first Monday in May and the fourth Monday in November. The clerk of the court for the *southern district* shall maintain an office in charge of

himself or a deputy at each of the places now designated for holding court in said district." ⁸⁸ "The counties of Bee, Live Oak, Aransas, San Patricio, Nueces, Jim Wells, Duval, Brooks, and Willacy shall constitute a division of the southern judicial district of Texas. Terms of the district court of the United States for the said southern district of Texas shall be held twice in each year at the city of Corpus Christi, in Nueces County, and that, until otherwise provided by law, the judge of said court shall fix the times at which said court shall be held at Corpus Christi, of which he shall make publication and give due notice." ⁸⁹ "That the counties of Reeves, Ward, Martin, Reagan, Winkler, Ector, Gaines, Andrews, Upton, Midland, Loving, Jeff Davis, and Crane shall constitute a division of the western judicial district of Texas. Terms of the district court of the United States for the said western district of Texas shall be held twice in each year at the city of Pecos, in Reeves county, and that, until otherwise provided by law, the judge of said court shall fix the times at which said court shall be held at Pecos, of which he shall make proclamation and give due notice: *Provided, however*, that suitable rooms and accommodations shall be furnished for the holding of said court and for the use of the officers of said court at Pecos, free of expense to the Government of the United States." ⁹⁰

"§ 109. The State of *Utah* shall constitute one judicial district, to be known as the district of Utah. It is divided into two divisions, to be known as the *northern* and *central* divisions. The *northern division* shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Boxelder, Cache, Davis, Morgan, Rich, and Weber. The *central division* shall include the territory embraced on the date last mentioned in the counties of Beaver, Carbon, Emery, Gar-

⁸⁸ 36 Stat. at L. 1125, Comp. St. § 1095, 39 St. at L. 939, Comp. St. § 1095a, Comp. St. § 1095b; Act of April 1, 1919. For special jurisdiction of the courts held in this district over controversies affecting the Gulf, Colorado & Santa Fe Railroad Company, see 23 St. at L., ch. 177, § 8, p. 72; 23 St. at L. ch. 179, § 8, p. 975; *Briscoe v. South-*

ern Kan. Ry. Co., 40 Fed. 273. As to jurisdiction over pending cases, see *O'Connor v. O'Connor*, 146 Fed. 994. See also *Re Jackson*, 40 Fed. 372; *International Bank & Trust Co. v. Scott, C. C. A.*, 159 Fed. 58.

⁸⁹ Act of May 29, 1912, 37 St. at L. 120, Comp. St. § 1097, 37 St. at L. 663, Comp. St. § 1098.

⁹⁰ Act of Feb'y 5, 1913.

field, Grand, Iron, Juab, Kane, Millard, Piute, Salt Lake, San Juan, San Pete, Sevier, Summit, Tooele, Uinta, Utah, Wasatch, Washington, and Wayne. Terms of the district court for the *northern division* shall be held at Ogden on the second Mondays in March and September; and for the *central division*, at Salt Lake City on the second Mondays in April and November. The clerk of the court for said district shall maintain an office in charge of himself or a deputy at each of the places where the court is now required to be held in the district.⁹¹

“§ 110. The State of *Vermont* shall constitute one judicial district, to be known as the district of Vermont. Terms of the District court shall be held at Burlington on the fourth Tuesday in February; at Windsor on the third Tuesday in May; and at Rutland on the first Tuesday in October. And at Brattleboro on the third Tuesday in December. In each year one of the stated terms of the district court may, when adjourned, be adjourned to meet at Montpelier and one at Newport; *Provided, however*, that suitable rooms and accommodations shall be furnished for the holdings of said court and for the use of the officers of said court at Brattleboro free of expense to the Government of the United States until the public building provided for by Act of Congress shall be erected.”⁹²

“§ 111. The State of *Virginia* is divided into two districts to be known as the *eastern* and *western* districts of Virginia. The *eastern district* shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Accomac, Alexandria, Amelia, Brunswick, Caroline, Charles City, Chesterfield, Culpeper, Dinwiddie, Elizabeth City, Essex, Fairfax, Fauquier, Gloucester, Goochland, Greensville, Hanover, Henrico, Isle of Wight, James City, King and Queen, King George, King William, Lancaster, Loudoun, Louisa, Lunenburg, Mathews, Mecklenburg, Middlesex, Nansemond, New Kent, Norfolk, Northampton, Northumberland, Nottoway, Orange, Powhatan, Prince Edward, Prince George, Prince William, Princess Anne, Richmond, Southampton, Spottsylvania, Stafford, Surry, Sussex, Warwick, Westmoreland, and York. Terms of the District court shall be held at Richmond on the first Mondays in

⁹¹ 36 St. at L. 1127, Comp. St. § 1100.

⁹² 36 St. at L. 1127, 37 St. at L. 58, Comp. St. § 1101.

April and October; at Norfolk on the first Mondays in May and November and at Alexandria, on the first Mondays in January and July. The *western district* shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Alleghany, Albemarle, Amherst, Appomattox, Augusta, Bath, Bedford, Bland, Botecourt, Buchanan, Buckingham, Campbell, Carroll, Charlotte, Clarke, Craig, Cumberland, Dickenson, Floyd, Fluvanna, Franklin, Frederick, Giles, Grayson, Greene, Halifax, Henry, Highland, Lee, Madison, Montgomery, Nelson, Page, Patrick, Pulaski, Pittsylvania, Rappahannock, Roanoke, Rockbridge, Rockingham, Russell, Scott, Shenandoah, Smyth, Tazewell, Warren, Washington, Wise, and Wythe." ⁹³

Terms of the district court shall be held at Lynchburg on the second Mondays in January and July; at Roanoke on the second Monday in February and the first Monday in August; at Danville on the second Monday in March and the third Monday in September; at Charlottesville on the second Mondays in April and November; at Harrisonburg on the fourth Mondays in April and November; at Big Stone Gap on the third Monday in May and the second Monday in October; and at Abingdon on the second Mondays in June and December.

The clerk of the court for the *western district* shall maintain an office in charge of himself or a deputy at Lynchburg, Roanoke, Danville, Charlottesville, Harrisonburg, Big Stone Gap, and Abingdon, which shall be kept open at all times for the transaction of the business of the court. ⁹⁴

The court of admiralty in the Eastern District of Virginia can serve process of the Potomac River below Georgetown, between the District of Columbia and Alexandria County, Virginia. ⁹⁵

"§ 112. The State of *Washington* is divided into two districts, to be known as the *eastern* and *western* districts of *Washington*. The *eastern district* shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of

⁹³ 36 St. at L. 1087, 1127. As to the boundary between Virginia and West Virginia, see *Bluefield Water Works & Imp. Co. v. Sanders*, 63 Fed. 333.

⁹⁴ Comp. St. § 1102.

⁹⁵ *Atcheson v. The Endless Chain Dredge*, 40 Fed. 253.

Spokane, Stevens, Ferry, Okanogan, Chelan, Grant, Douglas, Lincoln, and Adams, with the waters thereof, including all Indian reservations within said counties, which shall constitute the *northern division*; also the territory embraced on the date last mentioned in the counties of Asotin, Garfield, Whitman, Columbia, Franklin, Walla Walla, Benton, Klickitat, Kittitas, and Yakima, with the waters thereof, including all Indian reservations within said counties, which shall constitute the *southern division* of said district. Terms of the District court for the *northern division* shall be held at Spokane on the first Tuesdays in April and September; for the *southern division*, at Walla Walla on the first Tuesdays in June and December, and at North Yakima on the first Tuesdays in May and October. The *western district* shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Whatcom, Skagit, Snohomish, King, San Juan, Island, Kitsap, Clallam, and Jefferson, with the waters thereof, including all Indian reservations within said counties, which shall constitute the *northern division*; also the territory embraced on the date last mentioned in the counties of Pierce, Mason, Thurston, Chehalis, Pacific, Lewis, Wahkiakum, Cowlitz, Clarke, and Skamania, with the waters thereof, including all Indian reservations within said counties, which shall constitute the *southern division* of said district. Terms of the district court for the *northern division* shall be held at Bellingham on the first Tuesdays in April and October; at Seattle on the first Tuesdays in May and November; and for the *southern division*, at Tacoma on the first Tuesdays in February and July. The clerks of the courts for the *eastern* and *western* districts shall maintain an office in charge of himself or a deputy at each place in their respective districts where terms of court are now required to be held." ⁹⁶ The United States District Court and the State courts of Washington have jurisdiction concurrent with the courts, State and Federal, in the State of Oregon, in civil and criminal cases upon the Columbia River. Such jurisdiction does not include the bed of the stream on the Oregon side. A district court in Washington cannot direct the abatement of a nuisance which consists of a

⁹⁶ 36 St. at L. 1087, 1128, Comp. St. § 1103.

floating structure, consisting of nets connecting with buoys anchored by means of weights to the bottom of the river, within the territorial limits of the state of Oregon.⁹⁷ Where the court granted an injunction against the use of such a floating structure on the Oregon side of the Columbia River, under the erroneous belief that it was within the boundary of Washington, it refused to dismiss the suit at the complainant's request so as to deprive the defendant of its remedy upon the injunction bond.⁹⁸

"The State of *West Virginia* is divided into two districts, to be known as the *northern* and *southern* districts of West Virginia. The *northern district* shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Hancock, Brooke, Ohio, Marshall, Tyler, Pleasants, Wood, Wirt, Ritchie, Doddridge, Wetzel, Monongalia, Marion, Harrison, Lewis, Gilmer, Calhoun, Upshur, Barbour, Taylor, Preston, Tucker, Randolph, Pendleton, Hardy, Grant, Mineral, Hampshire, Morgan, Berkeley, and Jefferson, with the waters thereof. Terms of the district court for the *northern district* shall be held at Martinsburg on the first Tuesday of April and the third Tuesday of September; at Clarksburg on the second Tuesday of April and the first Tuesday of October; at Wheeling on the first Tuesday of May and the third Tuesday of October; at Philippi on the fourth Tuesday of May and the second Tuesday of November; at Elkins on the first Tuesday in July and the first Tuesday in December; and at Parkersburg on the second Tuesday of January and the second Tuesday of June: *Provided*, That a place for holding court at Philippi shall be furnished free of cost to the United States by Barbour County until other provision is made therefor by law: *And provided further*, That a place for holding court at Elkins shall be furnished free of cost to the United States by Randolph County until other provision is made therefor by law. The southern district shall include the territory embraced on the

⁹⁷ A nuisance consisting of nets connected with buoys and heavily anchored to the bottom of the Columbia River, between the line of extreme low tide and the channel, in Oregon, is not subject to abatement by the District Court sitting

in the Western District of Washington. Such jurisdiction does not reach the bed of the stream in Oregon. *Affirming* C. C. A., 219 Fed. 365; *reversing*, 172 Fed. 991.

⁹⁸ *Columbia River Packers Ass'n v. McGowan*, 172 Fed. 991.

first day of July, nineteen hundred and ten, in the counties of Jackson, Roane, Clay, Braxton, Webster, Nicholas, Pocahontas, Greenbrier, Fayette, Boone, Kanawha, Putnam, Mason, Cabell, Wayne, Lincoln, Logan, Mingo, Raleigh, Wyoming, McDowell, Mercer, Summers, and Monroe, with the waters thereof. Terms of district court for the southern district shall be held at Charleston on the first Tuesday of June and the third Tuesday of November; at Huntington on the first Tuesday of April and the first Tuesday after the third Monday of September; at Bluefield on the first Tuesday of May and the third Tuesday of October; at Williamson on the first Tuesday of October; at Webster Springs on the first Tuesday of September; and at Lewisburg on the second Tuesday of July: *Provided*, That a place for holding court at Webster Springs shall be furnished free of cost to the United States: *And provided further*, That a place for holding court at Williamson shall be furnished free of cost to the United States by Mingo County until other provision is made therefor by law." ⁹⁹

§ 114. The State of Wisconsin is divided into two districts, to be known as the *eastern* and *western* districts of Wisconsin. The *eastern district* shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Brown, Calumet, Dodge, Door, Florence, Fond du Lac, Forest, Green Lake, Kenosha, Kewaunee, Langlade, Manitowoc, Marinette, Marquette, Milwaukee, Oconto, Outagamie, Ozaukee, Racine, Shawano, Sheboygan, Walworth, Washington, Waukesha, Waupaca, Waushara, and Winnebago. Terms of the District court for said district shall be held at Milwaukee on the first Mondays in January and October; at Oshkosh on the second Tuesday in June; and at Green Bay on the first Tuesday in April. The *western district* shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Adams, Ashland, Barron, Bayfield, Buffalo, Burnett, Chippewa, Clark, Columbia, Crawford, Dane, Dunn, Douglas, Eau Claire, Grant, Green, Iowa, Iron, Jackson, Jefferson, Juneau, La Crosse, Lafayette, Lincoln, Marathon, Monroe.

⁹⁹ 31 Stat. at L. 736, 36 St. at L. 1129, 37 St. at L. 76, 38 St. at L. 702, Comp. St. § 1104.

Oneida, Pepin, Pierce, Polk, Portage, Price, Richland, Rock, Rusk, Saint Croix, Sauk, Sawyer, Taylor, Trempealeau, Vernon, Vilas, Washburn, and Wood. Terms of the District court for said district shall be held at Madison on the first Tuesday in December; at Eau Claire on the first Tuesday in June; at La Crosse on the third Tuesday in September; and at Superior on the fourth Tuesday in January and the second Tuesday in July. The District court for each of said districts shall be open at all times for the purpose of hearing and deciding causes of admiralty and maritime jurisdiction, so far as the same can be done without a jury. The clerk of the court for the western district shall maintain an office in charge of himself or a deputy at Madison, at La Crosse, and at Superior, which shall be kept open at all times for the transaction of the business of the court. The marshal for the western district shall appoint a deputy marshal who shall reside and keep his office at Superior. All writs and other process, except criminal warrants, issued at Superior may be made returnable at Superior; and the clerk at that place shall keep in his office the original records of all actions, prosecutions, and special proceedings so commenced and pending therein. Criminal warrants may be returned at any place within the district where court is held. Whenever warrants issued at Superior shall be returned at any other place, the clerk of the court wherein the warrant is returned, shall certify the same, under the seal of the court, together with the plea and other proceedings had thereon, and the determination of the court upon such plea or proceedings, with all papers and orders filed in reference thereto, to the clerk of the court at Superior; and the clerk at Superior shall enter upon his records a minute of the proceedings had upon the return of said warrant, certified as aforesaid. All causes and proceedings instituted in the court at Superior shall be tried therein, unless by consent of the parties, or upon the order of the court, they are transferred to another place for trial."¹⁰⁰

It was held: that the District Court for the Eastern District of Wisconsin had no jurisdiction of an indictment for assault, committed on a vessel on Lake Huron, within the boundary of the jurisdiction of the Eastern District of Michigan.¹⁰¹

¹⁰⁰ 36 St. at L. 1087, 1129, Comp. ¹⁰¹ U. S. v. Peterson 64 Fed. 145. St. § 1105.

“§ 115. The State of *Wyoming* and the Yellowstone National Park shall constitute one judicial district, to be known as the district of Wyoming. Terms of the district court for said district shall be held at Cheyenne on the second Mondays in May and November; at Evanston on the second Tuesday in July; and at Lander on the first Monday in October; and the said court shall hold one session annually at Sheridan, and in said national park, on such dates as the court may order. The marshal and clerk of the said court shall each, respectively, appoint at least one deputy to reside at Evanston, and one to reside at Lander, unless he himself shall reside there, and shall also maintain an office at each of those places: *Provided*, That until a public building is provided at Lander, suitable accommodations for holding court in said town shall be furnished the Government at an expense not to exceed three hundred dollars annually. The marshal of the United States for the said district may appoint one or more deputy marshals for the Yellowstone National Park, who shall reside in said park.”¹⁰² “The District court for the district of Wyoming shall have jurisdiction of all felonies committed within the Yellowstone National Park and appellate jurisdiction of judgments in cases of convictions before the commissioner authorized to be appointed under section five of an Act entitled ‘An Act to protect the birds and animals in Yellowstone National Park, and to punish crimes in said Park, and for other purposes,’ approved May seventh, eighteen hundred and ninety-four.”¹⁰³ It seems that the territorial limits of these districts, as fixed by the statute, are unaffected by any subsequent State legislation authorizing new counties and changing county lines.¹⁰⁴

§ 66a. Jurisdiction over ceded territory. The Federal Constitution gives Congress power to exercise exclusive legislation in all cases whatsoever “over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock Yards, and other needful Buildings.”¹

It has been held that this clause of the Constitution does not

¹⁰² 36 St. at L. 1130, Comp. St. § 1106.

¹⁰³ 36 St. at L. 1087.

¹⁰⁴ *Hyde v. Victoria Land Co.*, 125 Fed. 970.

§ 66a. 1 Article 1, section 8.

apply to territory acquired otherwise than by purchase;² nor to land leased to the United States for a camp.³ But it is settled that apart from this express grant the United States have power implied by the Constitution to accept a cession of jurisdiction made by a State for use for Federal purposes and that the acceptance by Congress of such a cession will be presumed in the absence of action to the contrary.⁴ The State may reserve the right to tax public lands⁵ and to serve process within such a cession.⁶

It has been said: "This jurisdiction cannot be acquired tortiously, or by disseisin of the State; much less, can it be acquired by a mere occupancy, without implied or tacit consent of the State, when such occupancy is for the purpose of protection."⁷ It has been said, that the consent of a State Convention is not equivalent to the consent of the State Legislature.⁸ The consent of the Legislature may be given after as well as before the purchase.⁹ The inhabitants of such places are not citizens or electors of the States by the consent of which they were purchased.¹⁰

The cession by the State includes judicial as well as legislative jurisdiction.¹¹

Such cession does not deprive the State court of jurisdiction by service made beyond the ceded territory of process in an action for tort or other transitory causes of action which arose within the district which is the property of the United States.¹² Otherwise, it was held that process of the State court could not be served in such ceded territory, when the right to make such

² *People v. Godfrey*, 17 Johnson (N. Y.) 225.

³ *U. S. v. Tierney*, 1 Bond 571, Fed. Cas. 16, 517.

⁴ *Fort Leavenworth R. R. Co. v. Lowe*, 114 U. S. 525, 528, 5 Sup. Ct. 995, 29 L. ed. 264; *Chicago & Pac. Ry. Co. v. McGlinn*, 114 U. S. 542, 5 Sup. Ct. 1005, 29 L. ed. 270; *Benson v. U. S.* 146 U. S. 32.

⁵ *Fort Leavenworth R. R. Co. v. Lowe*, 114 U. S. 525, 528, 5 Sup. Ct. 995, 29 L. ed. 264.

⁶ *Ibid.*

⁷ *People v. Godfrey*, 17 Johnson

(N. Y.) 225, 233, per Spencer, C. J.

⁸ 12 Op. A. G. 428. But see *Fort Leavenworth R. R. Co. v. Lowe*, 114 U. S. 525, 540, 5 Sup. Ct. 995, 29 L. ed. 264.

⁹ *U. S. v. Tucker*, 122 Fed. 518.

¹⁰ *Sinks v. Reese*, 19 Ohio St. 306. See opinion of Justices, 1 Metcalf (Mass.) 580; 6 Op. A. G. 577.

¹¹ *Re Lad*, 74 Fed. 31; *Steel v. Halligan*, 229 Fed. 1011, 1017.

¹² *Ohio River Contract. Co. v. Gordon*, 244 U. S. 268.

service had not been reserved.¹³ It is customary in the act of cession to include a clause stating that the State reserve the right to serve civil and criminal process in the ceded territory.¹⁴ "The reservation which has usually accompanied the consent of the States that the civil and criminal process of the State courts may be served in the places purchased, is not considered as interfering in any respect with the supremacy of the United States over them; but is admitted to prevent them from becoming an asylum for fugitives from justice. And Congress, by statute passed in 1795, declared that cessions from the States of the jurisdiction of places where light-houses, beacons, buoys, or public piers were or might be erected, with such reservations, should be deemed sufficient for the support and erection of such structures, and if no such reservation had been made, civil and criminal process issued under the authority of the States or of the United States might be served and executed within them."¹⁵

An action for a tort committed within such a district arises under the Constitution and laws of the United States although the liability of the defendant is determined by the principles of the common law and is not affected by any Federal statute.¹⁶ A suit brought in a State court against a Federal officer for acts committed within the district may be removed to a Federal court.¹⁷ It has been held that in such a case the plaintiff's statement of his cause of action need not show that it is based on the Constitution or laws of the United States.¹⁸

Whether the ceded territory was purchased by the United States¹⁹ or not²⁰ the criminal laws of the State have no force

¹³ *Folley v. Shriver*, 81 Va. 568 (a Soldiers' Home).

¹⁴ *E. G. Kansas Laws of 1875*, p. 95; *Wisconsin P. & L. Laws of 1867*, ch. 275.

¹⁵ *Fort Leavenworth R. R. Co. v. Lowe*, 114 U. S. 525, 533, 5 Sup. Ct. 995, 29 L. ed. 264, per Field, J., citing 1 St. at L. 426.

¹⁶ *Steele v. Halligan*, 229 Fed. 1011.

¹⁷ *Ibid.*

¹⁸ *Ibid.*

¹⁹ *U. S. v. Cornell*, 2 Mason 60, Fed. Cas. 14,867; *Commonwealth*

v. Clary, 8 Mass. 72; *Mitchell v. Tibbitts*, 17 Pick (Mass.) 298.

²⁰ *Re Lad*, 74 Fed. 31, 40; *Steele v. Halligan*, 229 Fed. 1011, 1017; see *U. S. v. Meagher*, 37 Fed. 875; *U. S. v. Lewis*, 111 Fed. 630; *Lasher v. State*, Tex. App. 17 S. W. 1064. *Contra, Re Kelly*, 71 Fed. 545; *Re O'Connor*, 37 Wisc. 379; both of which cases arose from crimes committed in a Soldiers' Home, a Federal corporation which held the title to the property, although jurisdiction over the land had been ceded to the United States

there after the cession unless adopted by legislative enactment of the United States. The laws regulating private rights, if not in conflict with the laws of the United States or the purposes for which the land is acquired, remain there in force until changed by Congress.²¹ A subsequent State statute has no effect there;²² except it has been held, as to such part of the land as the United States permits to be used for purposes not governmental and other than those for which it was ceded.²³

with a reservation of the right to serve civil and criminal process there.

²¹ *Chicago & P. R. R. Co. v. McGlinn*, 144 U. S. 542, 5 Sup. Ct. 1005, 29 L. ed. 270; *Steele v. Halligan*, 229 Fed. 1011, 1017; *Cf. Downes v. Bidwell*, 182 U. S. 244, 298, 21 Sup. Ct. 770, 45 L. ed. 1088.

²² *W. U. Tel. Co. v. Chiles*, 214 U. S. 274, 29 Sup. Ct. 613, 53 L. ed. 994 (imposing penalty for failure to deliver a telegram), *Kaufman v. Hopper*, 220 N. Y. 184 (a labor law).

²³ *Crook, Horner & Co. v. Old Point Comfort Hotel Co.*, 54 Fed. 604, 610, 611. "It is plain that the resolution of congress of March 3, 1887, relating to the Chamberlin Hotel, and the act of assembly of Virginia of March 30, 1887, on the same subject, both treat this hotel and its site as a diversion of that part of the cession obtained from Virginia by the United States from the purposes for which it was ceded. If so, what is the jurisdictional status of that hotel? Has it not reverted to the State, to remain under its jurisdiction so long as it continues to be used for other than military purposes, subject to such laws of the State as do not interfere with or conflict with the free and full use by the United States, for military purposes, of the rest of the

land ceded to and held by them at Old Point Comfort? If this be not the true jurisdictional status of the Chamberlin Hotel and its site, it would be very difficult to conceive and to define what their status is. It seems to me to be a necessary and an inevitable conclusion that the Chamberlin property has reverted jurisdictionally to Virginia, subject to such continued control by the United States as may be necessary to the discipline of the military purposes. Subject to these limitations, it results that the laws of Virginia of a general character such as do not conflict with the purposes for which the United States hold the land at Fortress Monroe, are in force there, especially in the places like the Chamberlin Hotel, which have been appropriated to other than the military purposes for which only they were ceded by Virginia. If these conclusions be not true, then, except State laws more than half a century old, the hundreds of inhabitants engaged in civil pursuits and residing at Old Point Comfort are living in a No Man's Land, and, except in a criminal sense, are as complete outlaws as if they were at Botany Bay.

"I am aware that the *argument ab inconvenienti* cannot be held to enact laws if they do not actually exist; but when reason and

Congress has enacted a Criminal Code which applies to offenses committed within the territory thus acquired.²⁴

§ 67. Jurisdiction of District Court of Alaska. In Alaska there is a District Court with general jurisdiction in civil, criminal, equity and admiralty cases.¹ This court is not a District Court of the United States.² It has been considered as a Supreme Court of a Territory.³ The court consists of three divisions, each of which is held by a different judge with a separate clerk, district attorney and marshal.

"The jurisdiction of each division of the court shall extend over the district of Alaska, but the court in which the action is pending may, on motion, change the place of trial in any action, civil or criminal, from one place to another place in the same division or to a designated place in another division in either of the following cases:

First. When there is reason to believe that an impartial trial can not be had therein;

Second. When the convenience of witnesses and the ends of justice would be promoted by the change;

Third. When from any cause the judge is disqualified from acting; but in such event, if the judge of another division will appear and try the action, no change of place of trial must be made;

Fourth. By the court, on its own motion, when, considering available means of travel, it appears that the defendant will be put to unnecessary expense and inconvenience if summoned to

legitimate statutory construction show that State legislation is in force in places where, if not, there would be no law at all, the inconvenience of holding otherwise comes in aid of the adopted construction. Let me emphasize the fact that this decision goes no further than to hold that the general laws of Virginia, other than criminal, which are not in conflict with those of the United States relating to forts, and which do not interfere with the military control, discipline, and use by the United States of Fortress Monroe as a mili-

tary post are in force at Old Point Comfort, and are especially in force in those parts and places at Old Point Comfort which have been appropriated to other than the military purposes of the United States."

²⁴ Act of March 4, 1909, 35 St. at L. 1088, Comp. St., §§ 10165-10519.

¹ § 67. 123 St. at L. 24; 30 St. at L. 545; 31 St. at L. 321. The boundaries of these divisions are described *supra*, § 66.

² *Summers v. U. S.*, 231 U. S. 92.

³ *Ibid.*

defend in the place or division in which an action has been commenced; and when it appears to the satisfaction of the court, or judge thereof, that an action has been commenced in a place or division remote from the residence of the defendant for the purpose of causing unnecessary expense or inconvenience, the place of the trial shall be changed at the cost of the plaintiff, and such costs shall not be recovered from the defendant.

In any criminal prosecution the court shall change the place of trial where it appears to the satisfaction of the court that the defendant will not be prejudiced thereby and that the United States will be put to unnecessary expense in such criminal prosecution if the transfer is not made."⁴

The judge of each division is required to divide his division into precincts, and is authorized to alter the same and establish new precincts from time to time, as public convenience may require.⁵

He is also required to appoint commissioners and to remove such commissioners, at pleasure.⁶ These commissioners have within their respective precincts the jurisdiction and powers of the commissioners of the District Courts of the United States and of notaries public. They are *ex officio* justices of the peace, recorders and probate judges. They have also power to grant writs of *habeas corpus*, returnable before a district judge, for the purpose of inquiring into the cause of restraint of liberty.⁷

It was held: that an order abolishing a precinct, providing that the territory embraced therein should become a part of another precinct, accepting the resignation of the commissioner for the precinct abolished, and directing him to "deliver the record and property pertaining to his office" to the commissioner of the new district, with which the former one was consolidated; constituted the commissioner of the latter precinct the successor

⁴ 31 St. at L. 325, Comp. St. § 3565.

⁵ 23 St. at L. 24; 30 St. at L. 545; 31 St. at L. 321, *supra*, § 66, ¶ 70.

⁶ *Ibid.*

⁷ Act of June 6, 1900, 31 St. at L. 321, § 6. This act contains the Code of Civil Procedure for Alaska. For the Alaska Criminal Code, see

Act of March 3, 1899, 30 St. at L. 1253. For the former statute, see the Organic Act of May 17, 1884, 23 St. at L. 24. It has been held that such commissioners have no jurisdiction of larceny committed in a ship, steamboat or other vessel. *Ex parte Kie*, 46 Fed. 485. As to probate jurisdiction, see *Ex parte Emma*, 48 Fed. 211.

in office of the former commissioner of that abolished, and transferred to him all the probate cases pending in the former precinct, with power to proceed in the same.⁸

The practice in Alaska is regulated by a Code of Civil Procedure for Alaska⁹ and a Criminal Code.¹⁰

The Act providing a civil government for Alaska directed: "That the general laws of the State of Oregon now in force are hereby declared to be the law in said district, so far as the same may be applicable and not in conflict with the provisions of this Act or the laws of the United States."¹¹

It has been held that the law of Oregon in force on May 17, 1894, determines the construction and proper requisites of an indictment although they are in conflict with the rules of the common law in that respect.¹² And that the sections of the Revised Statutes of the United States upon that subject do not apply.¹³ The inhabitants of Alaska, at least when they are not members of the Indian tribes there, have the right, when charged with crime, to a trial by jury of twelve, before they can be convicted.¹⁴ It has been said "that the whole subject matter of jurors in the territories is committed to territorial regulation."¹⁵ Until changed by statute, the court resorts to the laws of Oregon to determine the qualification of grand jurors.¹⁶ It seems that statutes of the United States granting defendants the right to separate trials in certain cases¹⁷ regulating the number of peremptory challenges to jurors¹⁸ and the mode of challenging petit jurors¹⁹ do not apply. Neither is application made of the section of the Revised Statutes directing that the defendant in certain cases be furnished with a list of the witnesses to be produced against him on the trial.²⁰ Nor of that permitting the

⁸ *Cheney v. Alaska Treadwell Gold Min. Co.*, C. C. A., 148 Fed. 808.

⁹ 31 St. at L. 321.

¹⁰ 30 St. at L. 253. Act of March 3, 1899; *Summers v. U. S.*, 231 U. S. 92.

¹¹ Act of May 17, 1884, ch. 53, 23 St. at L. 24.

¹² *Fitzpatrick v. U. S.*, 178 U. S. 304, 308. See *Endleman v. U. S.*, 86 Fed. 456.

¹³ *Summers v. U. S.*, 231 U. S. 92.

¹⁴ *Rasmussen v. U. S.*, 197 U. S. 516, 25 Sup. Ct. 514, 49 L. ed. 863.

¹⁵ *Clinton v. Englebrecht*, 13 Wallace, 434, 445.

¹⁶ *Jackson v. U. S.*, 102 Fed. 473, 477.

¹⁷ *Cochran v. U. S.*, C. C. A., 147 Fed. 206, 207.

¹⁸ *Ibid.*

¹⁹ *Miles v. U. S.*, 103 U. S. 304.

²⁰ U. S., R. S., § 1033, Ball v.

joinder in one indictment of several charges for connected acts or transactions or for acts or transactions of the same class of crimes.²¹ A subsequent act of the territory legislature permits such joinder.²² Nor the former sections forbidding testimony of a party in an action against an executor or an administrator with certain exceptions.²³ Where the statutes and decisions of Oregon and Alaska are silent, the common law is in force in this territory²⁴ so far as it has not been changed by the statutes of the United States.²⁵ "Congress by its legislation intends always special regulations for the Territories."²⁶

§ 68. Jurisdiction of the Supreme Court of the District of Columbia. The Supreme Court of the District of Columbia has in general the same civil jurisdiction that was vested in the General Court, or the Supreme Court of Chancery, of Maryland, on February 27th, 1801.¹ It has also the same civil jurisdiction as the District Courts of the United States,² with the possible exception of admiralty, and including jurisdiction in bankruptcy, when the bankrupt resides in the district.³ It has no jurisdiction of suits against persons not inhabitants of the district, except in the same way that nonresidents were proceeded against in the General Court or Supreme Court of Chancery of Maryland on May 3, 1802, and where such jurisdiction is conferred by special statutes.⁴ It has jurisdiction of applications for divorce.⁵ It has jurisdiction to issue writs of mandamus, prohibition and certiorari which cannot be issued by the District Courts of the United States.⁶ It may thus issue the writ of mandamus addressed to administrative officers of the United

U. S., 147 Fed. 32, 36; Thiede v. Utah, 159 U. S. 510, 514.

²¹ U. S. R. S. § 1024; Summers v. U. S., 231 U. S. 92.

²² Alaska Session Laws 1913, ch. 39.

²³ Corbus v. Leonhardt, 114 Fed. 10.

²⁴ McCloskey v. Pacific Coast Co., C. C. A., 22 L.R.A.(N.S.) 673, 160 Fed. 794.

²⁵ Kie v. U. S., C. C. A., 27 Fed. 351, 356. See U. S. v. Pridgen, 153

U. S. 48; Summers v. U. S., 231 U. S. 92.

²⁶ Summers v. U. S., 231 U. S. 92, 104.

§ 68. 1 D. C. Code, § 1; 31 St. at L. 1189.

² Ibid.

³ R. S. D. C. § 765, 19 St. at L. 253, 254.

⁴ D. C. Code, §§ 105-112. 32 St. at L. 520.

⁵ D. C. Code, § 963.

⁶ 32 St. at L. 520.

States within the district.⁷ It might be held that it has power to review by *certiorari* in a proper case a decision of a *quasi* judicial nature made by an executive officer of the United States at Washington;⁸ and to issue writs of prohibition directed to inferior courts and to public boards and officers acting in a *quasi* judicial capacity within the district,⁹ and writs of *quo warranto* to determine the right to hold an office of the United States within the district.¹⁰ The common law, both civil and criminal, prevails in the District of Columbia and there may be a common law offense against the United States committed therein which is not created by any statute.¹¹

The practice in this court is regulated by a code of procedure, enacted by Congress, which recognizes the distinction between common law and equity.¹² Before the enactment of that code, the court had power to make rules for its practice at common law and in equity;¹³ including a rule that in an action on contract where the plaintiff or his agent files an affidavit setting forth his cause of action and the sum claimed, exclusive of set-off and just grounds of defense, and serves the defendant with copies of the same and of his declaration, he shall be entitled to judgment, unless the defendant filed with his plea in bar a sufficient affidavit of defense, which specifically states in precise and distinct terms grounds of a defense in whole or in part.¹⁴

⁷ D. C. Code, § 68, 31 St. at L. 1189; U. S. v. Schurz, 102 U. S. 378, 394, 26 L. ed. 167, 171; Kendall v. U. S., 12 Pet. 524, 9 L. ed. 1181; Decatur v. Paulding, 14 Pet. 497, 10 L. ed. 559; Kendall v. Stokes, 3 How. 87, 11 L. ed. 506; Com'r of Patents v. Whiteley, 4 Wall. 522, 18 L. ed. 335; U. S. ex rel. Miller v. Black, 128 U. S. 40, 50, 32 L. ed. 354; U. S. ex rel. Redfield v. Windom, 137 U. S. 636, 34 L. ed. 811; U. S. ex rel. Boynton v. Blaine, 139 U. S. 306, 35 L. ed. 183; Roberts v. U. S., 176 U. S. 221, 44 L. ed. 443; U. S. ex rel. Riverside Oil Co. v. Hitchcock, 190 U. S. 316, 47 L. ed. 1074. See *infra*, § 469.

⁸ Alexandria C. R. & Br. Co. v.

District of Columbia, 5 Mackey (D. C.) 376; Wood v. District of Columbia, 6 Mackey (D. C.) 142; Foster & Abbott on the Federal Income Tax, 238. See *infra*, § 460.

⁹ Smith v. Whitney, 116 U. S. 167, 173, 29 L. ed. 601, 602. See *infra*, § 456.

¹⁰ See the discussion in the Electoral Commission, cited, *infra*, § 468.

¹¹ Harrison v. Mayer, 224 Fed. 224.

¹² 31 St. at L. 1189.

¹³ Fidelity & Deposit Co. v. U. S., 187 U. S. 315, 47 L. ed. 194.

¹⁴ *Ibid.* It is doubtful whether the Equity Rules prescribed by the Supreme Court of the United States

The general equity rules for the Federal courts do not apply to the Supreme Court of the District of Columbia.¹⁵

Whether the Act of March 3, 1915, previously quoted, which authorizes a suit improperly brought in equity to proceed at common law, and *vice versa*, and equitable defenses to be pleaded in actions at common law, applies to the Supreme Court of the District of Columbia does not seem to have been decided.¹⁶ If not, a case improperly brought in equity cannot be transferred to the common law side of the court.¹⁷

§ 69. Jurisdiction of the Court of Appeals of the District of Columbia. The appellate jurisdiction of the Court of Appeals of the District of Columbia is as follows: "Any party aggrieved by any final order, judgment, or decree of the supreme court of the District of Columbia, or of any justice thereof, including any final order or judgment in any case heard on appeal from a justice of the peace, may appeal therefrom to the said court of appeals; and upon such appeal the court of appeals shall review such order, judgment, or decree, and affirm, reverse, or modify the same as shall be just, except as provided in the following sections. Appeals shall also be allowed to said court of appeals from all interlocutory orders of the supreme court of the District of Columbia, or by any justice thereof, whereby the possession of property is changed or affected, such as orders for the appointment of receivers, granting injunctions, dissolving writs of attachment, and the like; and also from any other interlocutory order, in the discretion of the said court of appeals, whenever it is made to appear to said court upon petition that it will be in the interest of justice to allow such appeal."¹ This court has further jurisdiction of appeals from the decisions of the Commissioner of Patents refusing to issue or to reissue patents,² and

apply to this court. The judges thereof are preparing new rules substantially in accordance with these, which will probably be in force before this work is through the press.

¹⁵ *Curriden v. Middleton*, 232 U. S. 633.

¹⁶ 38 St. at L. 956, Comp. St. § 1251a, quoted, *infra*, § 80.

¹⁷ *Ibid.*

§ 69. 1 D. C. Code, § 226, 27 St.

at L. 434, Comp. St. 573, 4 Fed. St. Ann. 466.

² D. C. Code, § 228, 27 St. at L. 436, § 9, Comp. St. 3391, 5 Fed. St. Ann. 502, *Pierce's Fed. Code*, § 7336, D. C. R. S., § 780; U. S. R. S., § 4912, 5 Fed. St. Ann. 505; *Pierce's Fed. Code*, § 8777; *McKnight v. Metal Volatilization Co.*, 128 Fed. 51.

from the decision of that commissioner in any interference case.³ It has also jurisdiction of appeals from the decisions of the commissioner upon an application for the registration of a trademark, or for the cancellation of such a registration, or upon an interference as to a trademark.⁴ In the last class of cases, the appeal may be taken by an applicant for a registration, or a party to an interference, or a party who has filed opposition to a registration, or a party to an application for the cancellation of a registration.⁵ In these classes of cases, when an appeal is taken to the Court of Appeals of the District of Columbia, the appellant shall give notice thereof to the Commissioner, and file in the Patent-Office, within such time as the commissioner shall appoint, his reasons of appeal, specifically set forth in writing.⁶ "The court shall, before hearing such appeal, give notice to the Commissioner of the time and place of the hearing, and on receiving such notice the Commissioner shall give notice of such time and place, in such manner as the court may prescribe, to all parties who appear to be interested therein. The party appealing shall lay before the court certified copies of all the original papers and evidence in the case, and the Commissioner shall furnish the court with the grounds of his decision, fully set forth in writing, touching all the points involved by the reasons of appeal. And at the request of any party interested, or of the court, the Commissioner and the examiners may be examined under oath, in explanation of the principles of the thing for which a patent is demanded."⁷ "The court, on petition, shall hear and determine such appeal, and revise the decision appealed from in a summary way, on the evidence produced before the Commissioner, at such early and convenient time as the court may appoint; and the revision shall be confined to the points set forth in the reasons of appeal. After hearing the case the court shall return to the Commissioner a certificate of its proceedings

³ D. C. Code, § 228, 27 St. at L. 436, § 9, Comp. St. 3391, 5 Fed. St. Ann. 502; McKnight v. Metal Volatilization Co., 128 Fed. 51.

⁴ 34 St. at L. 1251, § 9; Pierce's Fed. Code, § 8815; McKnight v. Metal Volatilization Co., 128 Fed. 51.

⁵ Ibid.

⁶ U. S. R. S., § 4912, 5 Fed. St. Ann. 505, Pierce's Fed. Code, § 8777.

⁷ U. S. R. S., § 4913, 5 Fed. St. Ann. 506, Pierce's Fed. Code, § 8778.

and decision, which shall be entered of record in the Patent Office, and shall govern the further proceedings in the case. But no opinion or decision of the court in any such case shall preclude any person interested from the right to contest the validity of such patent in any court wherein the same may be called in question."⁸ The statute authorizing such appeals is constitutional.⁹ It does not repeal¹⁰ the prior statutes authorizing subsequent bill in equity to compel the issue of patents¹¹ and for relief against interfering patents,¹² which are discussed in a subsequent section of this work.¹³ Upon appeals to the Court of Appeals from the District of Columbia in interference cases, the question in issue is merely the priority between the two inventors, and whether either of them was the original inventor is not to be determined.¹⁴

§ 70. Jurisdiction of District Court of Porto Rico. The District Court of the United States for Porto Rico has the ordinary jurisdiction of the District Courts of the United States. It has jurisdiction over all controversies where the parties, or either of them, are citizens of the United States, or citizens or subjects of a foreign State or States; wherein the matter in dispute exceeds, exclusive of interest or costs, the sum or value of \$1,000.¹ This includes a suit between two subjects of a foreign government.² Unless a Federal question is involved it has no jurisdiction over controversies in which any litigant on either side is not a citizen of the United States or a subject of a foreign country, such as a suit where the sole plaintiff is a citizen of Porto Rico, and one or more of the defendants are citizens of the United States or aliens.³ The laws of the United States relating to appeals, writs of error and *certiorari* which apply to the Supreme Courts of the Territories and

⁸ U. S. R. S., § 4914, Pierce's Fed. Code, § 8779.

⁹ U. S. v. Duell, 172 U. S. 576.

¹⁰ McKnight v. Metal V. Co., 128 Fed. 51; Dover v. Greenwood, 143 Fed. 136.

¹¹ U. S. R. S., § 4915, 5 Fed. St. Ann. 507; Pierce's Fed. Code, § 8780.

¹² U. S. R. S., § 4918, 5 Fed. St. Ann. 526.

¹³ *Infra*, § 147.

¹⁴ Wheaton v. Kendall, 85 Fed. 666.

§ 70. 131 St. at L. 77, 84, 85.

² Ortega v. Larga, 202 U. S. 339, 50 L. ed. 1055.

³ Cuebas v. Cuebas, 223 U. S. 376, 56 L. ed. 476.

those relating to the removal of causes and other matters and proceedings as between the courts of the United States and the courts of the several States, govern in such matters and persons, as between the District Court of the United States and the courts of Porto Rico.⁴ The Supreme and District courts of Porto Rico, and the judges thereof, may grant writs of *habeas corpus*, in all cases in which the same can be made by the judges of the District Courts of the United States.⁵ The District Court of the United States for Porto Rico is not a constitutional court of the United States.⁶ Its authority emanates wholly from Congress, under the sanction of its power to govern territory occupying the relation that exists between Porto Rico and the United States.⁷ When Congress has not legislated upon the subject, the local law of Porto Rico remains in force.⁸ The statute laws of the United States not locally inapplicable have the same force and effect in Porto Rico as in the United States, except the revenue laws.⁹ It is subject to the provisions of the Revised Statutes¹⁰ providing for the surrender of fugitive criminals by Governors of Territories.¹¹ The Employers' Liability Act¹² and the Safety Appliance Acts,¹³ are there in force. The sections of the Revised Statutes regulating bills of exceptions apply to the District Court of the United States for Porto Rico.¹⁴ It is undetermined whether the provisions of the Code of Civil Procedure of Porto Rico upon that subject apply to that court.¹⁵ All pleadings and proceedings in this court must be conducted in the English language.¹⁶ The court has jurisdiction of a suit by members of a firm located in Porto Rico against subjects of Spain although

⁴ 31 St. at L. 84, 85, 953.

⁵ 31 St. at L. 86.

⁶ *Romeu v. Todd*, 206 U. S. 358, 51 L. ed. 1093.

⁷ *Ibid.*

⁸ *Ibid.*

⁹ Act of April 12, 1900, 31 St. at L. 7780, Ch. 191, § 14.

¹⁰ U. S. R. S., § 5278.

¹¹ *Kopel v. Bingham*, 211 U. S. 468, 53 L. ed. 286.

¹² Act of April 22, 1908, 35 St. at L. 65, 291 Ch. 149; Am. R. R. Co.

of Porto Rico v. Birch, 224 U. S. 547, 56 L. ed. 879.

¹³ Act of March 2, 1893, 27 St. at L. 531, Ch. 196; Act of April , 1896, 29 St. at L. 85; Act of March 2, 1903, St. at L. ; Am. R. R. Co. of Porto Rico v. Didricksen, 227 U. S. 145, 57 L. ed. —.

¹⁴ See U. S. R. S., § 953; *Guardian Assurance Co. v. Quintana*, 227 U. S. 100, 57 L. ed. —.

¹⁵ *Ibid.*, 227 U. S. 100, 105, 57 L. ed. —.

¹⁶ *Ibid.*

the citizenship of the members of the firm does not appear.¹⁷ In a suit brought by a citizen of the island against a foreign subject the jurisdiction is not ousted because on the application of the Attorney General, Porto Rico is substituted for the defendant.¹⁸ The court has power to enjoin a railway company from violating the statute regulating rates.¹⁹ The court has no probate jurisdiction.²⁰ It cannot in a suit to cancel a mortgage and foreclosure proceedings declare the plaintiffs the only heirs at law of the mortgagor.²¹ The court has no jurisdiction in a suit against the Government of Porto Rico²² without its consent²³ except perhaps in a suit affecting property which is an escheat.²⁴ The court has power to allow the Government of Porto Rico to intervene in a pending suit in a proper case.²⁵

§ 70a. Jurisdiction of District Court of the Canal Zone.

"There shall be in the Canal Zone one district court with two divisions, one including Balboa and the other including Cristobal; and one district judge of the said district, who shall hold his court in both divisions at such time as he may designate by order, at least once a month in each division. The rules of practice in such district court shall be prescribed or amended by order of the President. The said district court shall have original jurisdiction of all felony cases, of offenses arising under section ten of this Act, all causes in equity; admiralty and all cases at law involving principal sums exceeding three hundred dollars and all appeals from judgments rendered in magistrates' courts. The jurisdiction in admiralty herein conferred upon the district judge and the district court shall be the same that is exercised by the United States district judges and the United States district courts, and the procedure and practice shall also be the same. The district court or the judge thereof shall also have jurisdiction of all other matters and proceedings not herein

¹⁷ *Sucesores de L. Villamil & Co., S. En C., v. Merced, C. C. A.,* 239 Fed. 86.

¹⁸ *Porto Rico v. Ramos,* 232 U. S. 627.

¹⁹ *People of Porto Rico v. American R. Co. of Porto Rico, C. C. A.,* 254 Fed. 369.

²⁰ *Santiago v. Roses, C. C. A.,* 242 Fed. 209.

²¹ *Ibid.*

²² *Porto Rico v. Rosaly,* 227 U. S. 27.

²³ *Porto Rico v. Ramos,* 232 U. S. 627.

²⁴ *Porto Rico v. Ramos,* 232 U. S. 627, 632.

²⁵ *Ibid.*

provided for which are now within the jurisdiction of the Supreme Court of the Canal Zone, of the Circuit Court of the Canal Zone, the District Court of the Canal Zone, or the judges thereof. Said judge shall provide for the selection, summoning, serving, and compensation of jurors from among the citizens of the United States, to be subject to jury duty in either division of such district, and a jury shall be had in any criminal case or civil case at law originating in said court on the demand of either party. There shall be a district attorney and a marshal for said district. It shall be the duty of the district attorney to conduct all business, civil and criminal, for the Government, and to advise the governor of the Panama Canal on all legal questions touching the operation of the canal and the administration of civil affairs. It shall be the duty of the marshal to execute all process of the court, preserve order therein, and do all things incident to the office of marshal. The district judge, the district attorney, and the marshal shall be appointed by the President, by and with the advice and consent of the Senate, for terms of four years each, and until their successors are appointed and qualified, and during their terms of office shall reside within the Canal Zone, and shall hold no other office nor serve on any official board or commission nor receive any emoluments except their salaries. The district judge shall receive the same salary paid the district judges of the United States, and shall appoint the clerk of said court, and may appoint one assistant when necessary, who shall receive salaries to be fixed by the President. The district judge shall be entitled to six weeks' leave of absence each year with pay. During his absence or during any period of disability or disqualification from sickness or otherwise to discharge his duties the same shall be temporarily performed by any circuit or district judge of the United States who may be designated by the President, and who, during such service, shall receive the additional mileage and per diem allowed by law to district judges of the United States when holding court away from their homes. The district attorney and the marshal shall be paid each a salary of five thousand dollars per annum."¹

"The President is authorized to determine or cause to be determined what towns shall exist in the Canal Zone and subdi-

§ 70a. 137 St. at L. 565. Comp.
St., § 10044.

vide and from time to time resubdivide said Canal Zone into subdivisions, to be designated by name or number, so that there shall be situated one town in each subdivision, and the boundaries of each subdivision shall be clearly defined. In each town there shall be a magistrate's court with exclusive original jurisdiction coextensive with the subdivision in which it is situated of all civil cases in which the principal sum claimed does not exceed three hundred dollars, and all criminal cases wherein the punishment that may be imposed shall not exceed a fine of one hundred dollars, or imprisonment not exceeding thirty days, or both, and all violations of police regulations and ordinances and all actions involving possession or title to personal property or the forcible entry and detainer of real estate. Such magistrates shall also hold preliminary investigations in charges of felony and offenses under section ten of this Act, and commit or bail in bailable cases to the district court. A sufficient number of magistrates and constables, who must be citizens of the United States, to conduct the business of such courts, shall be appointed by the governor of the Panama Canal for terms of four years and until their successors are appointed and qualified, and the compensation of such persons shall be fixed by the President, or by his authority, until such time as Congress may by law regulate the same. The rules governing said courts and prescribing the duties of said magistrates and constables, oaths and bonds, the times and places of holding such courts, the disposition of fines, costs, forfeitures, enforcements of judgments, providing for appeals therefrom to the district court, and the disposition, treatment, and pardon of convicts shall be established by order of the President. The governor of the Panama Canal shall appoint all notaries public, prescribe their powers and duties, their official seal, and the fees to be charged and collected by them.²

This court has jurisdiction of all criminal offenses of trespass, injury or destruction of fortifications or harbor defenses committed within the Canal Zone or within any defensive sea areas which the President is authorized to establish for purposes of national defense.³

² 37 St. at L. 564, Comp. St., amended; 39 St. at L. 1194, 40 St. § 10043. at L. 89, Comp. St., § 10208.

³ 39 Criminal Code, § 44, as

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All laws of the Canal Zone which existed August 24, 1912 and which governed practice and procedure of the courts then existing are applicable and adapted to the practice and procedure in both these courts;⁴ but not as regards bills of exceptions, writs of error and appeals.⁵ The practice in this District court is regulated by the Code of Civil Procedure for the Canal Zone promulgated by the President. The executive order of the President issued August 14, 1919 provides amongst other things:—"The plaintiff in any civil suit, or special proceedings, may be ruled to give security for the costs upon motion of the defendant, or of any officer of the court interested in the costs accruing in such suit; and if such rule be entered against the plaintiff and he fail to comply therewith, within the time prescribed by the court or judge thereof, the suit shall be dismissed."⁶ This leaves the making of the rule in the discretion of the District court.⁷

The Act against Trading with the Enemy provides: "The several courts of the first instance in the Philippine Islands and the District Court of the Canal Zone shall have jurisdiction of offenses committed within their respective districts, and concurrent jurisdiction with the district courts of the United States of offenses under this Act committed upon the high seas and of conspiracies to commit such offenses as defined by section thirty-seven of the Act entitled 'An Act of codify, revise, and amend the penal laws of the United States,' approved March fourth, nineteen hundred and nine, and the provisions of such section for the purpose of this Act are hereby extended to the Philippine Island and to the Canal Zone."⁸

§ 71. Jurisdiction of District Court of Hawaii. The District Court of Hawaii has jurisdiction of all cases cognizable in a District Court of the United States, and it proceeds therein in the same manner as a District Court of the United States. The laws of the United States relating to juries and jury trials are applicable to this court. The laws of the United States, relating to appeals, writs of error, removal of causes, and other

⁴ 37 St. at L. 565; Comp. St., § 10045.

⁵ Promulgated March 22, 1907, government printing office, Washington, A. D. 1907.

⁶ *Panama R. Co. v. Curran*, C. C. A., 256 Fed. R. 768, 770.

⁷ *Ibid.*

⁸ Act of October 6, 1917, which prohibits Trading with the Enemy. 40 St. at L. 425, § 18, Comp. St., § 3115½ii.

matters and proceedings, as between the State and Federal courts, govern in such matters and proceedings between the courts of the United States and the courts of the Territory of Hawaii,¹ Until the Act of June 14, 1900, which formally incorporated the Territory of Hawaii,² there was no right to a grand jury, nor to the unanimous verdict of a petit jury, in Hawaii.³ Where a will provides that vacancies in the board of trustees therein created should be filled "by the choice of a majority of the justices of the Supreme Court"; it was held: that the power of appointment was conferred upon the justices of the Supreme Court as individuals and not in their official capacity.⁴ The Territory of Hawaii is exempt from suit without its consent.⁵ The Hawaiian statute which, as construed by the Supreme Court of the Territory, holds that, after garnishee process a summons may be served upon a non-resident defendant by leaving a copy at the place where he last had stopped in the Hawaiian Islands; is constitutional.⁶

§ 72. Jurisdiction of the Supreme Court and other courts of the Philippine Islands. The Acts of the Philippine Commission provide: "Courts of justice shall be maintained in every province in the Philippine Islands in which civil government is established; which courts shall be open for the trial of all causes proper for their cognizance, and justice shall be therein impartially administered without corruption or unnecessary delay."¹ "The judicial power of the Government of the Philippine Islands shall be vested in a Supreme Court, Courts of First Instance, and courts of justices of the peace, together with such special jurisdictions of municipal courts and other special tribunals as now are or hereafter may be authorized by law. The two courts first named shall be courts of record."²

¹ § 71. 131 St. at L. 158.

² 31 St. at L. 141. See §§ 5 and 83.

³ *Hawaii v. Mankichi*, 190 U. S. 197, 23 Sup. Ct. 787, 47 L. ed. 1016. See *Dorr v. U. S.*, 195 U. S. 138, 24 Sup. Ct. 808, 49 L. ed. 129.

⁴ *Re Bishop's Estate*, C. C. A., 250 Fed. 145.

⁵ *Kawananakoa v. Polyblank*, 205 U. S. 349. See *infra*, § 95.

⁶ *Herbert v. Bicknell*, 233 U. S. 70.

¹ § 72. 1 § 2160, Compilation Acts of the Philippine Commission 1908, Part VIII. the Judiciary, Title 39, Ch. 207.

² § 2161, Compilation Acts of the Philippine Commission 1908, Part VIII. the Judiciary, Title 39, Ct. 207. See Act of July 1, 1902 (32 St. at L. 691, 695). "Chap. 1369.—An act temporarily to provide for the administration of the affairs of civil government in the Philippine

"The interlocutory jurisdiction referred to in the previous sections of this chapter shall be held to include the hearing of all motions for appointment of receiver, for temporary injunctions, and for all other orders of the court which are not final in their character and do not involve a decision of the case pending upon its merits. The interlocutory jurisdiction shall also include the hearing of petitions for the writ of habeas corpus, applications for bail, the holding of preliminary examinations, and such orders in criminal causes as do not involve a final sentence of conviction or judgment of acquittal. The interlocutory jurisdiction shall also include the power of appointing notaries public, as provided in section thirty-three hundred and seventy-seven hereof."³ "The Supreme Court shall consist of a Chief Justice and six associate judges, any five of whom when convened shall form a quorum, and may transact any of the business of the court; but in the absence of a quorum the member or members present may adjourn the court from time to time with the same effect as if all were present. The concurrence of at least four members of the court shall be necessary to pronounce a judgment. The word 'judges' or 'judges of the Supreme Court' when used in this title shall include the Chief Justice."⁴ "The Supreme Court shall sit in banc as a body composed of all its members, and the Chief Justice shall be the presiding officer thereof. In case of his absence at a session of the court, the judge present next in seniority to the Chief Justice shall preside. The seniority of the associate judges shall be determined by the dates of their respective com-

islands, and for other purposes."
* * *

"§ 9. That the Supreme Court and the court of first instance of the Philippine Islands shall possess and exercise jurisdiction as heretofore provided and such additional jurisdiction as shall hereafter be prescribed by the government of said Islands, subject to the power of said government to change the practice and method of procedure. The municipal courts of said Islands shall possess and exercise jurisdiction as

heretofore provided by the Philippine Commission, subject in all matters to such alteration and amendment as may be hereafter enacted by law."

§ 2164 (d), Compilation Acts of the Philippine Commission 1908, Part VIII. the Judiciary, Title 39, Ch. 207.

§ 2169, Compilation Acts of the Philippine Commission 1908, Part VIII. the Judiciary, Title 39, Ch. 208.

missions."⁵ "The Supreme Court shall have original jurisdiction to issue writs of mandamus, certiorari, prohibition, habeas corpus, and quo warranto in the cases and in the manner prescribed in title forty-one hereof, and to hear and determine the controversies thus brought before it, and in other cases provided by law."⁶ "The Supreme Court shall have appellate jurisdiction of all actions and special proceedings properly brought to it from Courts of First Instance, and from other tribunals from whose judgment the law shall specially provide an appeal to the Supreme Court."⁷ "The Supreme Court shall have power to issue writs of certiorari and all other auxiliary writs and process necessary to the complete exercise of its original or appellate jurisdiction."⁸

"There shall be in each province a Court of First Instance, in each of which a judge shall preside. Each judge shall preside in all Courts of First Instance in his judicial district, which shall consist of such provinces as shall be by law designated to constitute such judicial district. But this section shall not apply to the city of Manila."⁹ "There shall be one Court of First Instance for the city of Manila, with three judges who shall preside in such court in separate court rooms. The judges of said court may be removed by the Governor-General, by and with the approval of the Commission. Actions brought in the Court of First Instance for the city of Manila shall be equally apportioned for trial among the judges thereof in accordance with rules to be made by the judges of the Supreme Court. Any action apportioned to one judge may be tried by another judge when more convenient to the judges."¹⁰ "The jurisdiction

⁵ § 2171, Compilation Acts of the Philippine Commission 1908, Part VIII. the Judiciary, Title 39, Ch. 208.

⁶ § 2177, Compilation Acts of the Philippine Commission 1908, Part VIII. the Judiciary, Title 39, Ch. 208. See chapters 252 and 253 and cases there cited.

⁷ § 2178, Compilation Acts of the Philippine Commission 1908, Part VIII. the Judiciary, Title 39, Ch. 208. *U. S. v. Atienza*, 1 Phil. Rep.

736. See, also, chapter 251 and cases there cited.

⁸ § 2179, Compilation Acts of the Philippine Commission 1908, Part VIII. the Judiciary, Title 39, Ch. 208.

⁹ § 2198, Compilation Acts of the Philippine Commission 1908, Part VIII. the Judiciary, Title 39, Ch. 209.

¹⁰ § 2199, Compilation Acts of the Philippine Commission 1908, Part VIII. the Judiciary, Title 39, Ch.

of Courts of First Instance shall be of two kinds: (a) Original; and (b) Appellate.”¹¹ “Courts of First Instance shall have original jurisdiction: (a) In all civil actions in which the subject of litigation is not capable of pecuniary estimation; (b) In all civil actions which involve the title to or possession of real property, or any interest therein, or the legality of any tax, impost, or assessment, except actions of forcible entry into and detainer of lands or buildings, original jurisdiction of which is by law conferred upon courts of justice of the peace; (c) In all cases in which the demand, exclusive of interest or the value of the property in controversy, amounts to two hundred pesos or more; (d) In all actions in admiralty and maritime jurisdiction, irrespective of the value of the property in controversy or the amount of the demand; (e) In all matters of probate, both of testate and intestate estates, appointment of guardians, trustees, and receivers, and in all actions for annulment of marriage, and in all such special cases and proceedings as are not otherwise provided for; (f) In all criminal cases in which a penalty of more than six months’ imprisonment or a fine exceeding two hundred pesos may be imposed; (g) Said courts and their Judges, or any of them, shall have power to issue writs of injunction, mandamus, certiorari, prohibition, quo warranto, and habeas corpus in their respective provinces and districts, in the manner provided in title forty-one hereof; (h) Of all crimes and offenses committed on the high seas or beyond the jurisdiction of any country, or within any of the navigable waters of the Philippine Islands, on board a ship or water craft of any kind registered or licensed in the Philippine Islands in accordance with the laws thereof. The jurisdiction herein conferred may be exercised by the Court of First Instance in any province into which the ship or water craft upon which the crime or offense was committed shall come after the commission thereof: *Provided, nevertheless*, That the court first lawfully taking cognizance thereof shall have jurisdiction of the same to the exclusion of all other courts in the Philippine Islands.”¹² The several courts of

209. *Garcia v. Ambler*, 4 Phil. Rep. 81.

VIII. the Judiciary, Title 29, Ch. 209.

¹¹ § 2204, Compilation Acts of the Philippine Commission 1908, Part

¹² § 2205, Compilation Acts of the Philippine Commission 1908, Part

first instance in the Philippine Islands and the District Court of the Canal Zone shall have jurisdiction of offenses committed within their respective districts, and concurrent jurisdiction with the District courts of the United States of offenses under this Act committed upon the high seas and of conspiracies to commit such offenses as defined by section thirty-seven of the Act entitled "An Act to codify, revise, and amend the penal laws of the United States," approved March fourth, nineteen hundred and nine, and the provisions of such section for the purpose of this Act are hereby extended to the Philippine Islands and to the Canal Zone.¹³ "Courts of First Instance shall have appellate jurisdiction over all causes arising in justices' and other inferior courts in their respective provinces."¹⁴ "A judge of First Instance shall have power to issue writs of injunction and to make orders appointing receivers in causes pending in the Court of First Instance within his district, and all other preliminary and interlocutory orders, when he is within the district but without the province; and to hear and determine, when within the district but without the province, any interlocutory motion or issue after due and reasonable notice to the parties; but all final hearings shall be had within the province unless the parties by their counsel consent in writing to a hearing at a place not within the province. On the filing of a petition for the writ of habeas corpus or for release upon bail or reduction of bail in any Court of First Instance, the

VIII. the Judiciary, Title 39, Ch. 209; *U. S. v. Sweet*, 1 Phil. Rep. 18; *Legarda v. Valdez*, 1 Phil. Rep. 146; *U. S. v. Fowler*, 1 Phil. Rep. 614; *U. S. v. Dasal*, 3 Phil. Rep. 6; *Benedicto v. De la Rama*, 3 Phil. Rep. 34; *Springer v. Odlin*, 3 Phil. Rep. 344; *Artacho v. Provincial Board of Pangasinan*, 4 Phil. Rep. 670; *Oehlers v. Hartwig*, 5 Phil. Rep. 487; *Castano v. Lobingier*, 7 Phil. Rep. 91; *Rafferty v. Judge of First Instance*, 7 Phil. Rep. 164. See, also, chapters 238 and 256, and cases there cited under different subjects mentioned in this section. The phrase "admiralty and maritime ju-

risdiction" did not put in force in the Philippines the law, practice, and procedure in force in admiralty courts in the United States, *Ivanich v. Odlin*, 1 Phil. Rep. 284; *Heath v. Steamer "San Nicholas"*, 7 Phil. Rep. 532. For annulment of marriage and divorce see *Benedicto v. De la Rama*, 3 Phil. Rep. 34; *Ibanez v. Ortiz*, 5 Phil. Rep. 325.

¹³ 40 St. at L. 425, § 18, Comp. St., § 3112½ii.

¹⁴ § 2206, Compilation Acts of the Philippine Commission 1908, Part VIII. the Judiciary, Title 39, Ch. 209.

hearing may be tried at any place in the judicial district which the judge shall deem convenient. All criminal trials must be tried at the place designated in the law as the place at which the court having jurisdiction thereof shall be held, unless the Secretary of Finance and Justice shall otherwise order, as provided in section twenty-two hundred and twenty-seven hereof." ¹⁵

"In every province in which there now is, or shall hereafter be established, a Court of First Instance, courts of justices of the peace shall be maintained in every organized municipality." ¹⁶ "In all civil actions including those mentioned in sections twenty-six hundred and ninety to twenty-seven hundred, inclusive, hereof, arising in his municipality and not exclusively cognizable by the Court of First Instance, the justice of the peace shall have exclusive original jurisdiction where the value of the subject-matter or amount of the demand does not exceed two hundred pesos, exclusive of interest and costs; and where such value or demand exceeds two hundred pesos but is less than six hundred pesos the justice of the peace shall have jurisdiction concurrent with the Court of First Instance. In forcible entry and detainer proceedings the justice shall have original jurisdiction but he may receive evidence upon the question of title therein solely for the purpose of determining character and extent of possession and damages for detention. A justice of the peace shall have no jurisdiction to adjudicate questions of title to real estate or any interest therein, and whenever a case requiring such adjudication is brought before him it shall be his duty, upon discovering the same, to suspend further proceedings therein and certify the cause forthwith to the Court of First Instance. The jurisdiction of a justice of the peace shall not extend to civil actions in which the subject of litigation is not capable of pecuniary estimation, except in forcible entry and detainer cases; nor to those which involve the legality of any tax, impost or assessment; nor to actions involving admiralty or maritime

¹⁵ § 2229, Compilation Acts of the Philippine Commission 1908, Part VIII. the Judiciary, Title 39, Ch. 209. U. S. v. Tan Banco, 4 Phil. Rep. 325.

¹⁶ § 2234, Compilation Acts of the Philippine Commission 1908, Part VIII. the Judiciary, Title 39, Ch. 210.

jurisdiction; nor to matters of probate, the appointment of guardians, trustees, or receivers; nor to actions for annulment of marriage.”¹⁷ “The territorial jurisdiction of a justice of the peace, except in the case of ex officio justices and in other special cases provided by existing law, shall be coextensive with his municipality, and the civil process of his court shall not run beyond the same except to summon a defendant impleaded with one who resides and has been served therein as provided in section twenty-four hundred and seventy-nine hereof. Forcible entry and detainer actions shall be brought in the municipality where the subject-matter thereof is situated. All other proceedings shall be instituted in the municipality wherein a defendant resides or may be served with summons.”¹⁸ “Justices of the peace, except in the city of Manila, shall have original jurisdiction to try parties charged with misdemeanors, offenses, and infractions of municipal ordinances, arising within the municipality, in which the penalty provided by law does not exceed six months’ imprisonment or a fine of two hundred pesos, or both such imprisonment and fine.”¹⁹ “Concurrent jurisdiction is hereby conferred upon the justices of the peace for the municipalities of Iloilo and Buenavista over causes arising in the barrio now known as Sanao, on the Island of Guimaras, in the Province of Iloilo, anything in existing law to the contrary notwithstanding: *Provided, however*, That the justice of the peace first acquiring jurisdiction over any cause shall have exclusive jurisdiction thereof.”²⁰ “The governor of the Province of Palawan is hereby made ex officio justice of the peace with authority to perform all the duties of a justice of the peace throughout the whole of the Province of Palawan. His jurisdiction as justice of the peace shall be concurrent in every municipality and in every part of said province with that of the proper justice of the peace of the municipality.

¹⁷ § 2237, Compilation Acts of the Philippine Commission 1908, Part VIII. the Judiciary, Title 39, Ch. 210.

¹⁸ § 2238, Compilation Acts of the Philippine Commission 1908, Part VIII. the Judiciary, Title 39, Ch. 210.

¹⁹ § 2239, Compilation Acts of the Philippine Commission 1908, Part VIII. the Judiciary, Title 39, Ch. 210.

²⁰ § 2240, Compilation Acts of the Philippine Commission 1908, Part VIII. the Judiciary, Title 39, Ch. 210.

The fees that would accrue to a justice of the peace shall, in all cases where the provincial governor acts as justice of the peace, be covered into the treasury of the province for the general purposes of the province."²¹ "The governor of the Province of Mindoro is hereby made ex officio justice of the peace with authority to perform all the duties of a justice of the peace throughout the whole of the Province of Mindoro. His jurisdiction as justice of the peace shall be concurrent in every municipality and in every part of said province with that of the proper justice of the peace of the municipality. The fees that would accrue to a justice of the peace shall, in all cases where the provincial governor acts as justice of the peace, be covered into the treasury of the province for the general purposes of the province."²² "The Governor-General is authorized, with the advice and approval of the Philippine Commission, to appoint a justice of the peace and auxiliary justice of the peace, from time to time, for the Island of Basilan, notwithstanding said island has been included within the municipality of Zamboanga by Act Numbered Twenty-one of the legislative council of the Moro Province. The justice of the peace and auxiliary justice of the peace appointed by virtue of this section shall have jurisdiction throughout the Island of Basilan to the same extent and with the same effect as though the Island of Basilan constituted a regular municipality. The justice of the peace and auxiliary justice of the peace for the municipality of Zamboanga shall not have jurisdiction within the Island of Basilan."²³

"The commission has also passed statutes regulating the practice in these courts in civil²⁴ and criminal procedure.²⁵ The power to enact such legislation is given by the Act of July 1, 1902.²⁶

²¹ § 2241, Compilation Acts of the Philippine Commission 1908, Part VIII. the Judiciary, Title 39, Ch. 210.

²² § 2242, Compilation Acts of the Philippine Commission 1908, Part VIII. the Judiciary, Title 39, Ch. 210.

²³ § 2443, Compilation Acts of the

Philippine Commission 1908, Part VIII. the Judiciary, Title 39, Ch. 210.

²⁴ Ibid. Title 41, chaps. 29-275, §§ 2403, 3248.

²⁵ Ibid. Title 42, chaps. 276-290, § 3249, 3375.

²⁶ 39 St. at L. 691, 695; unchanged in this respect by Act of

"The Act of February 6, 1905, after providing for the guarantee by the Philippine Government of the payment of interest on certain railroad bonds and of the security for the same by lien upon the railroad and the company's other property, subsequent to the mortgage, under which the bonds were issued, continues "The Supreme Court of the Philippine Islands shall have original and exclusive jurisdiction in all actions, proceedings or suits at law or in equity brought by the Philippine government against any person or corporation involving the construction of this section or any right existing under, duty enjoined, or act prohibited by said section or any contract made in pursuance thereof; and jurisdiction is hereby vested in the supreme court to make such order, to enter such judgment or decree and to take such proceedings in enforcement thereof as may be proper. During the vacations of said court the chief justice or any judge thereof shall have all the power to grant restraining orders, orders of injunction, to appoint receivers, or to do any other act under authority herein granted, that a judge of a court of general jurisdiction may do in the vacation of court."²⁷ It also has jurisdiction to determine adverse claims to land.²⁸

The Constitution of the United States does not guarantee to the inhabitants of the Philippine Islands the right to trial by jury.²⁹ It has been said that this right cannot exist until these Islands have been by Congress formally incorporated into the United States.³⁰

§ 73. Jurisdiction of the United States Court for China.

The United States Court for China has exclusive jurisdiction in all cases and judicial proceedings whereof jurisdiction might on June 30th, 1906,¹ "be exercised by United States consuls and ministers by law and by virtue of treaties between the United States and China, except in so far as the said jurisdiction is qualified by section two of this act. The said court

February 6, 1905, Ch. 453, 33 St. at L. 689, 691. Quoted *supra*, note 2.

²⁷ Ch. 453, § 4, 33 St. at L. 689, 691.

²⁸ *Ibid.* § 39.

²⁹ *Dorr v. U. S.*, 195 U. S. 138, 24 Sup. Ct. 808, 49 L. ed. 129.

³⁰ *Dorr v. U. S.*, 195 U. S. 138, 24 Sup. Ct. 808, 49 L. ed. 129.

§ 73. ¹ This jurisdiction is shown in U. S. R. S., §§ 4083-4130, quoted *infra*, § 74, and the treaties with China of Dec. 31, 1846, by Malley's *Treaties*, I, 196.

shall hold sessions at Shanghai, China, and shall also hold sessions at the cities of Canton, Tientsin, and Hongkong, at stated periods, the dates of such sessions at each city to be announced in such manner as the court shall direct, and a session of the court shall be held in each of these cities at least once annually. It shall be within the power of the judge, upon due notice to the parties in litigation, to open and hold court for the hearing of a special cause at any place permitted by the treaties, and where there is a United States consulate, when, in his judgment, it shall be required by the convenience of witnesses, or by some public interest. The place of sitting of the court shall be in the United States consulate of each of the cities, respectively."

This court also has supervisory control over the discharge by consuls and vice consuls of the duties prescribed by the laws of the United States relating to the estates of decedents in China which are specified in the statutes creating the court.

"§ 2. The consuls of the United States in the cities of China to which they are respectively accredited shall have the same jurisdiction as they now possess in civil cases where the sum or value of the property involved in the controversy does not exceed five hundred dollars United States money and in criminal cases where the punishment for the offense charged cannot exceed by law one hundred dollars fine or sixty days' imprisonment, or both, and shall have power to arrest, examine, and discharge accused persons or commit them to the said court. From all final judgments of the consular court either party shall have the right of appeal to the United States court for China: Provided, also, That appeal may be taken to the United States court for China from any final judgment of the consular courts of the United States in Korea so long as the rights of extra-territoriality shall obtain in favor of the United States."

"§ 4. The jurisdiction of the said United States court, both original and on appeal, in civil criminal matters, also the jurisdiction of the Consular courts in China, shall in all cases be exercised in conformity with said treaties and the laws of the United States now in force in reference to the American Consular courts in China, and all judgments and decisions of said Consular courts, and all decisions, judgments, and decrees of the United States court shall be enforced in accordance with

said treaties and laws. But in all such cases when such laws are deficient in the provisions necessary to give jurisdiction or to furnish suitable remedies, the common law and the law as established by the decisions of the courts of the United States shall be applied by said court in its decisions and shall govern the same subject of the terms of any treaties between the United States and China."² The provisions of the statute making the common law applicable to criminal offenses, committed by American citizens in China, are construed as referring to the common law in force in the several American Colonies at the time of their separation from England, and include, not only the ancient common or internal law, but also statutes, which had previously been passed amendatory or in aid of the common law.³ Among these was chapter 24 of the Statutes of 30, George II, enacted in 1757, creating the offense of obtaining money or goods under false pretenses, and subsequent amendments to the same.⁴ The court has jurisdiction of suits between citizens of the United States in controversies which arose in China.⁵ The court may grant a divorce to an American citizen from his wife who is a Chinese.⁶ The judicial authority of the United States Court in China is restricted to the five ports mentioned in the treaty with that nation,⁷ namely, Kwang-Chow, Amoy, Fuchow, Ningpo and Shanghai.⁸ The jurisdiction of Consular courts is explained in the succeeding section.⁹ An action may be brought in any one of the United States upon a money judgment recovered in a consular court of China.¹⁰ In the State of New

² Act of June 30, 1906, 34 Stat. at L. 814, Chap. 3934, "An Act creating a United States court for China and prescribing the jurisdiction thereof."

³ As to the effect of a plea of former acquittal, based upon proceedings in the former United States Consular Court of Shanghai, see *Price v. U. S.*, 156 Fed. 950, 85 C. C. A. 247, 13 Ann. Cas. 483, 15 L. R. A. (N. S.) 1272. *Biddle v. U. S.*, C. C. A., 156 Fed. 759.

⁴ *Biddle v. U. S.*, C. C. A., 156 Fed. 950.

⁵ *Swayne & Hoyt, Inc. v. Everett*, C. C. A., 255 Fed. 71.

⁶ *Richards v. Richards, Lobingier*, J. May 1, 1915. 38 St. at L. 1122. Note Act of March 4, 1915, Comp. St., § 7696a.

⁷ 34 St. at L. 814. See 9 Op. A. G. 294.

⁸ Treaty of Dec. 31, 1846, *Malley's Treaties*, I, 196.

⁹ *Infra*, § 74.

¹⁰ *Newman v. Basch*, 89 Misc. (N. Y.) 622.

York an action upon such a judgment is not barred for twenty years.¹¹ The Chinese Court Regulations of 1864 promulgated the following rule: "Civil actions, based on written promise, contract, or instrument, must be commenced within six years after the cause of action accrues; others, within two."¹² Final decrees and judgments of this court may be brought for review to the Circuit Court of Appeals for the Ninth Circuit, by appeal or writ of error, as the case may be.¹³ Upon an appeal from this court, the record in this court should show an allowance of the appeal.¹⁴ Unless the appeal is allowed in open court, a cita-

¹¹ Ibid.

¹² Secretary Bayard said concerning this: "I do not, it is true, regard this rule as a statute. Not only had Mr. Burlingame no power to enact a statute, as such, but the language of the rule shows that it cannot be regarded as a statutory enactment. It limits suits on even sealed instruments to six years, and on unwritten engagements, no matter how solemn or how strongly evidenced, to two years. It contains no exception in favor of minors or persons under disability. It must be regarded, therefore, not as a statute covering civil limitations in all their bearings, but as an assertion that suits in consular courts in China are to be limited as to time, the limitation to be adapted to the social and business conditions of the period of suit. In this way we can explain not only the limitation of two years for unwritten engagements, which in the then immature and unsettled condition of our business in China, may have been eminently proper, but the omission of the exceptions I have noticed above. I held, therefore, that Rule XV. of the Regulations of 1864, while not to be regarded as having the authority or the fixedness of a statute, is to be

viewed as a rule of court expressing a principle open to modification by the court that issued it. It stands in the same position as do the equity rules adopted by the Supreme Court of the United States and courts of the several States, not as a statutory mandate, to remain in force until expressly repealed or modified, but as a principle and regulation of practice which it is open to the court to expand or vary as the purposes of justice may require. As to the importance of your adopting such a rule there can be no question. Were there no such limitation required in China, American merchants in China might be harassed by old debts and stale demands outlawed in the United States, and their business much impeded. Aside from this the principle that the right of suit should be limited as to time, is as essential to public justice as is the principle that the right of suit should exist at all." Mr. Bayard to Mr. Denby, April 27, 1887. Wharton's Dig., § 125, Vol. III, Appendix, pp. 883, 884.

¹³ § 3, 34 St. at L. 814, 815, Jud. Code, § 131, 36 St. at L. 1087.

¹⁴ *Steamer Spark v. Lee Choi Chum*, 1 Sawyer 713.

tion should be issued and served,¹⁵ and the proceedings should conform in other respects to those of appeals to the Circuit Court of Appeals.

§ 74. Jurisdiction of the Consular Courts. The Revised Statutes provide as follows: "To carry into full effect the provisions of the treaties of the United States with China, Japan, Siam, Egypt, and Madagascar, respectively, the minister and the consuls of the United States, duly appointed to reside in each of those countries, shall, in addition to other powers and duties imposed upon them, respectively, by the provisions of such treaties, respectively, be invested with the judicial authority herein described, which shall appertain to the office of minister and consul, and be a part of the duties belonging thereto, wherein, and so far as, the same is allowed by treaty."¹ "The officers mentioned in the preceding section are fully empowered to arraign and try, in the manner herein provided, all citizens of the United States charged with offenses against law, committed in such countries, respectively, and to sentence such offenders in the manner herein authorized; and each of them is authorized to issue all such processes as are suitable and necessary to carry this authority into execution."² "Such officers are also invested with all the judicial authority necessary to execute the provisions of such treaties, respectively, in regard to civil rights, whether of property or person; and they shall entertain jurisdiction in matters of contract, at the port where, or nearest to which, the contract was made, or at the port at which, or nearest to which, it was to be executed, and in all other matters, at the port where, or nearest to which, the cause of controversy arose, or at least where, or nearest to which, the damage complained of was sustained, provided such port be one of the posts at which the United States are represented by consuls. Such jurisdiction shall embrace all controversies between citizens of the United States, or others, provided for by such treaties, respectively."³ "Jurisdiction in both criminal and civil matters shall, in all cases, be exercised and enforced in conformity with

¹⁵ Ibid.

Ann. 819, Pierce's Fed. Code,

§ 74. ¹ U. S. R. S., § 4083, 2
Fed. St. Ann. 819, Pierce's Fed.
Code, § 4245.

§ 4246.

³ U. S. R. S., § 4085, 2 Fed. St.
Ann. 819, Pierce's Fed. Code,

² U. S. R. S., § 4084, 2 Fed. St.

§ 4247.

the laws of the United States, which are hereby, so far as is necessary to execute such treaties, respectively, and so far as they are suitable to carry the same into effect, extended over all citizens of the United States in those countries, and over all others to the extent that the terms of the treaties, respectively, justify or require. But in all cases where such laws are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies, the common law and the law of equity and admiralty shall be extended in like manner over such citizens and others in those countries; and if neither the common law, nor the law of equity or admiralty, nor the statutes of the United States, furnish appropriate and sufficient remedies, the ministers in those countries, respectively, shall, by decrees and regulations which shall have the force of law, supply such defects and deficiencies.”⁴ “Each of the consuls mentioned in section forty hundred and eighty-three, at the port for which he is appointed, is authorized upon facts within his own knowledge, or which he has good reason to believe true, or upon complaint made or information filed in writing and authenticated in such way as shall be prescribed by the minister, to issue his warrant for the arrest of any citizen of the United States charged with committing in the country an offense against law; and to arraign and try any such offender; and to sentence him to punishment in the manner herein prescribed.”⁵ “The consuls and commercial agents of the United States at islands or in countries not inhabited by any civilized people, or recognized by any treaty with the United States, are authorized to try, hear, and determine all cases in regard to civil rights, whether of person or property, where the real debt or damages do not exceed the sum of one thousand dollars, exclusive of costs, and upon full hearing of the allegations and evidence of both parties, to give judgment according to the laws of the United States, and according to the equity and right of the matter, in the same manner as justices of the peace are now authorized and empowered where the United States have exclusive jurisdiction. They are also invested with the powers conferred by the provisions of sections forty hundred and eighty-six and forty hundred and eighty-seven for trial of

⁴ U. S. R. S., § 4086, 2 Fed. St. Ann. 820, Pierce's Fed. Code, § 4248.

⁵ U. S. R. S., § 4087, 2 Fed. St. Ann. 320, Pierce's Fed. Code, § 4249.

offenses or misdemeanors.”⁶ “Any consul when sitting alone may also decide all cases in which the fine imposed does not exceed five hundred dollars, or the term of imprisonment does not exceed ninety days; but in all such cases, if the fine exceeds one hundred dollars, or the term of imprisonment for misdemeanor exceeds sixty days, the defendants or any of them, if there be more than one, may take the case, by appeal, before the minister, if allowed jurisdiction, either upon errors of law or matters of fact, under such rules as may be prescribed by the minister for the prosecution of appeals in such cases.”⁷ “Capital cases for murder or insurrection against the government of either of the countries hereinbefore mentioned, by citizens of the United States, or for offenses against the public peace amounting to felony under the laws of the United States, may be tried before the minister of the United States in the country where the offense is committed if allowed jurisdiction; and every such minister may issue all manner of writs, to prevent the citizens of the United States from enlisting in the military or naval service of either of the said countries, to make war upon any foreign power with whom the United States are at peace, or in the service of one portion of the people against any other portion of the same people; and he may carry out this power by a resort to such force belonging to the United States, as may at the time be within his reach.”⁸ “Each of the ministers mentioned in section forty hundred and eighty-three shall, in the country to which he is appointed, be fully authorized to hear and decide all cases, criminal and civil, which may come before him, by appeal, under the provisions of this Title, and to issue all processes necessary to execute the power conferred upon him; and he is fully empowered to decide finally any case upon the evidence which comes up with it, or to hear the parties further, if he thinks justice will be promoted thereby; and he may also prescribe the rules upon which new trials may be granted, either by the consuls or by himself, if asked for upon sufficient

⁶ U. S. R. S., § 4088, 2 Fed. St. Ann. 820, Pierce's Fed. Code, § 4250. ⁸ U. S. R. S., § 4090, 2 Fed. St. Ann. 821, Pierce's Fed. Code, § 4252.

⁷ U. S. R. S., § 4089, 2 Fed. St. Ann. 821, Pierce's Fed. Code, § 4251.

grounds.”⁹ “In all cases, criminal and civil, the evidence shall be taken down in writing in open court, under such regulations as may be made for that purpose; and all objections to the competency or character of testimony shall be noted, with the ruling in all such cases, and the evidence shall be part of the case.”¹⁰ “It shall be the duty of the ministers and the consuls in the countries mentioned in section forty hundred and eighty-three, to encourage the settlement of controversies of a civil character, by mutual agreement, or to submit them to the decision of referees agreed upon by the parties; and the minister in each country shall prepare a form of submission for such cases, to be signed by the parties, and acknowledged before the consul. When parties have so agreed to refer, the referees may, after suitable notice of the time and place of meeting for the trial, proceed to hear the case, and a majority of them shall have power to decide the matter. If either party refuses or neglects to appear, the referees may proceed *ex parte*. After hearing any case such referees may deliver their award, sealed, to the consul, who, in court, shall open the same; and if he accepts it, he shall indorse the fact, and judgment shall be rendered thereon, and execution issue in compliance with the terms thereof. The parties, however, may always settle the same before return thereof is made to the consul.”¹¹ In all criminal cases which are not of a heinous character, it shall be lawful for the parties aggrieved or concerned therein, with the assent of the minister in the country, or consul, to adjust and settle the same among themselves, upon pecuniary or other considerations.”¹² “The ministers and consuls shall be fully authorized to call upon the local authorities to sustain and support them in the execution of the powers confided to them by treaty, and on their part to do and perform whatever is necessary to carry the provisions of the treaties into full effect, so far as they are to be executed in the countries, re-

⁹ U. S. R. S., § 4091, 2 Fed. St. Ann. 821, Pierce's Fed. Code, § 4253.

¹⁰ U. S. R. S., § 4097, 2 Fed. St. Ann. 822, Pierce's Fed. Code, § 4259.

¹¹ U. S. R. S., § 4098, 2 Fed. St. Ann. 822, Pierce's Fed. Code, § 4260.

¹² U. S. R. S., § 4099, 2 Fed. St. Ann. 823, Pierce's Fed. Code, § 4261.

spectively.”¹³ “In all cases, except as herein otherwise provided, the punishment of crime provided for by this Title shall be by fine or imprisonment, or both, at the discretion of the officer who decides the case, but subject to the regulations herein contained, and such as may hereafter be made. It shall, however, be the duty of such officer to award punishment according to the magnitude and aggravation of the offense. Every person who refuses or neglects to comply with the sentence passed upon him shall stand committed until he does comply, or is discharged by order of the consul, with the consent of the minister in the country.”¹⁴ “Insurrection or rebellion against the government of either of those countries, with intent to subvert the same, and murder, shall be capital offenses, punishable with death; but no person shall be convicted of either of those crimes, unless the consul and his associates in the trial all concur in opinion, and the minister also approves of the conviction. But it shall be lawful to convict one put upon trial for either of these crimes, of a less offense of a similar character, if the evidence justifies it, and to punish, as for other offenses, by fine or imprisonment, or both.”¹⁵ “Whenever any person is convicted of either of the crimes punishable with death, in either of these countries, it shall be the duty of the minister to issue his warrant for the execution of the convict, appointing the time, place, and manner; but if the minister is satisfied that the ends of public justice demand it, he may from time to time postpone such execution; and if he finds mitigating circumstances which authorize it, he may submit the case to the President for pardon.”¹⁶ “No fine imposed by a consul for a contempt committed in presence of the court, or for failing to obey a summons from the same, shall exceed fifty dollars; nor shall the imprisonment exceed twenty-four hours for the same contempt.”¹⁷ “Any consul, when sitting alone for the trial of offenses or misdemeanors, shall

¹³ U. S. R. S., § 4100, 2 Fed. St. Ann. 823, Pierce's Fed. Code, § 4262.

¹⁴ U. S. R. S., § 4101, 2 Fed. St. Ann. 823, Pierce's Fed. Code, § 4263.

¹⁵ U. S. R. S., § 4102, 2 Fed. St. Ann. 823, Pierce's Fed. Code, § 4264.

¹⁶ U. S. R. S., § 4103, 2 Fed. St. Ann. 823, Pierce's Fed. Code, § 4265.

¹⁷ U. S. R. S., § 4104, 2 Fed. St. Ann. 824, Pierce's Fed. Code, § 4266.

decide finally all cases where the fine imposed does not exceed one hundred dollars, or the term of imprisonment does not exceed sixty days.”¹⁸ “Whenever, in any case, the consul is of opinion that, by reason of the legal questions which may arise therein, assistance will be useful to him, or whenever he is of opinion that severer punishments than those specified in the preceding sections will be required, he shall summon, to sit with him on the trial, one or more citizens of the United States, not exceeding four, and in capital cases not less than four; who shall be taken by lot from a list which had previously been submitted to and approved by the minister, and shall be persons of good repute and competent for the duty. Every such associate shall enter upon the record his judgment and opinion, and shall sign the same; but the consul shall give judgment in the case. If the consul and his associates concur in opinion, the decision shall, in all cases, except of capital offenses, and except as provided in the preceding section, be final. If any of the associates differ in opinion from the consul, the case, without further proceedings, together with the evidence and opinions, shall be referred to the minister for his adjudication, either by entering up judgment therein, or by remitting the same to the consul with instruction how to proceed therewith.”¹⁹ “Each of the consuls mentioned in section four thousand and eighty-three shall have at the port for which he is appointed, jurisdiction as herein provided, in all civil cases arising under such treaties, respectively, wherein the damages do not exceed the sum of five hundred dollars, and, if he sees fit to decide the same without aid, his decision thereon shall be final. But whenever he is of opinion that any such case involves legal perplexities, and that assistance will be useful to him, or whenever the damages demanded exceed five hundred dollars, he shall summon, to sit with him on the hearing of the case, not less than two nor more than three citizens of the United States, if such are residing at the port, who shall be taken from a list which had previously been submitted to and approved by the minister, and shall be of good repute and competent for the duty. Every such associate shall note upon the record his opinion, and also, in case he dissents from the consul, such

¹⁸ U. S. R. S., § 4106, 2 Fed. St. Ann. 824, Pierce's Fed. Code, § 4267.

¹⁹ U. S. R. S., § 4106, 2 Fed. St. Ann. 824, Pierce's Fed. Code, § 4268.

reasons therefor as he thinks proper to assign; but the consul shall give judgment in the case. If the consul and his associates concur in opinion, the judgment shall be final. If any of the associates differ in opinion from the consul, either party may appeal to the minister, under such regulations as may exist; but if no appeal is lawfully claimed, the decision of the consul shall be final."²⁰ "The jurisdiction allowed by treaty to the ministers, respectively, in the countries named in section four thousand and eighty-three shall be exercised by them in those countries, respectively, wherever they may be."²¹ "The jurisdiction of such ministers in all matters of civil redress; or of crimes, except in capital cases for murder or insurrection against the governments of such countries, respectively, or for offenses against the public peace amounting to felony under the laws of the United States, shall be appellate only; Provided, That in cases where a consular officer is interested, either as party or witness, such minister shall have original jurisdiction."²² "All such officers shall be responsible for their conduct to the United States, and to the laws thereof, not only as diplomatic or consular officers, but as judicial officers, when they perform judicial duties, and shall be held liable for all negligences and misconduct as public officers."²³ "The President is authorized to appoint marshals for such of the consular courts in those countries as he may think proper, not to exceed seven in number, namely: one in Japan, four in China, one in Siam, and one in Turkey, each of whom shall receive a salary of one thousand dollars a year, in addition to the fees allowed by the regulations of the ministers, respectively, in those countries."²⁴ "It shall be the duty of the marshals, respectively, to execute all process issued by the ministers of the United States in those countries, respectively, or by the consul at the port at which they reside, and to make due return thereof to the officer by whom it was

²⁰ U. S. R. S., § 4107, 2 Fed. St. Ann. 824, Pierce's Fed. Code, § 4269.

²¹ U. S. R. S., § 4108, 2 Fed. St. Ann. 825, Pierce's Fed. Code, § 4270.

²² U. S. R. S., § 4109, 2 Fed. St. Ann. 825, Pierce's Fed. Code, § 4271.

²³ U. S. R. S., § 4110, 2 Fed. St. Ann. 825, Pierce's Fed. Code, § 4272.

²⁴ U. S. R. S., § 4111, 2 Fed. St. Ann. 825, Pierce's Fed. Code, § 4273. No longer in Japan and China. Treaty of Nov. 22, 1894, 29 St. at L. 853.

issued, and to conform in all respects to the regulations prescribed by the ministers, respectively, in regard to their duties." ²⁵ "Each marshal, before entering upon the duties of his office, shall give bond for the faithful performance thereof in a penal sum not to exceed ten thousand dollars, with two sureties to be approved by the Secretary of State. Such bond shall be transmitted to the Secretary of the Treasury, and a certified copy thereof be lodged in the office of the minister." ²⁶ "Whenever any person desires to bring suit upon the bond of any such marshal, it shall be the duty of the Secretary of the Treasury, or of the minister having custody of a copy of the same, to give to the person so applying a certified copy thereof, upon which suit may be brought and prosecuted with the same effect as could be done upon the original: Provided, The Secretary of the Treasury, or the minister to whom the application is made, is satisfied that there is probable cause of action against the marshal." ²⁷ "Upon a plea of non est factum, verified upon oath, or any other good cause shown, the court or the consul or minister trying the cause may require the original bond of the marshal in those countries to be produced; and it shall be the duty of the Secretary of the Treasury to forward the original bond to the court, or consul, or minister requiring the same." ²⁸ "All rules, orders, writs, and processes of every kind which are intended to operate or be enforced against any of the marshals, in any of the countries named in this Title, shall be directed to and executed by such persons as may be appointed for that purpose by the minister or consul issuing the same." ²⁹ "In order to organize and carry into effect the system of jurisprudence demanded by such treaties, respectively, the ministers, with the advice of the several consuls in each of the countries, respectively, or of so many of them as can be conveniently assembled, shall prescribe the forms of all processes to be issued

²⁵ U. S. R. S., § 4112, 2 Fed. St. Ann. 825, Pierce's Fed. Code, § 4274.

²⁶ U. S. R. S., § 4113, 2 Fed. St. Ann. 826, Pierce's Fed. Code, § 4275.

²⁷ U. S. R. S., § 4114, 2 Fed. St. Ann. 826, Pierce's Fed. Code, § 4276.

²⁸ U. S. R. S., § 4115, 2 Fed. St. Ann. 826, Pierce's Fed. Code, § 4277.

²⁹ U. S. R. S., § 4116, 2 Fed. St. Ann. 826, Pierce's Fed. Code, § 4278.

by any of the consuls; the mode of executing and the time of returning the same; the manner in which trials shall be conducted, and how the records thereof shall be kept; the form of oaths for Christian witnesses, and the mode of examining all other witnesses; the costs to be allowed to the prevailing party, and the fees to be paid for judicial services; the manner in which all officers and agents to execute process, and to carry this Title into effect, shall be appointed and compensated; the form of bail-bonds, and the security which shall be required of the party who appeals from the decision of a consul; and shall make all such further decrees and regulations from time to time, under the provisions of this Title, as the exigency may demand."³⁰ "All such regulations, decrees, and orders shall be plainly drawn up in writing, and submitted, as hereinbefore provided, for the advice of the consuls, or as many of them as can be consulted without prejudicial delay or inconvenience, and such consul shall signify his assent or dissent in writing, with his name subscribed thereto. After taking such advice, and considering the same, the minister in each of those countries may, nevertheless, by causing the decree, order, or regulation to be published with his signature thereto, and the opinions of his advisers inscribed thereon, make it binding and obligatory, until annulled or modified by Congress; and it shall take effect, from the publication or any subsequent day thereto named in the act."³¹ "All such regulations, orders, and decrees shall, as speedily as may be after publication, be transmitted by the ministers, with the opinions of their advisers, as drawn up by them severally, to the Secretary of State, to be laid before Congress for revision."³² "It shall be the duty of the minister in each of those countries to establish a tariff of fees for judicial services, which shall be paid by such parties, and to such persons, as the minister shall direct; and the proceeds shall, as far as is necessary, be applied to defray the expenses incident to the execution of this Title; and regular accounts, both of receipts and expenditures, shall be kept by

³⁰ U. S. R. S., § 4117, 2 Fed. St. Ann. 826, Pierce's Fed. Code, § 4279.

³¹ U. S. R. S., § 4118, 2 Fed. St. Ann. 827, Pierce's Fed. Code, § 4280.

³² U. S. R. S., § 4119, 2 Fed. St. Ann. 827, Pierce's Fed. Code, § 4281.

the minister and consuls and transmitted annually to the Secretary of State." ³³ "The President, when provision is not otherwise made, is authorized to allow, in the adjustment of the accounts of each of the ministers or consuls, the actual expenses of the rent of suitable buildings or parts of buildings to be used as prisons for American convicts in those countries, not to exceed in any case the rate of six hundred dollars a year; and also the wages of the keepers of the same, and for the care of offenders, not to exceed, in any case, the sum of eight hundred dollars per annum. But no more than one prison shall be hired in Japan, four in China, one in Turkey, and one in Siam, at such port or ports as the minister, with the sanction of the President, may designate, and the entire expense of prison and prison-keepers at the consulate of Bangkok, in Siam, shall not exceed the sum of one thousand dollars a year." ³⁴ "The provisions of this Title, so far as the same relate to crimes and offenses committed by citizens of the United States, shall extend to Turkey, under the treaty with the Sublime Porte of May seventh, eighteen hundred and thirty, and shall be executed in the Ottoman dominions in conformity with the provisions of the treaty, and of this Title, by the minister and the consuls appointed to reside therein, who are hereby ex-officio vested with the powers herein conferred upon the ministers and consuls in China, for the purposes above expressed, so far as regards the punishment of crime, and also for the exercise of jurisdiction in civil cases wherein the same is permitted by the laws of Turkey, or its usages in its intercourse with the Franks, or other foreign Christian nations." ³⁵ "The provisions of this Title shall extend to Persia, in respect to all suits and disputes which may arise between citizens of the United States therein; and the minister and consuls who may be appointed to reside in Persia are hereby invested, in relation to such suits and disputes, with such powers as are by this Title conferred upon the ministers and consuls in China. All suits and disputes arising in Persia between Persian

³³ U. S. R. S., § 4120, 2 Fed. St. China Treaty of Nov. 22, 1894, 29 Ann. 827, Pierce's Fed. Code, St. at L. 853.
§ 4282.

³⁴ U. S. R. S., § 4121, 2 Fed. St. Ann. 828, Pierce's Fed. Code, § 4287.
Ann. 829, Pierce's Fed. Code, § 4283. No longer in Japan and

³⁵ U. S. R. S., § 4125, 2 Fed. St.

subjects and citizens of the United States shall be carried before the Persian tribunal to which such matters are usually referred, at the place where a consul or agent of the United States may reside, and shall be discussed and decided according to equity, in the presence of an employe of the consul or agent of the United States; and it shall be the duty of the consular officer to attend the trial in person, and see that justice is administered. All suits and disputes occurring in Persia between the citizens of the United States and the subjects of other foreign powers, shall be tried and adjudicated by the intermediation of their respective ministers or consuls, in accordance with such regulations as shall be mutually agreed upon by the minister of the United States for the time being, and the ministers of such foreign powers; respectively, which regulations shall from time to time be submitted to the Secretary of State."³⁶ "The provisions of this title so far as the same are in conformity with the stipulations in the existing treaties between the United States and Tripoli, Tunis, Morocco, Muscat, and the Samoan or Navigator Islands, respectively, shall extend to those countries, and shall be executed in conformity with the provisions of the treaties and of the provisions of this title by the consuls appointed by the United States to reside therein, who are hereby *ex officio* invested with the powers herein delegated to the ministers and consuls of the United States appointed to reside in the countries named in section four thousand and eighty-three, so far as the same can be exercised under the provisions of treaties between the United States and the several countries mentioned in this section, and in accordance with the usages for the countries in their intercourse with the Franks or other foreign Christian Nations. And whenever the United States shall negotiate a treaty with any foreign government, in which the American consul-general or consul shall be clothed with judicial authority, and securing the right of trial to American citizens residing therein before such consul-general or consul, and containing provisions similar to or like those contained in the treaties with the governments named in this act, then said title, so far as the same may be applicable, shall have full force in reference to said treaty, and shall extend

³⁶ U. S. R. S., § 4126, 2 Fed. St. Ann. 829, Pierce's Fed. Code, § 4290.

to the country of the government negotiating the same.”³⁷ “If at any time there be no minister in either of the countries hereinbefore mentioned, the judicial duties which are imposed by this Title upon the minister shall devolve upon the Secretary of State, who is authorized and required to discharge the same.”³⁸ “The provisions of this Title relating to the jurisdiction of consular and diplomatic officers over civil and criminal cases in the countries therein named, shall extend to any country of like character with which the United States may hereafter enter into treaty relations.”³⁹ “The word ‘minister,’ when used in this title shall be understood to mean the person invested with, and exercising, the principal diplomatic functions. The word ‘consul’ shall be understood to mean any person invested by the United States with, and exercising, the functions of consul-general, vice consul-general, consul or vice-consul or a consular agent.”⁴⁰ Formerly the acting consul⁴¹ or acting consul-general⁴² could not exercise the jurisdiction conferred by those statutes.⁴³ Where no treaty otherwise provided, it was the opinion of Attorney General Cushing that the authority of consuls of the United States in foreign countries, in cases of crime at sea or in port, was ministerial and not judicial.⁴⁴

Consuls have exclusive jurisdiction over disputes between captains and crews of vessels of the United States, including questions of wages, by treaties or conventions, in the following countries: Austria-Hungary, Belgium, Columbia, Denmark, Dominican Republic, France, Germany, Greece, Italy, Kongo Free State, The Netherlands (and colonies), Portugal, Roumania, Salvador, Sweden and Norway, and Tripoli.⁴⁵ Similar

³⁷ U. S. R. S., § 4127, 2 Fed. St. Ann. 829, Pierce's Fed. Code, § 4291.

³⁸ U. S. R. S., § 4128, 2 Fed. St. Ann. 830, Pierce's Fed. Code, § 4292.

³⁹ U. S. R. S., § 4129, 2 Fed. St. Ann. 830, Pierce's Fed. Code, § 4293.

⁴⁰ U. S. R. S., § 4130, 2 Fed. St. Ann. 830, Pierce's Fed. Code, § 4294. Act of Feb'y, 1876, as amended by 19 St. at L. 2.

⁴¹ Acting Secretary Adee, March 22, 1894, Moore's Dig., § 264, II., 622.

⁴² Moore, §§ 261-284, Secretary Fish, Feb'y 9, 1876, Moore's Dig. § 264, II., 623.

⁴³ Ibid.

⁴⁴ 8 Op. A. G. 830.

⁴⁵ Consular Regulations, 1896, V. 88.

powers were given by a treaty with Russia;⁴⁶ but whether that will be in force at the time this book is published, is a doubtful question. In Sweden and Norway at least, this power does not extend to public offenses, nor to actual breaches of the public peace or other differences between the captains and crews which "disturb the order or tranquility of the country."⁴⁷ They have also power to adjust damages suffered at sea and in matters of wrecks and salvage, granted to them by treaties with Austria-Hungary, Belgium, Bolivia, Borneo, China, Columbia, Dominican Republic, Ecuador, France, Germany, Greece, Guatemala, Hayti, Honduras, Italy, Japan, Korea, Liberia, Madagascar, Maskat, Morocco, The Netherlands (including colonies), Ottoman Porte, Paraguay, Roumania, Salvador, Siam, Spain, Sweden and Norway, Tripoli, and Tunis.⁴⁸

These treaties are not in violation of the clause of the Federal Constitution which gives to the Federal courts jurisdiction in all cases of admiralty and maritime jurisdiction.⁴⁹ The court of admiralty has consequently no jurisdiction of the claims for transportation to Holland made by Dutch seamen against a Dutch vessel;⁵⁰ nor, it has been held, of a suit by an American seaman against a Dutch ship to recover wages.⁵¹ In Maskat and the Ottoman dominions, they have the right, in the absence of the owner or agent, to receive the property of American citizens wrecked or captured from pirates.⁵² Conventions secure to them the right to take depositions in Austria-Hungary, Belgium, Columbia, France, Germany, (for American citizens only), Italy, Kongo Free State, The Netherlands, Roumania, Servia and Salvador.⁵³ The advice of a consul in a foreign port gives the master of a vessel no justification for an illegal act.⁵⁴ His action in discharging a seaman in a foreign port is not conclusive where the latter subsequently files a libel for wages,⁵⁵ and where he has discharged seamen at the request of a master,

⁴⁶ Ibid.

⁴⁷ 15 Op. A. G. 178.

⁴⁸ Consular Regulations, 1896, V. 90.

⁴⁹ The *Albergen*, 223 Fed. 443.

⁵⁰ The *Rindjani*, C. C. A., 254 Fed. 913.

⁵¹ The *Albergen*, 223 Fed. 443.

⁵² Consular Regulations, 1896, V. 90.

⁵³ Ibid. V. 87.

⁵⁴ *Wilson v. The Mary, Gilpin*, 31.

⁵⁵ *Campbell v. The Uncle Sam, McAllister* 77.

the consul cannot detain them in prison as a punishment.⁵⁶ A consul has no authority to order the sale of a ship in a foreign port, whether on complaint of the crew or otherwise.⁵⁷ Where such a sale took place and the consul retained the money for the payment of sailors' wages, Attorney General Cushing was of the opinion that the United States were not liable to the owners for the money thus illegally collected and retained.⁵⁸ He has no authority to demand and receive from the master of a vessel, the money and effects belonging to a deserter from the same,⁵⁹ nor to retain the papers of vessels which he suspects are destined for the slave trade.⁶⁰ American consuls have no authority to require masters of American ships to carry to the United States for trial, persons accused of crime.⁶¹

The constitutionality of the statute granting judicial powers to consuls in countries where Christianity does not prevail has been sustained under the treaty power.⁶² The consular courts

⁵⁶ *Jordan v. Williams*, 1 Curtis, 69.

⁵⁷ 6 Op. A. G. 617.

⁵⁸ *Ibid.*

⁵⁹ 14 Op. A. G. 520.

⁶⁰ 9 Op. A. G. 426.

⁶¹ 7 Op. A. G. 722.

⁶² *Re Ross*, 140 U. S. 453, 462-463, 11 Sup. 897, 35 L. ed. 581, per Field, J.:

"The practice of European governments to send officers to reside in foreign countries, authorized to exercise a limited jurisdiction over vessels and seamen of their country, to watch the interests of their countrymen and to assist in adjusting their disputes and protecting their commerce, goes back to a very early period, even preceding what are termed the Middle Ages. During those ages these commercial magistrates, generally designated as consuls, possessed to some extent a representative character, sometimes discharging judicial and diplomatic functions. In other than Christian

countries they were, by treaty stipulations, usually clothed with authority to hear complaints against their countrymen and to sit in judgment upon them when charged with public offenses. After the rise of Islamism, and the spread of its followers over eastern Asia and other countries bordering on the Mediterranean, the exercise of this judicial authority became a matter of great concern. The intense hostility of the people of Moslem faith to all other sects, and particularly to Christians, affected all their intercourse, and all proceedings had in their tribunals. Even the rules of evidence adopted by them placed those of different faith on unequal grounds in any controversy with them. For this cause, and by reason of the barbarous and cruel punishments inflicted in those countries and the frequent use of torture to enforce confession from parties accused, it was a matter of deep interest to Christian governments to

have jurisdiction of crimes committed on water within the territory of their district.⁶³ A consular court has jurisdiction of a criminal offense, such as murder, committed in a port of its district by a citizen of a foreign State, such as a British subject, while duly enrolled as a seaman on a merchant vessel of the United States.⁶⁴ By a regulation of the Minister to China, approved by the State Department,⁶⁵ when a criminal prosecution was pending in any consular district of China against a citizen of the United States, who might be found in another district, the consul before whom the prosecution is pending might issue a warrant for the arrest, under which, when based by the consul of the latter district, the accused might be arrested and transported to the former district for trial.⁶⁶ The State Department has expressed the opinion: that the statutes confer no jurisdiction over citizens of the United States serving on board foreign vessels of war;⁶⁷ nor authority to make a regulation requiring citizens of the United States to register their names, nor power to enforce such a regulation judicially;⁶⁸ nor to banish a convict to China or another foreign country;⁶⁹ nor to try a criminal charge against anyone who is not a citizen of the United States;⁷⁰ nor a regulation concerning the importation of fire-arms and ammunition into a port, with the government of which there is no treaty.⁷¹

withdraw the trial of their subjects, when charged with the commission of a public offense, from the arbitrary and despotic action of the local officials. Treaties conferring such jurisdiction upon these consuls were essential to the peaceful residence of Christians within those countries and the successful prosecution of commerce with their people. The treaty-making power vested in our government extends to all proper subjects of negotiation with foreign governments. It can, equally with any of the former or present governments of Europe, make treaties providing for the exercise of judicial authority in other countries by its officers appointed to reside therein."

⁶³ *Re Ross*, 140 U. S. 453, 11 Sup. 897, 35 L. ed. 581.

⁶⁴ *Ibid.*

⁶⁵ Secretary Olney, Feb'y 2, 1897.

⁶⁶ Moore's Dig., § 263, II., 621.

⁶⁷ Mr. Cadwalader, November 26, 1875, Wharton's Dig., § 125, Vol. I., p. 809.

⁶⁸ Secretary Fish, February 26, 1873, Wharton's Dig., § 125, Vol. I., p. 803.

⁶⁹ Mr. Fish, September 10, 1870, Wharton's Dig., § 125, Vol. I., p. 805.

⁷⁰ Mr. Fish, January 8, 1873, Wharton's Dig., § 125, Vol. I., p. 808.

⁷¹ Instruction of August 15, 1895, Moore's Dig., § 263, I., 622.

The provisions of the Constitution which guarantee trial by jury under an indictment by a grand jury do not apply to the consular courts,⁷² nor to their jurisdiction over persons charged with crimes committed within their districts,⁷³ or upon vessels of the United States.⁷⁴ In the trial of a crime before a consular court, the accused should have an opportunity of examining

⁷² *Re Ross*, 140 U. S. 453, 464-465, 11 Sup. Ct. 897, 35 L. ed. 581, per Field, J.: "By the Constitution a government is ordained and established (for the United States of America), and not for countries outside of their limits. The guarantee it affords against accusation of capital or infamous crimes, except by indictment or presentment by a grand jury, and for an impartial trial by a jury when thus accused, apply only to citizens and others within the United States, or who are brought there for trial for alleged offenses committed elsewhere, and not to residents or temporary sojourners abroad. *Cook v. United States*, 138 U. S. 157, 181, 34 L. ed. 906, 912. The Constitution can have no operation in another country. When, therefore, the representatives or officers of our government are permitted to exercise authority of any kind in another country, it must be on such conditions as the two countries may agree, the laws of neither one being obligatory upon the other. The deck of a private American vessel, it is true, is considered for many purposes constructively as territory of the United States, yet persons on board of such vessels, whether officers, sailors, or passengers, cannot invoke the protection of the provisions referred to until brought within the actual territorial boundaries of the United States. And, besides, their enforcement abroad in numer-

ous places, where it would be highly important to have consuls invested with judicial authority, would be impracticable from the impossibility of obtaining a competent grand or petit jury. The requirement of such a body to accuse and to try an offender would, in a majority of cases, cause an abandonment of all prosecution. The framers of the Constitution, who were fully aware of the necessity of having judicial authority exercised by our consuls in non-Christian countries, if commercial intercourse was to be had with their people, never could have supposed that all the guarantees in the administration of the law upon criminals at home were to be transferred to such consular establishments, and applied before an American who had committed a felony there could be accused and tried. They must have known that such a requirement would defeat the main purpose of investing the consul with judicial authority. While, therefore, in one aspect the American accused of crime committed in those countries is deprived of the guarantees of the Constitution against unjust accusation and a partial trial, yet in another aspect he is the gainer, in being withdrawn from the procedure of their tribunals, often arbitrary and oppressive, and sometimes accompanied with extreme cruelty and torture."

⁷³ *Ibid.*

⁷⁴ *Ibid.*

the complaint against him or should be presented with a copy stating the offense he has committed.⁷⁵ At least in the absence of an act of Congress authorizing proof by the depositions of witnesses beyond the jurisdiction, he is entitled to be confronted with the witnesses against him and to cross-examine them.⁷⁶ He has the right to be represented by counsel.⁷⁷ The State Department has disapproved the use of torture to elicit testimony, although authorized by the law of the country where the consul holds court,⁷⁸ and the infliction of flogging as a punishment for wife-beating.⁷⁹ The Attorney General has expressed the opinion that a consular court cannot execute a sentence of imprisonment beyond its territorial jurisdiction, so that, in the absence of legislation, a convict of a consular court cannot be imprisoned in the United States.⁸⁰ The State Department has directed that, in all cases of capital punishment, the execution shall be postponed until the case has been reported, copies of the judgment and testimony transmitted to the Department, and the President's views in the premises shall have been received.⁸¹ Consuls exercise in the Turkish dominions, by usage, the power to adjudicate controversies between Christian citizens of the United States and the trial of suits by foreign Christians against the same.⁸² Citizens of a foreign country, who are not in the employ of the consulate, nor enrolled on American ships, can only sue in the courts of the United States by comity.⁸³ The Attorney General has ruled that a consular court cannot, in a suit by a person not a citizen of the United States, enter judgment for a set-off beyond the extent of the claim asserted by the plaintiff, nor render a judgment against a person of foreign birth not a citizen of the United States.⁸⁴

⁷⁵ Ibid.

⁷⁶ Ibid.

⁷⁷ Ibid.

⁷⁸ Assistant Secretary Hay, August 16, 1880, Wharton's Dig. (2nd ed.), § 125, Vol. I, p. 810.

⁷⁹ Moore's Dig., § 266, Vol. II, p. 632.

⁸⁰ 14 Op. A. G. 522.

⁸¹ Wharton's Dig., § 125, Vol. I, p. 819.

⁸² Op. A. G. 565; Consular Regulations, XXX, 620. See U. S. R. S., § 4125, 2 Fed. St. Ann. 829, Pierce's Fed. Code, § 4291, quoted *supra*.

⁸³ Acting Secretary Davis, August 11, 1882, Moore's Dig., § 260, Vol. II, p. 604.

⁸⁴ 11 Op. A. G. 474.

In Oriental countries, consuls may probate wills.⁸⁵ They have granted decrees of divorce.⁸⁶ In Turkey, the consular courts have exclusive jurisdiction to decide who are the heirs and widow of an American citizen who died when there domiciled.⁸⁷ It seems to be the rule that, in the absence of legislation by Congress, consuls and consular courts have no jurisdiction over the property of Americans in a foreign country who have abandoned their residence or have never resided there.⁸⁸ It has been ruled by the State Department that a Consul General in a country with which there is no treaty, has no power to promulgate a regulation concerning the validity of mortgages and bills of sale,⁸⁹ nor to adjudicate upon the title to land; but that he may pass on the rights of landlord and tenant or adverse claims to the right of possession under a written contract.⁹⁰ The power of the Secretary of State to exercise the right to review by appeal a consular decision or the exercise of other judicial functions, has been said to be doubtful.⁹¹ It has been said that where the consul acts beyond his jurisdiction, his order may be set aside by the Secretary of State or the President, but that, in the absence of a treaty giving such authority, this cannot be done in case of an erroneous decision upon the merits within the consular jurisdiction.⁹² A person imprisoned within the United States by the order of a consul or a consular court acting beyond its jurisdiction may, in a proper case, have a review by habeas corpus.⁹³ Except pos-

⁸⁵ Secretary Evarts, March 15, 1879, Moore's Dig., § 265, Vol. II, p. 626.

⁸⁶ See Naggar's Case in Cairo, Egypt, Moore's Dig., § 265, Vol. II, p. 626. Regulations concerning divorce by Minister of Japan were disapproved; Secretary Fish, December 26, 1870, Wharton's Dig. (2nd ed.), § 125, Vol. I, p. 807.

⁸⁷ Decree of Turkish Council of Ministers, Moore's Dig., § 265, Vol. II, p. 627.

⁸⁸ Mr. Fish, December 20, 1870, Wharton's Dig., § 125, Vol. I, p. 807. See *Dainese v. Hale*, 91 U. S. 13.

⁸⁹ Assistant Secretary Rockhill, Oct. 9, 1896, Moore's Dig., § 263, II, 622.

⁹⁰ Assistant Secretary Hunter, Sept. 3, 1874, Moore's Dig., § 265, II, p. 627.

⁹¹ Assistant Secretary Strobell, January 16, 1894, concerning the Madagascar Treaty, Moore's Dig., § 266, Vol. II, p. 631. See *Re Ross*, 140 U. S. 453, 11 Sup. Ct. 897, 35 L. ed. 581.

⁹² *Pacific Mail S. S. Case*, by Secretary Seward, Moore's Dig., August 18, 1868, § 265, Vol. II, p. 629.

⁹³ *Re Ross*, 140 U. S. 453, 11 Sup. Ct. 897, 35 L. ed. 581.

sibly in the five ports of China,⁹⁴ an action will lie against the consul if his order is void for want of jurisdiction.⁹⁵ It has been held that a consular court is a court of limited jurisdiction and that all the jurisdictional facts must be alleged in the plaintiff's libel, petition or other pleading, which otherwise will be insufficient.⁹⁶

§ 75. Jurisdiction and practice of the Commerce Court. Since the Commerce Court has been repealed, this section has been omitted from this edition.

§ 76. Jurisdiction of the Board of General Appraisers. The Payne Tariff Law of August 5, 1909, as amended October 3, 1913, contains the following provisions concerning the Board of General Appraisers of merchandise: "§ 12. That there shall be appointed by the President, by and with the advice and consent of the Senate, nine general appraisers of merchandise. Not more than five of such general appraisers shall be appointed from the same political party. They shall not be engaged in any other business, avocation, or employment. That the office of said general appraisers shall be at the port of New York, and three of them shall be on duty at that port daily as a board of general appraisers.

"All of the general appraisers of merchandise heretofore or hereafter appointed under the authority of said Act shall hold their office during good behavior, but may, after due hearing, be removed by the President for the following causes, and no other: Neglect of duty, malfeasance in office, or inefficiency. "That hereafter the salary of each of the general appraisers of merchandise shall be at the rate of nine thousand dollars per annum. "That the boards of general appraisers and the members thereof shall have and possess all the powers of a circuit court of the United States in preserving order, compelling the attendance of witnesses, and the production of evidence, and in punishing for contempt.

"All notices in writing to collectors of dissatisfaction of any

⁹⁴ See *Lange v. Benedict*, 73 N. Y. 12, 29 Am. Rep. 80.

⁹⁵ *Dainese v. Hale*, 91 U. S. 13, 23 L. ed. 190; *Secretary Seward in Pacific Mail S. S. Case*, Moore's Dig., August 18, 1868, § 265, Vol.

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⁹⁶ *Steamer Spark v. Lee Choi Chum*, 1 Sawyer, 713. For this subject generally, see Wharton's Dig., § 125, Vol. I, Moore's Dig., §§ 259-266, and the authorities therein cited.

decision thereof, as to the rate or amount of duties chargeable upon imported merchandise, including all dutiable costs and charges, and as to all fees and exactions of whatever character (except duties on tonnage), with the invoice and all papers and exhibits, shall be forwarded to the board of nine general appraisers of merchandise of New York to be by rule thereof assigned for hearing or determination, or both. The President of the United States shall designate one of the board of nine general appraisers of merchandise as president of said board and others in order to act in his absence. Said general appraisers of merchandise shall be divided into three boards of three members each, to be denominated respectively Board 1, Board 2, and Board 3. The president of the board shall assign three general appraisers to each of said boards and shall designate one member of each of said boards as chairman thereof, and such assignment or designation may be by him changed from time to time, and he may assign or designate all boards of three general appraisers where it is now or heretofore was provided by law that such might be assigned or designated by the Secretary of the Treasury. The president of the board shall be competent to sit as a member of any board or assign one or two other members thereto, in the absence of or inability of any one or two members of such board. Each of the boards of three general appraisers, or a majority thereof, shall have full power to hear and determine all cases and questions arising therein or assigned thereto; and the general board of nine general appraisers, each of the boards of three general appraisers and each of the general appraisers of merchandise, shall have all the jurisdiction and powers and proceed as now, heretofore, and herein provided. The said board of nine general appraisers shall have power to establish from time to time such rules of evidence, practice, and procedure, not inconsistent with the statutes, as may be deemed necessary for the conduct and uniformity of its proceedings and decisions and the proceedings and decisions of the boards of three thereof; and the production, care, and custody of samples and records of said board. The president of the board shall have control of the fiscal affairs and the clerical force of the board, make all recommendations for appointment, promotion, and otherwise affecting said clerical force; he may at any time before trial under the rules of said

board assign or reassign any case for hearing, determination, or both, and shall designate a general appraiser, or a board of general appraisers, and, if necessary, a clerk thereto, to proceed to any port within the jurisdiction of the United States for the purpose of hearing, or determining if authorized by law, causes assigned for hearing at such port, and shall cause to be prepared duly promulgated dockets therefor. No member of any of said boards shall sit to hear or decide any case on appeal in the decision of which he may have previously participated. The board of three general appraisers, or a majority of them, who decided the case, may, upon motion of either party made within thirty days next after their decision, grant a rehearing or retrial of said case when in their opinion the ends of justice may require it."

"The appraiser shall revise and correct the reports of the assistant appraisers as he may judge proper, and the appraiser, or at ports where there is no appraiser, the person acting as such, shall report to the collector his decision as to the value of the merchandise appraised. At ports where there is no appraiser the certificate of the customs officer to whom is committed the estimating and collection of duties, of the dutiable value of any merchandise required to be appraised, shall be deemed and taken to be the appraisement of such merchandise. If the collector shall deem the appraisement of any imported merchandise too low, he may, within sixty days thereafter, appeal to reappraisement, which shall be made by one of the general appraisers, or if the importer, owner, agent or consignee of such merchandise shall deem the appraisement, thereof, too high and shall have complied with the requirements of law with respect to the entry and appraisement of merchandise, he may within ten days thereafter appeal for reappraisement by giving notice thereof to the collector in writing. Such appeal shall be deemed to be finally abandoned and waived unless within two days from the date of filing thereof the person who filed such notice shall deposit with the collector of customs a fee of \$1 for each entry. Such fee shall be deposited and accounted for as miscellaneous receipts, and in case the appeal in connection with which such fee was deposited shall be finally sustained, in whole or in part, such fee shall be refunded to the importer, with the duties found to be collected in excess,

from the appropriation for the refund to importers of excess of deposits. The decision of the general appraiser in cases of reappraisement shall be final and conclusive as to the dutiable value of such merchandise against all parties interested therein, unless the importer, owner, consignee, or agent of the merchandise shall deem the reappraisement of the merchandise too high, and shall, within five days thereafter, give notice to the collector, in writing, of an appeal, or unless the collector shall deem the reappraisement of the merchandise too low, and shall within ten days thereafter appeal for reappraisement; in either case the collector shall transmit the invoice and all the papers appertaining thereto to the board of nine general appraisers, to be by rule thereof duly assigned for determination. In such cases the general appraiser and Boards of General Appraisers shall proceed by all reasonable ways and means in their power to ascertain, estimate, and determine the dutiable value of the imported merchandise, and in so doing may exercise both judicial and inquisitorial functions. In such cases the general appraisers and the Boards of General Appraisers shall give reasonable notice to the importer and the proper representative of the Government of the time and place of each and every hearing at which the parties or their attorneys shall have opportunity to introduce evidence and to hear and cross-examine the witnesses for the other party, and to inspect all samples and all documentary evidence or other papers offered. Affidavits of persons whose attendance can not be procured may be admitted in the discretion of the general appraiser or Board of General Appraisers. The decision of the appraiser, or the person acting as such (in case where no objection is made thereto, either by the collector or by the importer, owner, consignee, or agent), or the single general appraiser in case of no appeal, or of the board of three general appraisers, in all reappraisement cases, shall be final and conclusive against all parties and shall not be subject to review in any manner for any cause in any tribunal or court, and the collector or the person acting as such shall ascertain, fix, and liquidate the rate and amount of the duties to be paid on such merchandise, and the dutiable costs and charges thereon, according to law; and no reappraisement or re-reappraisement shall be considered invalid because of the absence of the merchandise or samples

thereof before the officer or officers making the same, where no party in interest had demanded the inspection of such merchandise or samples, and where the merchandise or samples were reasonably accessible for inspection."

"The decision of the collector as to the rate and amount of duties chargeable upon imported merchandise, or upon merchandise on which duty shall have been assessed including all dutiable costs and charges, and as to all fees and exactions of whatever character (except duties on tonnage), shall be final and conclusive against all persons interested therein, unless the owner, importer, consignee, or agent of such merchandise, or the person paying such fees, charges, and exactions other than duties, shall, within thirty days after but not before such ascertainment and liquidation of duties, as well in cases of merchandise entered in bond as for consumption, or within fifteen days after the payment of such fees, charges, and exactions, if dissatisfied with such decision, imposing a higher rate of duty, or a greater charge, fee or exaction, than he shall claim to be legally payable, file a protest or protest in writing with the collector, setting forth therein distinctly and specifically, and in respect to each entry or payment, the reasons for his objections thereto, and if the merchandise is entered for consumption shall pay the full amount of the duties and charges ascertained to be due thereon. Upon such notice and payment the collector shall transmit the invoice and all the papers and exhibits connected therewith to the board of nine general appraisers, for due assignment and determination as hereinbefore provided; such determination shall be final and conclusive upon all persons interested therein, and the record shall be transmitted to the proper collector or person acting as such, who shall liquidate the entry accordingly, except in cases where an application shall be filed in the United States Court of Customs Appeals within the time and in the manner provided for in this Act.

"The general appraisers, or any of them, are hereby authorized to administer oaths, and said general appraisers, the board of general appraisers, the local appraisers or the collectors, as the case may be, may cite to appear before them, and examine upon oath any owner, importer, agent, consignee, or other person touching any matter or thing which they, or

either of them, may deem material respecting any imported merchandise, then under consideration or previously imported within one year, in ascertaining the classification or dutiable value thereof, or the rate or amount of duty; and they, or either of them, may require the production of any letters, accounts, contracts, or invoices relating to said merchandise, and may require such testimony to be reduced to writing, and when so taken it shall be filed and preserved for use or reference until the final decision of the collector, appraiser, or said board of appraisers shall be made respecting the valuation or classification of said merchandise, as the case may be."

"If any person so cited to appear shall neglect or refuse to attend, or shall decline to answer, or shall refuse to answer in writing any interrogatories, and subscribe his name to his deposition, or to produce such papers when so required by a general appraiser, or a board of general appraisers, or a local appraiser or a collector, he shall be liable to a penalty of not less than twenty dollars nor more than \$500; and if such person be the owner, importer, or consignee, the appraisement which the general appraiser, or board of general appraisers, or local appraiser or collector, where there is no appraiser, may make of the merchandise shall be final and conclusive; and any person who shall willfully and corruptly swear falsely on an examination before any general appraiser, or board of general appraisers, or local appraiser or collector, shall be deemed guilty of perjury; and if he is the owner, importer, or consignee, the merchandise shall be forfeited, or the value thereof may be recovered from him."

"All decisions of the general appraisers and of the boards of general appraisers, respecting values and rates of duty, shall be preserved and filed, and shall be open to inspection under proper regulations to be prescribed by the Secretary of the Treasury. All decisions of the general appraisers shall be reported forthwith to the Secretary of the Treasury and to the board of general appraisers on duty at the port of New York, and the report to the board shall be accompanied, whenever practicable, by samples of the merchandise in question, and it shall be the duty of the said board, under the direction of the Secretary of the Treasury, to cause an abstract to be made and published of such decisions of the appraisers as

or he may deem important to be published either in full or if full publication shall not be requested by the secretary or by the board, then by an abstract containing a general description of the merchandise in question, and of the value and rate of duty fixed in each case, with reference, whenever practicable, by number or other designation, to samples deposited in the place of samples at New York, and such abstracts shall be issued from time to time, at least once in each week, for the information of customs officers and the public.

"No allowance shall be made in the estimation and liquidation of duties for shortage or non-importation caused by decay, destruction or injury to fruit or other perishable articles imported into the United States whereby their commercial value has been destroyed, unless under regulations prescribed by the Secretary of the Treasury. Proof to ascertain such destruction or non-importation shall be lodged with the collector of customs of the port where such merchandise has been landed, or the person acting as such, within ten days after the landing of such merchandise. The provisions hereof shall apply whether or not the merchandise has been entered, and whether or not the duties have been paid or secured to be paid, and whether or not a permit of delivery has been granted to the owner or consignee. Nor shall any allowance be made for damage, but the importers may within ten days after entry abandon to the United States all or any portion of goods, wares or merchandise of every description included in any invoice and be relieved from the payment of the duties on the portion so abandoned: Provided, That the portion so abandoned shall amount to ten per centum or more of the total value or quantity of the invoice. The right of abandonment herein provided for may be exercised whether the goods, wares or merchandise have been damaged or not, or whether or not the same have any commercial value. Provided further, That section twenty-eight hundred and ninety-nine of the Revised Statutes, relating to the return of packages unopened for appraisement, shall in no wise prohibit the right of importers to make all needful examinations to determine whether the right to abandon accrues, or whether by reason of total destruction there is a non-importation in whole or in part. All merchandise abandoned to the Government by the importers shall be delivered by the im-

porters thereof at such place within the port of arrival as the chief officer of customs may direct, and on the failure of the importers to comply with the direction of the collector or the chief officer of customs, as the case may be, the abandoned merchandise shall be disposed of by the customs authorities under such regulations as the Secretary of the Treasury may prescribe, at the expense of such importers. Where imported fruit or perishable goods have been condemned at the port of original entry within ten days after landing by health officers or other legally constituted authorities the importers or their agents shall, within twenty-four hours after such condemnation, lodge with the collector, or the person acting as collector, of said port, notice thereof in writing, together with an invoice description and the quantity of the articles condemned, their location, and the name of the vessel in which imported. Upon receipt of said notice the collector, or person acting as collector, shall at once cause an investigation and a report to be made in writing by at least two customs officers touching the identity and quantity of fruit or perishable goods condemned, and unless proof to ascertain the shortage or nonimportation of fruit or perishable goods shall have been lodged as herein required, or if the importer or his agent fails to notify the collector of such condemnation proceedings as herein provided, proof of such shortage or non-importation shall not be deemed established and no allowance shall be made in the liquidation of duties chargeable thereon.

“§ 23. That whenever it shall be shown to the satisfaction of the Secretary of the Treasury that, in any case of unascertained or estimated duties, or payments made upon appeal, more money has been paid to or deposited with a collector of customs than, as has been ascertained by final liquidation thereof, the law required to be paid or deposited, the Secretary of the Treasury shall direct the Treasurer to refund and pay the same out of any money in the Treasury not otherwise appropriated. The necessary moneys therefor are hereby appropriated, and this appropriation shall be deemed a permanent indefinite appropriation; and the Secretary of the Treasury is hereby authorized to correct manifest clerical errors in any entry or liquidation, for or against the United States, at any time within one year of the date of such entry, but not after-

wards: Provided, That the Secretary of the Treasury shall, in his annual report to Congress, give a detailed statement of the various sums of money refunded under the provisions of this Act or of any other Act of Congress relating to the revenue, together with copies of the rulings under which repayments were made.”¹

§ 77. Jurisdiction of the Court of Customs Appeals. The Court of Customs Appeals was created by the Payne Tariff Law of August 5, 1909.¹ It was continued by the Judicial Code which provides for the same as follows:

“§ 188. There shall be a United States Court of Customs Appeals, which shall consist of a presiding judge and four associate judges, each of whom shall be appointed by the President, by and with the advice and consent of the Senate, and shall receive a salary of eight thousand five hundred * dollars a year. The presiding judge shall be so designated in the order of appointment and in the commission issued to him by the President; and the associate judges shall have precedence according to the date of their commissions. Any three members of said court shall constitute a quorum, and the concurrence of three members shall be necessary to any decision thereof. In case of a vacancy or of the temporary inability or disqualification, for any reason, of one or two of the judges of said court, the President may, upon the request of the presiding judge of said court, designate any qualified United States circuit or district judge or judges to act in his or their place; and such circuit or district judges shall be duly qualified to so act.

“§ 189. The said court of Customs Appeals shall always be open for the transaction of business, and sessions thereof may, in the discretion of the court, be held in the several judicial circuits, and at such places as said court may from time to time designate.”

“§ 194. The said Court of Customs Appeals shall be a court of record, with jurisdiction as in this chapter established and limited. It shall prescribe the form and style of its seal, and

* 76. 136 St. at L. 11, 38 St. at L. 186-188, Comp. St. §§ 5594-5597.

§ 77. 136 St. at L. 11, 105. * Act of Feb. 25, 1919.

the form of its writs and other process and procedure, and exercise such powers conferred by law as may be conformable and necessary to the exercise of its jurisdiction. It shall have power to establish all rules and regulations for the conduct of the business of the court, and as may be needful for the uniformity of decisions within its jurisdiction as conferred by law. It shall have power to review any decision or matter within its jurisdiction, and may affirm, modify, or reverse the same and remand the case with such orders as may seem to it proper in the premises, which shall be executed accordingly.

“§ 195. The Court of Customs Appeals established by this chapter shall exercise exclusive appellate jurisdiction to review by appeal, as herein provided, final decisions by a Board of General Appraisers in all cases as to the construction of the law and the facts respecting the classification of merchandise and the rate of duty imposed thereon under such classification, and the fees and charges connected therewith, and all appealable questions as to the jurisdiction of said board, and all appealable questions as to the laws and regulations governing the collection of the customs revenues; and the judgments and decrees of said Court of Customs Appeals shall be final in all such cases. Provided, however, That in any case in which the judgment or decree of the Court of Customs Appeals is made final by the provisions of this title, it shall be competent for the Supreme Court, upon the petition of either party, filed within sixty days next after the issue by the Court of Customs Appeals of its mandate upon decision, in any case in which there is drawn in question the construction of the Constitution of the United States, or any part thereof, or of any treaty made pursuant thereto, or in any other case when the Attorney General of the United States shall before the decision of the Court of Customs Appeals is rendered, file with the court a certificate to the effect that the case is of such importance as to render expedient its review by the Supreme Court, to require, by certiorari or otherwise, such case to be certified to the Supreme Court for its review and determination, with the same power and authority in the case as if it had been carried by appeal or writ of error to the Supreme Court: And provided further, That this Act shall not apply to any case involving only the construction of section one, or any portion thereof, of an Act

entitled 'An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes,' approved August fifth, nineteen hundred and nine, nor to any case involving the construction of section two of an Act entitled 'An Act to promote reciprocal trade relations with the Dominion of Canada, and for other purposes,' approved July twenty-sixth, nineteen hundred and eleven.³

"§ 196. After the organization of said court, no appeal shall be taken or allowed from any Board of United States General Appraisers to any other court, and no appellate jurisdiction shall thereafter be exercised or allowed by any other courts in cases decided by said Board of United States General Appraisers; but all appeals allowed by law from such Board of General Appraisers shall be subject to review only in the Court of Customs Appeals hereby established, according to the provisions of this chapter: *Provided*, That nothing in this chapter shall be deemed to deprive the Supreme Court of the United States of jurisdiction to hear and determine all customs cases which have heretofore been certified to said court from the United States circuit courts of appeals on applications for writs of certiorari or otherwise, nor to review by writ of certiorari any customs case heretofore decided or now pending and hereafter decided by any circuit court of appeals, provided application for said writ be made within six months after August fifth, nineteen hundred and nine; *Provided further*, That all customs cases decided by a circuit or district court of the United States or a court of a Territory of the United States prior to said date above mentioned, and which have not been removed from said courts by appeal or writ of error, and all such cases heretofore submitted for decision in said courts and remaining undecided may be reviewed on appeal at the instance of either party by the United States Court of Customs Appeals, provided such appeal be taken within one year from the date of the entry of the order, judgment, or decrees sought to be reviewed."⁴

"§ 198. If the importer, owner, consignee, or agent of any imported merchandise, or the collector or Secretary of the Treas-

³ 36 St. at L. 91, 105, 38 St. at L. 703, Comp. St. § 1186. ⁴ 36 St. at L. 1087.

ury, shall be dissatisfied with the decision of the Board of General Appraisers as to the construction of the law and the facts respecting the classification of such merchandise, and the rate of duty imposed thereon under such classification, or with any other appealable decision of said board, they, or either of them, may, within sixty days next after the entry of such decree or judgment, and not afterwards, apply to the Court of Customs Appeals for a review of the questions of law and fact involved in such decision: *Provided*, That in Alaska and in the insular and other outside possessions of the United States ninety days shall be allowed for making such application to the Court of Customs Appeals. Such application shall be made by filing in the office of the clerk of said court a concise statement of errors of law and fact complained of; and a copy of such statement shall be served on the collector, or on the importer, owner, consignee, or agent, as the case may be. Thereupon the court shall immediately order the Board of General Appraisers to transmit to said court the record and evidence taken by them, together with the certified statement of the facts involved in the case and their decision thereon; and all the evidence taken by and before said board shall be competent evidence before said Court of Customs Appeals. The decision of said Court of Customs Appeals shall be final, and such cause shall be remanded to said Board of General Appraisers for further proceedings to be taken in pursuance of such determination.

“§ 199. Immediately upon receipt of any record transmitted to said court for determination the clerk thereof shall place the same upon the calendar for hearing and submission, and such calendar shall be called and all cases thereupon submitted, except for good cause shown, at least once every sixty days: *Provided*, That such calendar need not be called during the months of July and August of any Year.”⁴

Prior to the creation of this court, the questions of law and fact involved in the decisions of the Board of General Appraisers were reviewed by the Circuit Court of the United States within the district in which the matter arose.⁵ No appeal would lie from the

⁴ 36 St. at L., 91, 105, 1146. ville Pub. W. Co. v. Collector, 49

⁵ 26 St. at L., ch. 407, § 15, p. Fed. 561.
131; 35 St. at L. 403. See Louis-

decision of the Board of General Appraisers ascertaining and fixing the dutiable value of goods when the board had acted regularly and without fraud or other misunderstanding.⁶ The return of the board was compared to a master's report.⁷ Where, on review by a Circuit Court of a decision of the Board of General Appraisers, the record returned by the Board was defective by reason of the loss of the evidence on which the Board's findings were based, it was held that, no other evidence being presented, it must be conclusively presumed that the findings by the Board were proper and justifiable.⁸ The Board may make a different finding from the local appraiser without taking additional evidence.⁹ In a case where the only fact certified by the appraisers was that "silk is the component material of chief value," it was held that the return should be sent back for a further statement. Judge Lacombe then said: "Had the board also certified that the articles were correctly described in the invoice or entry, or in the appraisers' return, there might be sufficient; but, as it is, there is nothing to show what the articles really are."¹⁰ In a case where the return stated that "all the facts involved in said case, so far as ascertained by the board, are fully stated in [a certain opinion] and decision annexed thereto; and in such opinion it was stated, that inasmuch as some of the questions raised by protest were "understood to be now pending in the United States courts, [they] do not deem it advisable to enter into the merits of the same, but affirmed the [collector's] assessment of dues;" a further return was ordered.¹¹ A single day's delay after the period of thirty days allowed for filing the application compelled the dismissal of the appeal although the parties have gone to trial in the Circuit Court upon the merits.¹² The provision in the former Act, that upon an appeal to the Circuit Court the board should return "the record and the evidence taken before them,"

⁶ *Passavant v. U. S.*, 148 U. S. 214, 37 L. ed. 426.

⁷ *Re Van Blankensteyn*, C. C. A., 56 Fed. 474.

⁸ *Schoellkopf, Hartford & MacLagan v. U. S.*, 147 Fed. 855.

⁹ *U. S. v. Strauss Bros. & Co.*, 128 Fed. 473.

¹⁰ *Re Dieckerhoff*, 45 Fed. 235.

¹¹ *Re Blumlein*, 45 Fed. 236; *Re Downing*, 45 Fed. 412.

¹² *Carriere & Son v. U. S.*, 163 Fed. 1009.

was held not to require the return of evidence which was excluded.¹³ Where a party wished to have the court upon appeal review evidence that had been excluded, he was required either to except below to the ruling excluding the same and bring the matter up by assignments of error or else offer it as additional evidence upon the appeal.¹⁴ An importer who had offered evidence before the board was not thereby precluded from introducing new evidence in the Circuit Court upon an appeal from the board's decision.¹⁵ Where no new evidence was offered by the importers before the Board of General Appraisers, it was held that they could offer none before the Circuit Court.¹⁶

§ 77a. Jurisdiction of the Interstate Commerce Commission. The Interstate Commerce Act is enforced primarily by the Interstate Commerce Commission. The orders of the Interstate Commerce Commission are enforced by the courts. The courts have also power to review, to set aside, and to restrain the enforcement of the orders of the Commission in proper cases. The Interstate Commerce Commission was created by the Act of February 4, 1887, which has since been repeatedly amended.

¹³ *Harris v. U. S.*, 177 Fed. 475.

¹⁴ *Ibid.*

¹⁵ *Wm. Wolff & Co. v. U. S.*, 168 Fed. 970.

¹⁶ *William F. Allen & Co. v. U. S.*, 127 Fed. 777. See also *U. S. v. Klingenberg*, 153 U. S. 93, 38 L. ed. 647; *U. S. v. Jahn*, 155 U. S. 109, 39 L. ed. 87; *U. S. v. Lies*, 170 U. S. 628, 42 L. ed. 1170; *Earnshaw v. U. S.*, 146 U. S. 60, 36 L. ed. 887; *Apgar v. U. S.*, C. C. A., 78 Fed. 332; *Marine v. Lyon*, C. C. A., 5 Fed. 992; *U. S. v. Davis*, C. C. A., 54 Fed. 147; *Re Marquard*, 57 Fed. 189; *U. S. v. Rosenwald*, C. C. A., 67 Fed. 323; *White v. U. S.*, C. C. A., 72 Fed. 251; *U. S. v. Lies*, 74 Fed. 546; *U. S. v. Kenworthy*, C. C. A., 668 Fed. 904; "Zante Currants," 73 Fed. 183; *Sang Lung v. Jackson*, 85 Fed. 502;

Foster v. Vocke, 60 Fed. 745; *Re Chase*, 50 Fed. 695; *Re Wyman*, 45 Fed. 469; *Re Sternbach*, 44 Fed. 413; *Re Sherman*, 49 Fed. 224; s. c., *sub nom. Re Collector of Customs*, C. C. A., 55 Fed. 276; *Re Kursheedt Mfg. Co.*, 49 Fed. 633; s. c., C. C. A., 54 Fed. 159; *Re Muser*, 49 Fed. 831; *Re Crowley*, 50 Fed. 465; s. c., C. C. A., 55 Fed. 283; *Re Bache*, 54 Fed. 371; s. c., *U. S. v. Bache*, C. C. A., 59 Fed. 762; *Mexican Onyx & Tr. Co. v. U. S.*, 66 Fed. 732; *Re Buffalo Natural Fuel Co.*, 73 Fed. 191; s. c., *U. S. v. Buffalo N. G. F. Co.*, C. C. A., 78 Fed. 110; *Stern v. U. S.*, 77 Fed. 607; *Lesser v. U. S.*, 89 Fed. 197; *U. S. v. Hahn*, 91 Fed. 755; *Morris E. & A. Ex. Co. v. U. S.*, 94 Fed. 6643; *Re F. W. Myers & Co.*, 123 Fed. 952.

The latest amendments are contained in the Transportation Act of February 28, 1920.

The Interstate Commerce Commission consists of eleven members with terms of seven years, except that the terms of those appointed to fill vacancies, expires at the same time as the original term of the commissioners whom they succeed. Each of them receives as compensation \$12,000 a year. Not more than three of the commissioners can be appointed from the same political party. "Any commissioner may be removed by the President for inefficiency neglect of duty, or malfeasance in office. No person in the employ of or holding any official relation to any common carrier subject to the provisions of this act, or owning stock or bonds thereof, or who is in any manner pecuniarily interested therein, shall enter upon the duties of or hold such office. Said Commissioners shall not engage in any other business, vocation, or employment. No vacancy shall in the Commission impair the right of the remaining Commissioners to exercise all the powers of the Commission."¹

The statute provides: "The Commission hereby created shall have authority to inquire into the management of the business of all common carriers subject to the provisions of this act, and shall keep itself informed as to the manner and method in which the same is conducted, and shall have the right to obtain from such common carriers full and complete information necessary to enable the Commission to perform the duties and carry out the objects for which it was created; and the Commission is hereby authorized and required to execute and enforce the provisions of this act:

"(1) The provisions of this Act shall apply to common carriers engaged in—

"(a) The transportation of passengers or property wholly by railroad, or partly by railroad and partly by water when both are used under a common control, management, or arrangement for a continuous carriage or shipment; or

"(b) The transportation of oil or other commodity, except

§ 77a. ¹ Act of Feb. 4, 1887, ch. 595, as amended Aug. 9, 1917, ch. 104. § 11, 24 St. at L., 383, Comp. 50, 40 St. at L. 270, as amended St. § 8575; Act of June 29, 1906, Act of Feb. 28, 1920, Comp. St. ch. 3591, adding § 24, 34 St. at L. § 8396.

water and except natural or artificial gas, by pipe line, or partly by pipe line and partly by railroad or by water; or

“(c) The transmission of intelligence by wire or wireless;— from one State or Territory of the United States, or the District of Columbia, to any other State or Territory of the United States, or the District of Columbia, or from one place in a Territory to another place in the same Territory, or from any place in the United States through a foreign country to any other place in the United States, or from or to any place in the United States to or from a foreign country, but only in so far as such transportation or transmission takes place within the United States.

“(2) The provisions of this Act shall also apply to such transportation of passengers and property and transmission of intelligence, but only in so far as such transportation or transmission takes place within the United States, but shall not apply—

“(a) To the transportation of passengers or property, or to the receiving, delivering, storage, or handling of property, wholly within one State and not shipped to or from a foreign country from or to any place in the United States as aforesaid;

“(b) To the transmission of intelligence by wire or wireless wholly within one State and not transmitted to or from a foreign country from or to any place in the United States as aforesaid; or

“(c) To the transportation of passengers or property by a carrier by water where such transportation would not be subject to the provisions of this act except for the fact that such carrier absorbs, out of its port-to-port water rates or out of its proportional through rates, any switching, terminal, lighterage, car rental, trackage, handling, or other charges by a rail carrier for services within the switching, drayage, lighterage, or corporate limits of a port terminal or district.

“(3) The term ‘common carrier’ as used in this Act shall include all pipe-line companies; telegraph, telephone, and cable companies operating by wire or wireless; express companies; sleeping-car companies; and all persons, natural or artificial, engaged in such transportation or transmission as aforesaid as common carriers for hire. Wherever the word ‘carrier’ is used in this Act it shall be held to mean ‘common carrier.’ The

term 'railroad' as used in this Act shall include all bridges, car floats, lighters, and ferries used by or operated in connection with any railroad, and also all the road in use by any common carrier operating a railroad, whether owned or operated under a contract, agreement, or lease, and also all switches, spurs, tracks, terminals, and terminal facilities of every kind used or necessary in the transportation of the persons or property designated herein, including all freight depots, yards, and grounds, used or necessary in the transportation or delivery of any such property. The term 'transportation' as used in this Act shall include locomotives, cars, and other vehicles, vessels, and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported. The term 'transmission' as used in this Act shall include the transmission of intelligence through the application of electrical energy or other use of electricity, whether by means of wire, cable, radio apparatus, or other wire or wireless conductors or appliances, and all instrumentalities and facilities for and services in connection with the receipt, forwarding, and delivery of messages, communications, or other intelligence so transmitted, hereinafter also collectively called messages.

"(4) It shall be the duty of every common carrier subject to this Act engaged in the transportation of passengers or property to provide and furnish such transportation upon reasonable request therefor, and to establish through routes and just and reasonable rates, fares, and charges applicable thereto, and to provide reasonable facilities for operating through routes and to make reasonable rules and regulations with respect to the operation of through routes, and providing for reasonable compensation to those entitled thereto; and in case of joint rates, fares, or charges, to establish just, reasonable, and equitable divisions thereof as between the carriers subject to this Act participating therein which shall not unduly prefer or prejudice any of such participating carriers.

"(5) All charges made for any service rendered or to be rendered in the transportation of passengers or property or

in the transmission of intelligence by wire or wireless as aforesaid, or in connection therewith, shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful: Provided, That messages by wire or wireless subject to the provisions of this Act may be classified into day, night, repeated, unpeated, letter, commercial, press, Government, and such other classes as are just and reasonable, and different rates may be charged for the different classes of messages: And provided further, That nothing in this Act shall be construed to prevent telephone, telegraph, and cable companies from entering into contracts with common carriers for the exchange of services.

“(6) It is hereby made the duty of all common carriers subject to the provisions of this Act to establish, observe, and enforce just and reasonable classifications of property for transportation, with reference to which rates, tariffs, regulations, or practices are or may be made or prescribed, and just and reasonable regulations and practices affecting classifications, rates, or tariffs, the issuance, form, and substance of tickets, receipts, and bills of lading, the manner and method of presenting, marking, packing, and delivering property for transportation, the facilities for transportation, the carrying of personal, sample, and excess baggage, and all other matters relating to or connected with the receiving, handling, transporting, storing, and delivery of property subject to the provisions of this Act which may be necessary or proper to secure the safe and prompt receipt, handling, transportation, and delivery of property subject to the provisions of this Act upon just and reasonable terms, and every unjust and unreasonable classification, regulation, and practice is prohibited and declared to be unlawful.

“(7) No common carrier subject to the provisions of this Act, shall, after January first, nineteen hundred and seven, directly or indirectly, issue or give any interstate free ticket, free pass, or free transportation for passengers, except to its employees and their families, its officers, agents, surgeons, physicians, and attorneys at law; to ministers of religion, traveling secretaries of railroad Young Men's Christian Associations, inmates of hospitals and charitable and eleemosynary institutions, and persons exclusively engaged in charitable and eleemosynary

work; to indigent, destitute, and homeless persons, and to such persons when transported by charitable societies or hospitals, and the necessary agents employed in such transportation; to inmates of the National Homes or State Homes for Disabled Volunteer Soldiers, and of Soldiers' and Sailors' Homes, including those about to enter and those returning home after discharge; to necessary care takers of live stock, poultry, milk, and fruit; to employees on sleeping cars, express cars, and to linemen of telegraph and telephone companies; to Railway Mail Service employees, post-office inspectors, customs inspectors, and immigration inspectors; to newsboys on trains, baggage agents, witnesses attending any legal investigation in which the common carrier is interested, persons injured in wrecks and physicians and nurses attending such persons: Provided, That this provision shall not be construed to prohibit the interchange of passes for the officers, agents, and employees of common carriers, and their families; nor to prohibit any common carrier from carrying passengers free with the object of providing relief in cases of general epidemic, pestilence, or other calamitous visitation: And provided further, That this provision shall not be construed to prohibit the privilege of passes or franks, or the exchange thereof with each other, for the officers, agents, employees, and their families of such telegraph, telephone, and cable lines, and the officers, agents, employees and their families of other common carriers subject to the provisions of this Act: Provided further, That the term 'employees' as used in this paragraph shall include furloughed, pensioned, and superannuated employees, persons who have become disabled or infirm in the service of any such common carrier, and the remains of a person killed in the employment of a carrier and ex-employees traveling for the purpose of entering the service of any such common carrier; and the term 'families' as used in this paragraph shall include the families of those persons named in this proviso, also the families of persons killed, and the widows during widowhood and minor children during minority of persons who died, while in the service of any such common carrier. Any common carrier violating this provision shall be deemed guilty of a misdemeanor, and for each offense, on conviction, shall pay to the United States a penalty of not less than one hundred dollars nor more than two thousand dollars, and any

person, other than the persons excepted in this provision, who uses any such interstate free ticket, free pass, or free transportation shall be subject to a like penalty. Jurisdiction of offenses under this provision shall be the same as that provided for offenses in an Act entitled 'An Act to further regulate commerce with foreign nations and among the States,' approved February nineteenth, nineteen hundred and three, and any amendment thereof.

"(8) From and after May first, nineteen hundred and eight, it shall be unlawful for any railroad company to transport from any State, Territory, or the District of Columbia, to any other State, Territory, or the District of Columbia, or to any foreign country, any article or commodity, other than timber and the manufactured products thereof, manufactured, mined, or produced by it, or under its authority, or which it may own in whole or in part, or in which it may have any interest, direct or indirect, except such articles or commodities as may be necessary and intended for its use in the conduct of its business as a common carrier.

"(9) Any common carrier subject to the provisions of this Act, upon application of any lateral, branch line of railroad, or of any shipper tendering interstate traffic for transportation, shall construct, maintain, and operate upon reasonable terms a switch connection with any such lateral, branch line of railroad, or private side track which may be constructed to connect with its railroad, where such connection is reasonably practicable and can be put in with safety and will furnish sufficient business to justify the construction and maintenance of the same; and shall furnish cars for the movement of such traffic to the best of its ability without discrimination in favor of or against any such shipper. If any common carrier shall fail to install and operate any such switch or connection as aforesaid, on application therefor in writing by any shipper or owner of such lateral, branch line of railroad, such shipper or owner of such lateral, branch line of railroad may make complaint to the commission, as provided in section thirteen of this Act, and the commission shall hear and investigate the same and shall determine as to the safety and practicability thereof and justification and reasonable compensation therefor, and the commission may make an order, as provided in section fifteen of

this Act, directing the common carrier to comply with the provisions of this section in accordance with such order, and such order shall be enforced as hereinafter provided for the enforcement of all other orders by the commission, other than orders for the payment of money.

“(10) The term ‘car service’ in this Act shall include the use, control, supply, movement, distribution, exchange, interchange, and return of locomotives, cars, and other vehicles used in the transportation of property, including special types of equipment, and the supply of trains, by any carrier by railroad subject to this Act.

“(11) It shall be the duty of every carrier by railroad subject to this Act to furnish safe and adequate car service and to establish, observe, and enforce just and reasonable rules, regulations, and practices with respect to car service; and every unjust and unreasonable rule, regulation, and practice with respect to car service is prohibited and declared to be unlawful.

“(12) It shall also be the duty of every carrier by railroad to make just and reasonable distribution of cars for transportation of coal among the coal mines served by it, whether located upon its line or lines or customarily dependent upon it for car supply. During any period when the supply of cars available for such service does not equal the requirements of such mines it shall be the duty of the carrier to maintain and apply just and reasonable ratings of such mines and to count each and every car furnished to or used by any such mine for transportation of coal against the mine. Failure or refusal so to do shall be unlawful, and in respect of each car not so counted shall be deemed a separate offense, and the carrier, receiver, or operating trustee so failing or refusing shall forfeit to the United States the sum of \$100 for each offense, which may be recovered in a civil action brought by the United States.

“(13) The Commission is hereby authorized by general or special orders to require all carriers by railroad subject to this Act, or any of them, to file with it from time to time their rules and regulations with respect to car service, and the Commission may, in its discretion, direct that such rules and regulations shall be incorporated in their schedules showing rates, fares, and charges for transportation, and be subject to any or all of the provisions of this Act relating thereto.

“(14) The Commission may, after hearing, on a complaint or upon its own initiative without complaint, establish reasonable rules, regulations, and practices with respect to car service by carriers by railroad subject to this Act, including the compensation to be paid for the use of any locomotive, car, or other vehicle not owned by the carrier using it, and the penalties or other sanctions for nonobservance of such rules, regulations or practices.

“(15) Whenever the Commission is of opinion that shortage of equipment, congestion of traffic, or other emergency requiring immediate action exists in any section of the country, the Commission shall have, and it is hereby given, authority, either upon complaint or upon its own initiative without complaint, at once, if it so orders, without answer or other formal pleading by the interested carrier or carriers, and with or without notice, hearing, or the making or filing of a report, according as the Commission may determine: (a) to suspend the operation of any or all rules, regulations, or practices then established with respect to car service for such time as may be determined by the Commission; (b) to make such just and reasonable directions with respect to car service without regard to the ownership as between carriers of locomotives, cars, and other vehicles, during such emergency as in its opinion will best promote the service in the interest of the public and the commerce of the people, upon such terms of compensation as between the carriers as they may agree upon, or, in the event of their disagreement, as the Commission may after subsequent hearing find to be just and reasonable; (c) to require such joint or common use of terminals, including main-line track or tracks for a reasonable distance outside of such terminals, as in its opinion will best meet the emergency and serve the public interest, and upon such terms as between the carriers as they may agree upon, or, in the event of their disagreement, as the Commission may after subsequent hearing find to be just and reasonable; and (d) to give directions for preference or priority in transportation, embargoes, or movement of traffic under permits, at such time and for such periods as it may determine, and to modify, change, suspend, or annul them. In time of war or threatened war the President may certify to the Commission that it is essential to the national defense and security

that certain traffic shall have preference or priority in transportation, and the Commission shall, under the power herein conferred, direct that such preference or priority be afforded.

“(16) Whenever the Commission is of opinion that any carrier by railroad subject to this Act is for any reason unable to transport the traffic offered it so as properly to serve the public, it may, upon the same procedure as provided in paragraph (15), make such just and reasonable directions with respect to the handling, routing, and movement of the traffic of such carrier and its distribution over other lines of roads, as in the opinion of the Commission will best promote the service in the interest of the public and the commerce of the people, and upon such terms as between the carriers as they may agree upon, or, in the event of their disagreement, as the Commission may after subsequent hearing find to be just and reasonable.

“(17) The directions of the Commission as to car service and to the matters referred to in paragraph (15) and (16) may be made through and by such agents or agencies as the Commission shall designate and appoint for that purpose. It shall be the duty of all carriers by railroad subject to this Act, and of their officers, agents, and employees, to obey strictly and conform promptly to such orders or directions of the Commission, and in case of failure or refusal on the part of any carrier, receiver, or operating trustee to comply with any such order or direction such carrier, receiver, or trustee shall be liable to a penalty of not less than \$100 nor more than \$500 for each offense and \$50 for each and every day of the continuance of such offense, which shall accrue to the United States and may be recovered in a civil action brought by the United States: Provided, however, That nothing in this Act shall impair or affect the right of a State, in the exercise of its police power, to require just and reasonable freight and passenger service for intrastate business, except in so far as such requirement is inconsistent with any lawful order of the Commission made under the provisions of this Act.

“(18) After ninety days after this paragraph takes effect no carrier by railroad subject to this Act shall undertake the extension of its line of railroad, or the construction of a new line of railroad, or shall acquire or operate any line of railroad, or extension thereof, or shall engage in transportation

under this Act over or by means of such additional or extended line or railroad, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line of railroad, and no carrier by railroad subject to this Act shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity permit of such abandonment.

“(19) The application for and issuance of any such certificate shall be under such rules and regulations as to hearings and other matters as the Commission may from time to time prescribe, and the provisions of this Act shall apply to all such proceedings. Upon receipt of any application for such certificate the Commission shall cause notice thereof to be given to and a copy filed with the governor of each State in which such additional or extended line of railroad is proposed to be constructed or operated, or all or any portion of a line of railroad, or the operation thereof, is proposed to be abandoned, with the right to be heard as hereinafter provided with respect to the hearing of complaints or the issuance of securities; and said notice shall also be published for three consecutive weeks in some newspaper of general circulation in each county in or through which said line of railroad is constructed or operates.

“(20) The Commission shall have power to issue such certificate as prayed for, or to refuse to issue it, or to issue it for a portion or portions of a line of railroad, or extension thereof, described in the application, or for the partial exercise only of such right or privilege, and may attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require. From and after issuance of such certificate, and not before, the carrier by railroad may, without securing approval other than such certificate, comply with the terms and conditions contained in or attached to the issuance of such certificate and proceed with the construction, operation, or abandonment covered thereby. Any construction, operation, or abandonment contrary to the provisions of this paragraph or of paragraphs (18) and (19) of this section may be enjoined by any court of competent ju-

risdiction at the suit of the United States, the Commission, any commission or regulating body of the State or States affected, or any party in interest; and any carrier which, or any director, officer, receiver, operating trustee, lessee, agent, or person, acting for or employed by such carrier, who knowingly authorizes, consents to, or permits any violation of the provisions of this paragraph or of paragraph (18) of this section, shall upon conviction thereof be punished by a fine of not more than \$5,000 or by imprisonment for not more than three years, or both.

“(21) The Commission may, after hearing, in a proceeding upon complaint or upon its own initiative without complaint, authorize or require by order any carrier by railroad subject to this Act, party to such proceeding, to provide itself with safe and adequate facilities for performing as a common carrier its car service as that term is used in this Act, and to extend its line or lines: Provided, That no such authorization or order shall be made unless the Commission finds, as to such extension, that it is reasonably required in the interest of public convenience and necessity, or as to such extension or facilities that the expense involved therein will not impair the ability of the carrier to perform its duty to the public. Any carrier subject to this Act which refuses or neglects to comply with any order of the Commission made in pursuance of this paragraph shall be liable to a penalty of \$100 for each day during which such refusal or neglect continues, which shall accrue to the United States and may be recovered in a civil action brought by the United States.

“(22) The authority of the Commission conferred by paragraphs (18) to (21), both inclusive, shall not extend to the construction or abandonment of spur, industrial, team, switching or side tracks, located or to be located wholly within one State, or of street, suburban, or interurban electric railways, which are not operated as a part or parts of a general steam railroad system of transportation.

“For the transportation of persons or property in carrying out the orders and directions of the President,” during the war with Germany, “just and reasonable rates shall be fixed by the Interstate Commerce Commission; and if the transportation be for the Government of the United States, it shall be paid

for currently or monthly by the Secretary of the Treasury out of any funds not otherwise appropriated. Any carrier complying with any such order or direction for preference or priority herein authorized shall be exempt from any and all provisions in existing law imposing civil or criminal pains, penalties, obligations, or liabilities upon carriers by reason of giving preference or priority in compliance with such order or direction.”²

“If any common carrier subject to the provisions of this Act shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property or the transmission of intelligence, subject to the provisions of this Act, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation or transmission of a like kind of traffic or message under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful.”³

“(1) It shall be unlawful for any common carrier subject to the provisions of this Act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

“(2) From and after July 1, 1920, no carrier by railroad subject to the provisions of this Act shall deliver or relinquish possession at destination of any freight transported by it until all tariff rates and charges thereon have been paid, except under

² Act of February 4, 1887, ch. 104, § 1, 24 St. at L. 379, as amended June 29, 1906, ch. 3591, 34 St. at L. 584; April 13, 1908, ch. 143, 35 St. at L. 60, June 18, 1910, ch. 309, 36 St. at L. 545, May 29, 1918, ch. 23, 40 St. at L. 101;

August 10, 1917, ch. 51, 40 St. at L. 272, Feb. 28, 1920, §§ 400-403, Comp. St. § 8563.

³ Ibid., § 2, 24 St. at L. 379, as amended Feb. 28, 1920, § 404, Comp. St. § 8564.

such rules and regulations as the Commission may from time to time prescribe to assure prompt payment of all such rates and charges and to prevent unjust discrimination: Provided, That the provisions of this paragraph shall not be construed to prohibit any carrier from extending credit in connection with rates and charges on freight transported for the United States, for any department, bureau, or agency thereof, or for any State or Territory or political subdivision thereof, or for the District of Columbia.

“(3) All carriers, engaged in the transportation of passengers or property, subject to the provisions of this Act, shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding, and delivering of passengers or property to and from their several lines and those connecting therewith, and shall not discriminate in their rates, fares, and charges between such connecting lines, or unduly prejudice any such connecting line in the distribution of traffic that is not specifically routed by the shipper.

“(4) If the Commission finds it to be in the public interest and to be practicable, without substantially impairing the ability of a carrier owning or entitled to the enjoyment of terminal facilities to handle its own business, it shall have power to require the use of any such terminal facilities, including main line track or tracks for a reasonable distance outside of such terminal, of any carrier, by another carrier or other carriers, on such terms and for such compensation as the carriers affected may agree upon, or, in the event of a failure to agree, as the Commission may fix as just and reasonable for the use so required, to be ascertained on the principle controlling compensation in condemnation proceedings. Such compensation shall be paid or adequately secured before the enjoyment of the use may be commenced. If under this paragraph the use of such terminal facilities of any carrier is required to be given to another carrier or other carriers, and the carrier whose terminal facilities are required to be so used is not satisfied with the terms fixed for such use, or if the amount of compensation so fixed is not duly and promptly paid, the carrier whose terminal facilities have thus been required to be given to another carrier or other carriers shall be entitled to recover, by suit or action

against such other carrier or carriers, proper damages for any injuries sustained by it as the result of compliance with such requirement, or just compensation for such use, or both, as the case may be.”⁴

“(1) It shall be unlawful for any common carrier subject to the provisions of this Act to charge or receive any greater compensation in the aggregate for the transportation of passengers, or of like kind of property, for a shorter than for a longer distance over the same line or route in the same direction, the shorter being included within the longer distance, or to charge any greater compensation as a through rate than the aggregate of the intermediate rates subject to the provisions of this Act, but this shall not be construed as authorizing any common carrier within the terms of this Act to charge or receive as great compensation for a shorter as for a longer distance: Provided, That upon application to the Commission such common carrier may in special cases, after investigation, be authorized by the Commission to charge less for longer than for shorter distances for the transportation of passengers or property; and the Commission may from time to time prescribe the extent to which such designated common carrier may be relieved from the operation of this section; but in exercising the authority conferred upon it in this proviso the Commission shall not permit the establishment of any charge to or from the more distant point that is not reasonably compensatory for the service performed; and if a circuitous rail line or route is, because of such circuitry, granted authority to meet the charges of a more direct line or route to or from competitive points and to maintain higher charges to or from intermediate points on its line, the authority shall not include intermediate points as to which the haul of the petitioning line or route is not longer than that of the direct line or route between the competitive points; and no such authorization shall be granted on account of merely potential water competition not actually in existence: And provided further, That rates, fares, or charges existing at the time of the passage of this amendatory Act by virtue of orders of the Commission or as to which application has theretofore

⁴ Ibid., § 3, 24 St. at L. 380, as amended Feb. 28, 1920, § 405, Comp. St. § 8565.

been filed with the Commission and not yet acted upon, shall not be required to be changed by reason of the provisions of this section until the further order of or a determination by the Commission.

“(2) Wherever a carrier by railroad shall in competition with a water route or routes reduce the rates on the carriage of any species of freight to or from competitive points it shall not be permitted to increase such rates unless after hearing by the Commission it shall be found that such proposed increase rests upon changed conditions other than the elimination of water competition.”⁵

“(1) Except upon specific approval by order of the Commission as in this section provided, and except as provided in paragraph (16) of section 1 of this Act, it shall be unlawful for any common carrier subject to this Act to enter into any contract, agreement, or combination with any other common carrier or carriers for the pooling of freights of different and competing railroads, or to divide between them the aggregate or net proceeds of the earnings of such railroads, or any portion thereof; and in any case of an agreement for the pooling of freights as aforesaid each day of its continuance shall be deemed a separate offense: Provided, That whenever the Commission is of opinion, after hearing upon application of any carrier or carriers engaged in the transportation of passengers or property subject to this Act, or upon its own initiative, that the division of their traffic or earnings, to the extent indicated by the Commission, will be in the interest of better service to the public, or economy in operation, and will not unduly restrain competition, the Commission shall have authority by order to approve and authorize, if assented to by all the carriers involved, such division of traffic or earnings, under such rules and regulations, and for such consideration as between such carriers and upon such terms and conditions, as shall be found by the Commission to be just and reasonable in the premises.

“(2) Whenever the Commission is of opinion, after hearing, upon application of any carrier or carriers engaged in the transportation of passengers or property subject to this Act, that

⁵ *Ibid.*, § 4, 24 St. at L. 380, as 36 St. at L. 547, Feb. 28, 1920, amended June 18, 1910, ch. 309, § 406, Comp. St. § 8566.

the acquisition, to the extent indicated by the Commission, by one of such carriers of the control of any other such carrier or carriers either under a lease or by the purchase of stock or in any other manner not involving the consolidation of such carriers into a single system for ownership and operation, will be in the public interest, the Commission shall have authority by order to approve and authorize such acquisition, under such rules and regulations and for such consideration and on such terms and conditions as shall be found by the Commission to be just and reasonable in the premises.

“(3) The Commission may from time to time, for good cause shown, make such orders, supplemental to any order made under paragraph (1) or (2), as it may deem necessary or appropriate.

“(4) The Commission shall as soon as practicable prepare and adopt a plan for the consolidation of the railway properties of the continental United States into a limited number of systems. In the division of such railways into such systems under such plan, competition shall be preserved as fully as possible and wherever practicable the existing routes and channels of trade and commerce shall be maintained. Subject to the foregoing requirements, the several systems shall be so arranged that the cost of transportation as between competitive systems and as related to the values of the properties through which the service is rendered shall be the same, so far as practicable, so that these systems can employ uniform rates in the movement of competitive traffic and under efficient management earn substantially the same rate of return upon the value of their respective railway properties.

“(5) When the Commission has agreed upon a tentative plan, it shall give the same due publicity and upon reasonable notice, including notice to the Governor of each State, shall hear all persons who may file or present objections thereto. The Commission is authorized to prescribe a procedure for such hearings and to fix a time for bringing them to a close. After the hearings are at an end, the Commission shall adopt a plan for such consolidation and publish the same; but it may at any time thereafter, upon its own motion or upon application, reopen the subject for such changes or modifications as in its judgment will promote the public interest. The consolidations herein provided for shall be in harmony with such plan.

“(6) It shall be lawful for two or more carriers by railroad, subject to this Act, to consolidate their properties or any part thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership, management, and operation, under the following conditions:

“(a) The proposed consolidation must be in harmony with and in furtherance of the complete plan of consolidation mentioned in paragraph (5) and must be approved by the Commission;

“(b) The bonds at par of the corporation which is to become the owner of the consolidated properties, together with the outstanding capital stock at par of such corporation, shall not exceed the value of the consolidated properties as determined by the Commission. The value of the properties sought to be consolidated shall be ascertained by the Commission under section 19a of this Act, and it shall be the duty of the Commission to proceed immediately to the ascertainment of such value for the properties involved in a proposed consolidation upon the filing of the application for such consolidation.

“(c) Whenever two or more carriers propose a consolidation under this section, they shall present their application therefor to the Commission, and thereupon the Commission shall notify the Governor of each State in which any part of the properties sought to be consolidated is situated and the carriers involved in the proposed consolidation, of the time and place for a public hearing. If after such hearing the Commission finds that the public interest will be promoted by the consolidation and that the conditions of this section have been or will be fulfilled, it may enter an order approving and authorizing such consolidation, with such modifications and upon such terms and conditions as it may prescribe, and thereupon such consolidation may be effected, in accordance with such order, if all the carriers involved assent thereto, the law of any State or the decision or order of any State authority to the contrary notwithstanding.

“(7) The power and authority of the Commission to approve and authorize the consolidation of two or more carriers shall extend and apply to the consolidation of four express companies into the American Railway Express Company, a Delaware corporation, if application for such approval and authority is made

to the Commission within thirty days after the passage of this amendatory Act; and pending the decision of the Commission such consolidation shall not be dissolved.

“(8) The carriers affected by any order made under the foregoing provisions of this section and any corporation organized to effect a consolidation approved and authorized in such order shall be, and they are hereby, relieved from the operation of the ‘anti-trust laws,’ as designated in section 1 of the Act entitled ‘An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes,’ approved October 15, 1914, and of all other restraints or prohibitions by law, State or Federal, in so far as may be necessary to enable them to do anything authorized or required by any order made under and pursuant to the foregoing provisions of this section.

“(9) From and after the first day of July, nineteen hundred and fourteen, it shall be unlawful for any railroad company or other common carrier subject to the Act to regulate commerce to own, lease, operate, control, or have any interest whatsoever (by stock ownership or otherwise, either directly, indirectly, through any holding company, or by stockholders or directors in common, or in any other manner) in any common carrier by water operated through the Panama Canal or elsewhere with which said railroad or other carrier aforesaid does or may compete for traffic or any vessel carrying freight or passengers upon said water route or elsewhere with which said railroad or other carrier aforesaid does or may compete for traffic; and in case of the violation of this provision each day in which such violation continues shall be deemed a separate offense.

“(10) Jurisdiction is hereby conferred on the Interstate Commerce Commission to determine questions of fact as to the competition or possibility of competition, after full hearing, on the application of any railroad company or other carrier. Such application may be filed for the purpose of determining whether any existing service is in violation of this section and pray for an order permitting the continuance of any vessel or vessels already in operation, or for the purpose of asking an order to install new service not in conflict with the provisions of this paragraph. The Commission may on its own motion or the application of any shipper institute proceedings to inquire into

the operation of any vessel in use by any railroad or other carrier which has not applied to the commission and had the question of competition or the possibility of competition determined as herein provided. In all such cases the order of said commission shall be final.

“(11) If the Interstate Commerce Commission shall be of the opinion that any such existing specified service by water other than through the Panama Canal is being operated in the interest of the public and is of advantage to the convenience and commerce of the people, and that such extension will neither exclude, prevent, nor reduce competition on the route by water under consideration, the Interstate Commerce Commission may, by order, extend the time during which such service by water may continue to be operated beyond July first, nineteen hundred and fourteen. In every case of such extension the rates, schedules, and practices of such water carrier shall be filed with the Interstate Commerce Commission and shall be subject to the Act to regulate commerce and all amendments thereto in the same manner and to the same extent as is the railroad or other common carrier controlling such water carrier or interested in any manner in its operation: Provided, Any application for extension under the terms of this provision filed with the Interstate Commerce Commission prior to July first, nineteen hundred and fourteen, but for any reason not heard and disposed of before said date, may be considered and granted thereafter.”⁶

“(1) Every common carrier subject to the provisions of this Act shall file with the Commission created by this Act and print and keep open to public inspection schedules showing all the rates, fares, and charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier by railroad, by pipe line, or by water when a through route and joint rate have been established. If no joint rate over the through route has been established, the several carriers in such through route shall file, print and keep open to public inspection as aforesaid, the separately established rates, fares and charges applied to the through transportation. The schedules printed as afore-

⁶ *Ibid.*, § 5, 24 St. at L. 380, as 37 St. at L. 566, Feb. 28, 1920, amended Aug. 24, 1912, ch. 390, §§ 407, 408, Comp. St. § 8567.

said by any such common carrier shall plainly state the places between which property and passengers will be carried, and shall contain the classification of freight in force, and shall also state separately all terminal charges, storage charges, icing charges, and all other charges which the Commission may require, all privileges or facilities granted or allowed and any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates, fares, and charges, or the value of the service rendered to the passenger, shipper, or consignee. Such schedules shall be plainly printed in large type, and copies for the use of the public shall be kept posted in two public and conspicuous places in every depot, station, or office of such carrier where passengers or freight, respectively, are received for transportation, in such form that they shall be accessible to the public and can be conveniently inspected. The provisions of this section shall apply to all traffic, transportation, and facilities defined in this Act.

“(2) Any common carrier subject to the provisions of this Act receiving freight in the United States to be carried through a foreign country to any place in the United States shall also in like manner print and keep open to public inspection, at every depot or office where such freight is received for shipment, schedules showing the through rates established and charged by such common carrier to all points in the United States beyond the foreign country to which it accepts freight for shipment; and any freight shipped from the United States through a foreign country into the United States the through rate on which shall not have been made public, as required by this Act, shall, before it is admitted into the United States from said foreign country, be subject to customs duties as if said freight were of foreign production.

“(3) No change shall be made in the rates, fares, and charges or joint rates, fares, and charges which have been filed and published by any common carrier in compliance with the requirements of this section, except after thirty days' notice to the Commission and to the public published as aforesaid, which shall plainly state the changes proposed to be made in the schedule then in force and the time when the changed rates, fares, or charges will go into effect; and the proposed changes shall be shown by printing new schedules, or shall be plainly

indicated upon the schedules in force at the time and kept open to public inspection: Provided, That the Commission may, in its discretion and for good cause shown, allow changes upon less than the notice herein specified, or modify the requirements of this section in respect to publishing, posting, and filing of tariffs, either in particular instances or by a general order applicable to special or peculiar circumstances or conditions: Provided further, That the Commission is hereby authorized to make suitable rules and regulations for the simplification of schedules of rates, fares, charges, and classifications and to permit in such rules and regulations the filing of an amendment of or change in any rate, fare, charge, or classification without filing complete schedules covering rates, fares, charges or classifications not changed if, in its judgment, not inconsistent with the public interest.

“(4) The names of the several carriers which are parties to any joint tariff shall be specified therein, and each of the parties thereto, other than the one filing the same, shall file with the Commission such evidence of concurrence therein or acceptance thereof as may be required or approved by the Commission, and where such evidence of concurrence or acceptance is filed it shall not be necessary for the carriers filing the same to also file copies of the tariffs in which they are named as parties.

“(5) Every common carrier subject to this Act shall also file with said Commission copies of all contracts, agreements, or arrangements with other common carriers in relation to any traffic affected by the provisions of this Act to which it may be a party.

“(6) The Commission may determine and prescribe the form in which the schedules required by this section to be kept open to public inspection shall be prepared and arranged and may change the form from time to time as shall be found expedient.

“(7) No carrier, unless otherwise provided by this Act, shall engage or participate in the transportation of passengers or property, as defined in this Act, unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this Act; nor shall any carrier charge or demand or collect

or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs.

“(8) That in time of war or threatened war preference and precedence shall, upon the demand of the President of the United States, be given, over all other traffic, for the transportation of troops and material of war, and carriers shall adopt every means within their control to facilitate and expedite the military traffic. And in time of peace shipments consigned to agents of the United States for its use shall be delivered by the carriers as promptly as possible and without regard to any embargo that may have been declared, and no such embargo shall apply to shipments so consigned.

“(9) The Commission may reject and refuse to file any schedule that is tendered for filing which does not provide and give lawful notice of its effective date, and any schedule so rejected by the Commission shall be void and its use shall be unlawful.

“(10) In case of failure or refusal on the part of any carrier, receiver, or trustee to comply with the terms of any regulation adopted and promulgated or any order made by the Commission under the provisions of this section, such carrier, receiver, or trustee shall be liable to a penalty of five hundred dollars for each such offense, and twenty-five dollars for each and every day of the continuance of such offense, which shall accrue to the United States and may be recovered in a civil action brought by the United States.

“(11) If any common carrier subject to the provisions of this Act, after written request made upon the agent of such carrier hereinafter in this section referred to, by any person or company for a written statement of the rate or charge applicable to a described shipment between stated places under the schedules or tariffs to which such carrier is a party, shall refuse or omit to give such written statement within a reasonable

time, or shall misstate in writing the applicable rate, and if the person or company making such request suffers damage in consequence of such refusal or omission or in consequence of the misstatement of the rate, either through making the shipment over a line or route for which the proper rate is higher than the rate over another available line or route, or through entering into any sale or other contract whereunder such person or company obligates himself or itself to make such shipment of freight at his or its cost, then the said carrier shall be liable to a penalty of two hundred and fifty dollars, which shall accrue to the United States and may be recovered in a civil action brought by the United States.

“(12) It shall be the duty of every carrier by railroad to keep at all times conspicuously posted in every station where freight is received for transportation the name of an agent resident in the city, village, or town where such station is located, to whom application may be made for the information by this section required to be furnished on written request; and in case any carrier shall fail at any time to have such name so posted in any station, it shall be sufficient to address such request in substantially the following form: ‘The Station Agent of the ——— Company at ——— Station,’ together with the name of the proper post-office, inserting the name of the carrier company and of the station in the blanks, and to serve the same by depositing the request so addressed, with postage thereon prepaid, in any post-office.

“(13) When property may be or is transported from point to point in the United States by rail and water through the Panama Canal or otherwise, the transportation being by a common carrier or carriers, and not entirely within the limits of a single State, the Interstate Commerce Commission shall have jurisdiction of such transportation and of the carriers, both by rail and by water, which may or do engage in the same, in the following particulars, in addition to the jurisdiction given by the Act to regulate commerce, as amended June eighteenth, nineteen hundred and ten:

“(a) To establish physical connection between the lines of the rail carrier and the dock at which interchange of passenger or property is to be made by directing the rail carrier to make suitable connection between its line and a track or tracks which

have been constructed from the dock to the limits of the railroad right of way, or by directing either or both the rail and water carrier, individually or in connection with one another, to construct and connect with the lines of the rail carrier a track or tracks to the dock. The Commission shall have full authority to determine and prescribe the terms and conditions upon which these connecting tracks shall be operated, and it may, either in the construction or the operation of such tracks, determine what sum shall be paid to or by either carrier: Provided, That construction required by the Commission under the provisions of this paragraph shall be subject to the same restrictions as to findings of public convenience and necessity and other matters as is construction required under section 1 of this Act.

“(b) To establish through routes and maximum joint rates between and over such rail and water lines, and to determine all the terms and conditions under which such lines shall be operated in the handling of the traffic embraced.

“(c) To establish proportional rates or maximum, or minimum, or maximum and minimum proportional rates, by rail to and from the ports to which the traffic is brought, or from which it is taken by the water carrier, and to determine to what traffic and in connection with what vessels and upon what terms and conditions such rates shall apply. By proportional rates are meant those which differ from the corresponding local rates to and from the port and which apply only to traffic which has been brought to the port or is carried from the port by a common carrier by water.

“(d) If any rail carrier subject to the Act to regulate commerce enters into arrangements with any water carrier operating from a port in the United States to a foreign country, through the Panama Canal or otherwise, for the handling of through business between interior points of the United States and such foreign country, the Interstate Commerce Commission may require such railway to enter into similar arrangements with any or all other lines of steamships operating from said port to the same foreign country.”⁷

⁷ Ibid., § 6, 24 St. at L. 380, as St. at L. 855, June 29, 1906, ch. amended March 2, 1889, ch. 382, 25 3591, 34 St. at L. 586, June 18,

“(1) Any person, firm, corporation, company, or association, or any mercantile, agricultural, or manufacturing society or other organization, or any body politic or municipal organization, or any common carrier, complaining of anything done or omitted to be done by any common carrier subject to the provisions of this Act, in contravention of the provisions thereof, may apply to said commission by petition, which shall briefly state the facts; whereupon a statement of the complaint thus made shall be forwarded by the commission to such common carrier, who shall be called upon to satisfy the complaint, or to answer the same in writing, within a reasonable time, to be specified by the commission. If such common carrier within the time specified shall make reparation for the injury alleged to have been done, the common carrier shall be relieved of liability to the complainant only for the particular violation of law thus complained of. If such carrier or carriers shall not satisfy the complaint within the time specified, or there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the commission to investigate the matters complained of in such manner and by such means as it shall deem proper.

“(2) Said commission shall, in like manner and with the same authority and powers, investigate any complaint forwarded by the railroad commission or railroad commission of any State or Territory at the request of such commissioner or commission, and the Interstate Commerce Commission shall have full authority and power at any time to institute an inquiry, on its own motion, in any case and as to any matter or thing concerning which a complaint is authorized to be made, to or before said commission by any provision of this Act, or concerning which any question may arise under any of the provisions of this Act, or relating to the enforcement of any of the provisions of this Act. And the said commission shall have the same powers and authority to proceed with any inquiry instituted on its motion as though it had been appealed to by complaint or petition under any of the provisions of this Act, including the power to make and enforce any order or orders in the case, or relating to the

1910 ch. 309, 36 St. at L. 548, Aug. 604, Feb. 28, 1920, § 409-413, Comp. 24, 1912, ch. 390, 37 St. at L. 568, St., § 8569.
Aug. 29, 1916, ch. 417, 39 St. at L.

matter or thing concerning which the inquiry is had excepting orders for the payment of money. No complaint shall at any time be dismissed because of the absence of direct damage to the complainant.

“(3) Whenever in any investigation under the provisions of this Act, or in any investigation instituted upon petition of the carrier concerned, which petition is hereby authorized to be filed, there shall be brought in issue any rate, fare, charge, classification, regulation, or practice, made or imposed by authority of any State, or initiated by the President during the period of Federal control, the Commission, before proceeding to hear and dispose of such issue, shall cause the State or States interested to be notified of the proceeding. The Commission may confer with the authorities of any State having regulatory jurisdiction over the class of persons and corporations subject to this Act with respect to the relationship between rate structures and practices of carriers subject to the jurisdiction of such State bodies and of the Commission; and to that end is authorized and empowered, under rules to be prescribed by it, and which may be modified from time to time, to hold joint hearings with any such State regulating bodies on any matters wherein the Commission is empowered to act and where the rate-making authority of a State is or may be affected by the action taken by the Commission. The Commission is also authorized to avail itself of the cooperation, services, records and facilities of such State authorities in the enforcement of any provision of this Act.

“(4) Whenever in any such investigation the Commission, after full hearing finds that any such rate, fare, charge, classification, regulation, or practice causes any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand, or any undue, unreasonable, or unjust discrimination against interstate or foreign commerce, which is hereby forbidden and declared to be unlawful, it shall prescribe the rate, fare, or charge, or the maximum or minimum, or maximum and minimum thereafter to be charged, and the classification, regulation, or practice thereafter to be observed, in such manner as, in its judgment will remove such advantage, preference, prejudice, or discrimination. Such rates, fares, charges, classifications, regulations, and

practices shall be observed while in effect by the carriers parties to such proceeding affected thereby, the law of any State or the decision or order of any State authority to the contrary notwithstanding." ⁸

"Whenever, after full hearing, upon a complaint made as provided in section 13 of this Act, or after full hearing under an order for investigation and hearing made by the Commission on its own initiative, either in extension of any pending complaint or without any complaint whatever, the Commission shall be of opinion that any individual or joint rate, fare, or charge whatsoever demanded, charged, or collected by any common carrier or carriers subject to this Act for the transportation of persons or property or for the transmission of messages as defined in the first section of this Act, or that any individual or joint classification, regulation, or practice whatsoever of such carrier or carriers subject to the provisions of this Act, is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this Act, the Commission is hereby authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare, or charge, or rates, fares, or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged (or, in the case of a through route where one of the carriers is a water line, the maximum rates, fares, and charges applicable thereto), and what individual or joint classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any rate, fare, or charge for such transportation or transmission other than the rate, fare, or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed." ⁹

⁸ Act of Feb. 4, 1887, ch. 104. at L. 550, Feb. 28, 1920, ch. —,
§ 13, 24 St. at L. 383, amended, § 416, Comp. St. § 8581.
June 18, 1910, ch. 309, § 11, 36 St. ⁹ Act of Feb. 4, 1887, ch. 104,

“(3) The Commission may, and it shall whenever deemed by it to be necessary or desirable in the public interest, after full hearing upon complaint or upon its own initiative without a complaint, establish through routes, joint classifications, and joint rates, fares, or charges, applicable to the transportation of passengers or property, or the maxima or minima, or maxima and minima, to be charged (or, in the case of a through route where one of the carriers is a water line, the maximum rates, fares, and charges applicable thereto), and the divisions of such rates, fares, or charges as hereinafter provided, and the terms and conditions under which such through routes shall be operated; and this provision, except as herein otherwise provided, shall apply when one of the carriers is a water line. The Commission shall not, however, establish any through route, classification, or practice, or any rate, fare, or charge, between street electric passenger railways not engaged in the general business of transporting freight in addition to their passenger and express business, and railroads of a different character; nor shall the Commission have the right to establish any route, classification, or practice, or any rate, fare, or charge when the transportation is wholly by water, and any transportation by water affected by this Act shall be subject to the laws and regulations applicable to transportation by water.

“(4) In establishing any such through route the Commission shall not (except as provided in section 3, and except where one of the carriers is a water line), require any carrier by railroad, without its consent, to embrace in such route substantially less than the entire length of its railroad and of any intermediate railroad operated in conjunction and under a common management or control therewith, which lies between the termini of such proposed through route, unless such inclusion of lines would make the through route unreasonably long as compared with another practicable through route which could otherwise be established: Provided, That in time of shortage of equipment, congestion of traffic, or other emergency declared by the Commission it may (either upon complaint or upon its own

§ 15, 24 St. at L. 384, amended ch. 50, § 4, 40 St. at L. 272, Feb. June 29, 1906, ch. 3591, § 4, 34 St. 28, 1920, ch. —, §§ 418-421, Comp. at L. 589, June 18, 1910, ch. 309, St. § 8583.
§ 12, 36 St. at L. 551, Aug. 9, 1917,

initiative without complaint, at once, if it so orders without answer or other formal pleadings by the interested carrier or carriers, and with or without notice, hearing or the making or filing of a report, according as the Commission may determine) establish temporarily such through routes as in its opinion are necessary or desirable in the public interest.

“(5) Transportation wholly by railroad of ordinary livestock in carload lots destined to or received at public stockyards shall include all necessary service of unloading and reloading en route, delivery at public stockyards of inbound shipments into suitable pens, and receipt and loading at such yards of outbound shipments, without extra charge therefor to the shipper, consignee or owner, except in cases where the unloading or reloading en route is at the request of the shipper, consignee or owner, or to try an intermediate market, or to comply with quarantine regulations. The Commission may prescribe or approve just and reasonable rules governing each of such excepted services. Nothing in this paragraph shall be construed to affect the duties and liabilities of the carriers now existing by virtue of law respecting the transportation of other than ordinary livestock, or the duty of performing service as to shipments other than those to or from public stockyards.

“(6) Whenever, after full hearing upon complaint or upon its own initiative, the Commission is of opinion that the divisions of joint rates, fares, or charges, applicable to the transportation of passengers or property, are or will be unjust, unreasonable, inequitable, or unduly preferential or prejudicial as between the carriers parties thereto (whether agreed upon by such carriers, or any of them, or otherwise established), the Commission shall by order prescribe the just, reasonable, and equitable divisions thereof to be received by the several carriers, and in cases where the joint rate, fare, or charge was established pursuant to a finding or order of the Commission and the divisions thereof are found by it to have been unjust, unreasonable, or unequitable, or unduly preferential or prejudicial, the Commission may also by order determine what (for the period subsequent to the filing of the complaint or petition or the making of the order of investigation) would have been the just, reasonable, and equitable divisions thereof to be received by the several carriers, and require adjustment to be made in accordance therewith. In so

prescribing and determining the divisions of joint rates, fares and charges, the Commission shall give the consideration, among other things, to the efficiency with which the carriers concerned are operated, the amount of revenue required to pay their respective operating expenses, taxes, and a fair return on their railway property held for and used in the service of transportation, and the importance to the public of the transportation services of such carriers and also whether any particular participating carrier is an originating, intermediate, or delivering line, and any other fact or circumstances which would ordinarily, without regard to the mileage haul, entitle one carrier to a greater or less proportion than another carrier of the joint rate, fare or charge.

“(7) Whenever there shall be filed with the Commission any schedule stating a new individual or joint rate, fare, or charge, or any new individual or joint classification, or any new individual or joint regulation or practice affecting any rate, fare, or charge, the Commission shall have, and it is hereby given, authority, either upon complaint or upon its own initiative without complaint at once, and if it so orders without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the unlawfulness of such rate, fare, charge, classification, regulation, or practice; and pending such hearing and the decision thereon the Commission, upon filing with such schedule and delivery to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, fare, charge, classification, regulation, or practice, but not for a longer period than one hundred and twenty days beyond the time when it would otherwise go into effect; and after full hearing whether completed before or after the rate, fare, charge, classification, regulation, or practice goes into effect, the Commission may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective. If any such hearing cannot be concluded within the period of suspension, as above stated, the commission may extend the time of suspension for a further period not exceeding thirty days, and if the proceeding has not been concluded and an order made at the expiration of such thirty days, the proposed change of rate, fare,

charge, classification, regulation, or practice shall go into effect at the end of such period, but, in case of a proposed increased rate or charge for or in respect to the transportation of property, the Commission may by order require the interested carrier or carriers to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require the interested carrier or carriers to refund, with interest, to the persons in whose behalf such amounts were paid such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a rate, fare, or charge increased after January 1, 1910, or of a rate, fare, or charge, sought to be increased after the passage of this Act, the burden of proof to show that the increased rate, fare, or charge, or proposed increased rate, fare, or charge, is just and reasonable shall be upon the carrier, and the Commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible."

"(8) In all cases where at the time of delivery of property to any railroad corporation being a common carrier for transportation subject to the provisions of this Act to any point of destination, between which and the point of such delivery for shipment two or more through routes and through rates shall have been established as in this Act provided to which through routes and through rates such carrier is a party, the person, firm, or corporation making such shipment, subject to such reasonable exceptions and regulations as the Interstate Commerce Commission shall from time to time prescribe, shall have the right to designate in writing by which of such through routes such property shall be transported to destination, and it shall thereupon be the duty of the initial carrier to route said property and issue a through bill of lading therefor as so directed, and to transport said property over its own line or lines and deliver the same to a connecting line or lines according to such through route, and it shall be the duty of each of said connecting carriers to receive said property and transport it over the said line or lines and deliver the same to the next succeeding carrier or consignee according to the routing instructions in said

bill of lading: Provided, however, That the shipper shall in all instances have the right to determine, where competing lines of railroad constitute portions of a through line or route, over which of said competing lines so constituting a portion of said through line or route his freight shall be transported.

“(9) Whenever property is diverted or delivered by one carrier to another carrier contrary to routing instructions in the bill of lading, unless such diversion or delivery is in compliance with a lawful order, rule, or regulation of the Commission, such carriers shall, in a suit or action in any court of competent jurisdiction, be jointly and severally liable to the carrier thus deprived of its right to participate in the haul of the property, for the total amount of the rate or charge it would have received had it participated in the haul of the property. The carrier to which the property is thus diverted shall not be liable in such suit or action if it can show, the burden of proof being upon it, that before carrying the property it had no notice, by bill of lading, waybill or otherwise, of the routing instructions. In any judgment which may be rendered the plaintiff shall be allowed to recover against the defendant a reasonable attorney's fee to be taxed in the case.

“(10) With respect to traffic not routed by the shipper, the Commission may, whenever the public interest and a fair distribution of the traffic require, direct the route which such traffic shall take after it arrives at the terminus of one carrier or at a junction point with another carrier, and is to be there delivered to another carrier.

“(11) It shall be unlawful for any common carrier subject to the provisions of this Act, or any officer, agent, or employee of such common carrier, or for any other person or corporation lawfully authorized by such common carrier to receive information therefrom, knowingly to disclose to or permit to be acquired by any person or corporation other than the shipper or consignee, without the consent of such shipper or consignee, any information concerning the nature, kind, quantity, destination, consignee, or routing of any property tendered or delivered to such common carrier for interstate transportation, which information may be used to the detriment or prejudice of such shipper or consignee, or which may improperly disclose his business transactions to a competitor; and it shall also be unlawful for

any person or corporation to solicit or knowingly receive any such information which may be so used: Provided, That nothing in this Act shall be construed to prevent the giving of such information in response to any legal process issued under the authority of any state or federal court, or to any officer or agent of the Government of the United States, or of any State or Territory, in the exercise of his powers, or to any officer or other duly authorized person seeking such information for the prosecution of persons charged with or suspected of crime; or information given by a common carrier to another carrier or its duly authorized agent, for the purpose of adjusting mutual traffic accounts in the ordinary course of business of such carriers.

“(12) Any person, corporation, or association violating any of the provisions of the next preceding paragraph of this section shall be deemed guilty of a misdemeanor, and for each offense, on conviction, shall pay to the United States a penalty of not more than one thousand dollars.

“(13) If the owner of property transported under this Act directly or indirectly renders any service connected with such transportation, or furnishes any instrumentality used therein, the charge and allowance therefor shall be no more than is just and reasonable, and the Commission may, after hearing on a complaint or on its own initiative, determine what is a reasonable charge as the maximum to be paid by the carrier or carriers for the services so rendered or for the use of the instrumentality so furnished, and fix the same by appropriate order, which order shall have the same force and effect and be enforced in like manner as the orders above provided for under this section.

“(14) The foregoing enumeration of powers shall not exclude any power which the Commission would otherwise have in the making of an order under the provisions of this Act.”^{••}

“(1) When used in this section the term ‘rates’ means rates, fares, and charges, and all classifications, regulations, and practices, relating thereto; the term ‘carrier’ means a carrier by railroad or partly by railroad and partly by water, within the continental United States, subject to this Act, excluding (a)

^{••}Ibid.

sleeping-car companies and express companies, (b) street or suburban electric railways unless operated as a part of a general steam railroad system of transportation, (c) interurban electric railways unless operated as a part of a general steam railroad system of transportation or engaged in the general transportation of freight, and (d) any belt-line railroad, terminal switching railroad, or other terminal facility, owned exclusively and maintained, operated, and controlled by any State or political subdivision thereof; and the term 'net railway operating income' means railway operating income, including in the computation thereof debits and credits arising from equipment rents and joint facility rents.

"(2) In the exercise of its power to prescribe just and reasonable rates the Commission shall initiate, modify, establish or adjust such rates so that carriers as a whole (or as a whole in each of such rate groups or territories as the Commission may from time to time designate) will, under honest, efficient and economical management and reasonable expenditures for maintenance of way, structures and equipment, earn an aggregate annual net railway operating income equal, as nearly as may be, to a fair return upon the aggregate value of the railway property of such carriers held for and used in the service of transportation: Provided, That the Commission shall have reasonable latitude to modify or adjust any particular rate which it may find to be unjust or unreasonable, and to prescribe different rates for different sections of the country.

"(3) The Commission shall from time to time determine and make public what percentage of such aggregate property value constitutes a fair return thereon, and such percentage shall be uniform for all rate groups or territories which may be designated by the Commission. In making such determination it shall give due consideration, among other things, to the transportation needs of the country and the necessity (under honest, efficient and economical management of existing transportation facilities) of enlarging such facilities in order to provide the people of the United States with adequate transportation: Provided, That during the two years beginning March 1, 1920, the Commission shall take as such fair return a sum equal to $5\frac{1}{2}$ per centum of such aggregate value, but may, in its discretion, add thereto a sum not exceeding one-half of one per

centum of such aggregate value to make provision in whole or in part for improvements, betterments or equipment, which, according to the accounting system prescribed by the Commission, are chargeable to capital account.

“(4) For the purposes of this section, such aggregate value of the property of the carriers shall be determined by the Commission from time to time and as often as may be necessary. The Commission may utilize the results of its investigation under section 19a of this Act, in so far as deemed by it available, and shall give due consideration to all the elements of value recognized by the law of the land for rate-making purposes, and shall give to the property investment account of the carriers only that consideration which under such law it is entitled to in establishing values for rate-making purposes. Whenever pursuant to section 19a of this Act the value of the railway property of any carrier held for and used in the service of transportation has been finally ascertained, the value so ascertained shall be deemed by the Commission to be the value thereof for the purpose of determining such aggregate value.

“(5) Inasmuch as it is impossible (without regulation and control in the interest of the commerce of the United States considered as a whole) to establish uniform rates upon competitive traffic which will adequately sustain all the carriers which are engaged in such traffic and which are indispensable to the communities to which they render the service of transportation, without enabling some of such carriers to receive a net railway operating income substantially and unreasonably in excess of a fair return upon the value of their railway property held for and used in the service of transportation, it is hereby declared that any carrier which receives such an income so in excess of a fair return, shall hold such part of the excess, as hereinafter prescribed, as trustee for, and shall pay it to, the United States.

“(6) If, under the provisions of this section, any carrier receives for any year a net railway operating income in excess of 6 per centum of the value of the railway property held for and used by it in the service of transportation, one-half of such excess shall be placed in a reserve fund established and maintained by such carrier, and the remaining one-half thereof shall, within the first four months following the close of the

period for which such computation is made, be recoverable by and paid to the Commission for the purpose of establishing and maintaining a general railroad contingent fund as hereinafter described. For the purposes of this paragraph the value of the railway property and the net railway operating income of a group of carriers, which the Commission finds are under common control and management and are operated as a single system, shall be computed for the system as a whole irrespective of the separate ownership and accounting returns of the various parts of such system. In the case of any carrier which has accepted the provisions of section 209 of this amendatory Act the provisions of this paragraph shall not be applicable to the income for any period prior to September 1, 1920. The value of such railway property shall be determined by the Commission in the manner provided in paragraph (4).

“(7) For the purpose of paying dividends or interest on its stocks, bonds, or other securities, or rent for leased roads, a carrier may draw from the reserve fund established and maintained by it under the provisions of this section to the extent that its net railway operating income for any year is less than a sum equal to 6 per centum of the value of the railway property held for and used by it in the service of transportation, determined as provided in paragraph (6); but such funds shall not be drawn upon for any other purpose.

“(8) Such reserve fund need not be accumulated and maintained by any carrier beyond a sum equal to 5 per centum of the value of its railway property determined as herein provided, and when such fund is so accumulated and maintained the portion of its excess income which the carrier is permitted to retain under paragraph (6) may be used by it for any lawful purpose.

“(9) The Commission shall prescribe rules and regulations for the determination and recovery of the excess income payable to it under this section, and may require such security and prescribe such reasonable terms and conditions in connection therewith as it may find necessary. The Commission shall make proper adjustments to provide for the computation of excess income for a portion of a year, and for a year in which a change in the percentage constituting a fair return or in the value of a carrier's railway property becomes effective.

“(10) The general railroad contingent fund so to be recoverable by and paid to the Commission and all accretions thereof shall be a revolving fund and shall be administered by the Commission. It shall be used by the Commission in furtherance of the public interest in railway transportation either by making loans to carriers to meet expenditures for capital account or to refund maturing securities originally issued for capital account, or by purchasing transportation equipment and facilities and leasing the same to carriers, as hereinafter provided. Any moneys in the fund not so employed shall be invested in obligations of the United States or deposited in authorized depositories of the United States subject to the rules promulgated from time to time by the Secretary of the Treasury relating to Government deposits.

“(11) A carrier may at any time make application to the Commission for a loan from the general railroad contingent funds, setting forth the amount of the loan and the term for which it is desired, the purpose of the loan and the uses to which it will be applied, the present and prospective ability of the applicant to repay the loan and meet the requirements of its obligations in that regard, the character and value of the security offered, and the extent to which the public convenience and necessity will be served. The application shall be accompanied by statements showing such facts and details as the Commission may require with respect to the physical situation, ownership, capitalization, indebtedness, contract, obligations, operations, and earning power of the applicant, together with such other facts relating to the propriety and expediency of granting the loan applied for and the ability of the applicant to make good the obligation, as the Commission may deem pertinent to the inquiry.

“(12) If the Commission, after such hearing and investigation, with or without notice, as it may direct, finds that the making, in whole or in part, of the proposed loan from the general railroad contingent fund is necessary to enable the applicant properly to meet the transportation needs of the public, and that the prospective earning power of the applicant and the character and value of the security offered are such as to furnish reasonable assurance of the applicant's ability to repay the loan within the time fixed therefor, and to meet

its other obligations in connection with such loan, the Commission may make a loan to the applicant from such railroad contingent fund, in such amount, for such length of time, and under such terms and conditions as it may deem proper. The Commission shall also prescribe the security to be furnished, which shall be adequate to secure the loan. All such loans shall bear interest at the rate of 6 per centum per annum, payable semiannually to the Commission. Such loans when repaid, and all interest paid thereon, shall be placed in the general railroad contingent fund.

“(13) A carrier may at any time make application to the Commission for the lease to it of transportation equipment or facilities, purchased from the general railroad contingent fund, setting forth the kind and amount of such equipment or facilities and the term for which it is desired to be leased, the uses to which it is proposed to put such equipment or facilities, the present and prospective ability of the applicant to pay the rental charges thereon and to meet the requirements of its obligations under the lease, and the extent to which the public convenience and necessity will be served. The application shall be accompanied by statements showing such facts and details as the Commission may require with respect to the physical situation, ownership, capitalization, indebtedness, contract obligations, operation, and earning power of the applicant, together with such other facts relating to the propriety and expediency of leasing such equipment or facilities to the applicant as the Commission may deem pertinent to the inquiry.

“(14) If the Commission, after such hearing and investigation, with or without notice, as it may direct, finds that the leasing to the applicant of such equipment or facilities, in whole or in part, is necessary to enable the applicant properly to meet the transportation needs of the public, and that the prospective earning power of the applicant is such as to furnish reasonable assurance of the applicant's ability to pay promptly the rental charges and meet its other obligations under such lease, the Commission may lease such equipment or facilities purchased by it from the general railroad contingent fund, to the applicant for such length of time, and under such terms and conditions as it may deem proper. The rental charges

provided in every such lease shall be at least sufficient to pay a return of 6 per centum per annum, plus allowance for depreciation determined as provided in paragraph (5) of section 20 of this Act, upon the value of the equipment or facilities leased thereunder. All rental charges and other payments received by the Commission in connection with such equipment and facilities, including amounts received under any sale thereof, shall be placed in the general railroad contingent fund.

“(15) The Commission may from time to time purchase, contract for the construction, repair and replacement of, and sell, equipment and facilities, and enter into and carry out contracts and other obligations in connection therewith, to the extent that moneys included in the general railroad contingent fund are available therefor, and in so far as necessary to enable it to secure and supply equipment and facilities to carriers whose applications therefor are approved under the provisions of this section, and to maintain and dispose of such equipment and facilities.

“(16) The Commission may from time to time prescribe such rules and regulations as it deems necessary to carry out the provisions of this section respecting the making of loans and the lease of equipment and facilities.

“(17) The provisions of this section shall not be construed as depriving shippers of their right to reparation in case of overcharges, unlawfully excessive or discriminatory rates, or rates excessive in their relation to other rates, but no shipper shall be entitled to recover upon the sole ground that any particular rate may reflect a proportion of excess income to be paid by the carrier to the Commission in the public interest under the provisions of this section.

“(18) Any carrier, or any corporation organized to construct and operate a railroad, proposing to undertake the construction and operation of a new line of railroad may apply to the Commission for permission to retain for a period not to exceed ten years all or any part of its earnings derived from such new construction in excess of the amount heretofore in this section provided, for such disposition as it may lawfully make of the same, and the Commission may, in its discretion, grant such permission, conditioned, however, upon the com-

pletion by the Commission in its order granting such permission."¹⁰

"(a) The commission shall, as hereinafter provided, investigate, ascertain, and report the value of all the property owned or used by every common carrier subject to the provisions of this Act. To enable the commission to make such investigation and report, it is authorized to employ such experts and other assistants as may be necessary. The commission may appoint examiners who shall have power to administer oaths, examine witnesses, and take testimony. The commission shall make an inventory which shall list the property of every common carrier subject to the provisions of this Act in detail, and show the value thereof as hereinafter provided, and shall classify the physical property, as nearly as practicable, in conformity with the classification of expenditures for road and equipment, as prescribed by the Interstate Commerce Commission.

"(b) First. In such investigation said commission shall ascertain and report in detail as to each piece of property owned or used by said common carrier for its purposes as a common carrier, the original cost to date, the cost of reproduction new, the cost of reproduction less depreciation, and an analysis of the methods by which these several costs are obtained, and the reason for their differences, if any. The commission shall in like manner ascertain and report separately other values, and elements of value, if any, of the property of such common carrier, and an analysis of the methods of valuation employed, and of the reasons for any differences between any such value, and each of the foregoing cost values.

"Second. Such investigation and report shall state in detail and separately from improvements the original cost of all lands, rights of way, and terminals owned or used for the purposes of a common carrier, and ascertained as of the time of dedication to public use, and the present value of the same, and separately the original and present cost of condemnation and damages or of purchase in excess of such original cost or present value.

"Third. Such investigation and report shall show separately

¹⁰ Act of Feb. 4, 1887, ch. 104,
§ 15a, 24 St. at L. 385, as added,
Feb. 28, 1920, ch. —, §§ 422, 8583a.

the property held for purposes other than those of a common carrier, and the original cost and present value of the same, together with an analysis of the methods of valuation employed.

"Fourth. In ascertaining the original cost to date of the property of such common carrier the commission, in addition to such other elements as it may deem necessary, shall investigate and report upon the history and organization of the present and of any previous corporation operating such property; upon any increases or decreases of stocks, bonds, or other securities, in any reorganization; upon moneys received by any such corporation by reason of any issues of stocks, bonds, or other securities; upon the syndicating, banking, and other financial arrangements under which such issues were made and the expense thereof; and upon the net and gross earnings of such corporations; and shall also ascertain and report in such detail as may be determined by the commission upon the expenditure of all moneys and the purposes for which the same were expended.

"Fifth. The commission shall ascertain and report the amount and value of any aid, gift, grant of right of way, or donation, made to any such common carrier, or to any previous corporation operating such property, by the Government of the United States or by any State, county, or municipal government, or by individuals, associations, or corporations; and it shall also ascertain and report the grants of land to any such common carrier, or any previous corporation operating such property, by the Government of the United States, or by any State, county, or municipal government, and the amount of money derived from the sale of any portion of such grants and the value of the unsold portion thereof at the time acquired and at the present time, also, the amount and value of any concession and allowance made by such common carrier to the Government of the United States, or to any State, county, or municipal government in consideration of such aid, gift, grant, or donation.

"(c) Except as herein otherwise provided, the commission shall have power to prescribe the method of procedure to be followed in the conduct of the investigation, the form in which the results of the valuation shall be submitted, and the classification of the elements that constitute the ascertained value, and such investigation shall show the value of the property of

every common carrier as a whole and separately the value of its property in each of the several States and Territories and the District of Columbia, classified and in detail as herein required.

“(d) Such investigation shall be commenced within sixty days after the approval of this Act and shall be prosecuted with diligence and thoroughness, and the result thereof reported to Congress at the beginning of each regular session thereafter until completed.

“(e) Every common carrier subject to the provisions of this Act shall furnish to the commission or its agents from time to time and as the commission may require maps, profiles, contracts, reports of engineers, and any other documents, records, and papers, or copies of any or all of the same, in aid of such investigation and determination of the value of the property of said common carrier, and shall grant to all agents of the commission free access to its right of way, its property, and its accounts, records, and memoranda whenever and wherever requested by any such duly authorized agent, and every common carrier is hereby directed and required to cooperate with and aid the commission in the work of the valuation of its property in such further particulars and to such extent as the commission may require and direct, and all rules and regulations made by the commission for the purpose of administering the provisions of this section and section twenty of this Act shall have the full force and effect of law. Unless otherwise ordered by the commission, with the reasons therefor, the records and data of the commission shall be open to the inspection and examination of the public.

“(f) Upon the completion of the valuation herein provided for the commission shall thereafter in like manner keep itself informed of all extensions and improvements or other changes in the condition and value of the property of all common carriers, and shall ascertain the value thereof, and shall from time to time, revise and correct its valuations, showing such revision and correction classified and as a whole and separately in each of the several States and Territories and the District of Columbia, which valuations, both original and corrected, shall be tentative valuations and shall be reported to Congress at the beginning of each regular session.

“(g) To enable the commission to make such changes and corrections in its valuations of each class of property, every common carrier subject to the provisions of this Act shall make such reports and furnish such information as the commission may require.

“(h) Whenever the commission shall have completed the tentative valuation of the property of any common carrier, as herein directed, and before such valuation shall become final, the commission shall give notice by registered letter to the said carrier, the Attorney General of the United States, the governor of any State in which the property so valued is located, and to such additional parties as the commission may prescribe, stating the valuation placed upon the several classes of property of said carrier, and shall allow thirty days in which to file a protest of the same with the commission. If no protest is filed within thirty days, said valuation shall become final as of the date thereof.

“(i) If notice of protest is filed the commission shall fix a time for hearing the same, and shall proceed as promptly as may be to hear and consider any matter relative and material thereto which may be presented in support of any such protest so filed as aforesaid. If after hearing any protest of such tentative valuation under the provisions of this Act the commission shall be of the opinion that its valuation should not become final, it shall make such changes as may be necessary, and shall issue an order making such corrected tentative valuation final as of the date thereof. All final valuations by the commission and the classification thereof shall be published and shall be prima facie evidence of the value of the property in all proceedings under the Act to regulate commerce as of the date of the fixing thereof, and in all judicial proceedings for the enforcement of the Act approved February fourth, eighteen hundred and eighty-seven, commonly known as ‘the Act to regulate commerce,’ and the various Acts amendatory thereof, and in all judicial proceedings brought to enjoin, set aside, annul, or suspend, in whole or in part, any order of the Interstate Commerce Commission.

“(j) If upon the trial of any action involving a final value fixed by the commission, evidence shall be introduced regarding such value which is found by the court to be different from

that offered upon the hearing before the commission, or additional thereto and substantially affecting said value, the court, before proceeding to render judgment shall transmit a copy of such evidence to the commission, and shall stay further proceedings in said action for such time as the court shall determine from the date of such transmission. Upon the receipt of such evidence the commission shall consider the same and may fix a final value different from the one fixed in the first instance, and may alter, modify, amend or rescind any order which it has made involving said final value, and shall report its action thereon to said court within the time fixed by the court. If the commission shall alter, modify, or amend its order, such altered, modified, or amended order shall take the place of the original order complained of and judgment shall be rendered thereon as though made by the commission in the first instance. If the original order shall not be rescinded or changed by the commission, judgment shall be rendered upon such original order.

“(k) The provisions of this section shall apply to receivers of carriers and operating trustees. In case of failure or refusal on the part of any carrier, receiver, or trustee to comply with all the requirements of this section and in the manner prescribed by the commission such carrier, receiver, or trustee shall forfeit to the United States the sum of five hundred dollars for each such offense and for each and every day of the continuance of such offense, such forfeiture to be recoverable in the same manner as other forfeitures provided for in section sixteen of the Act to regulate commerce.

“(l) That the district courts of the United States shall have jurisdiction, upon the application of the Attorney General of the United States at the request of the commission, alleging a failure to comply with or a violation of any of the provisions of this section by any common carrier, to issue a writ or writs of mandamus commanding such common carrier to comply with the provisions of this section.”¹¹

The Supreme Court of the United States has directed the issue of the writ of mandamus to compel the Commission to investigate and to report separately the present cost of condemna-

¹¹ Act of Feb. 4, 1887, ch. 104, 37 St. at L. 701, Feb. 28, 1920, ch. § 19a, added, March 1, 1913, ch. 92, —, § 433, Comp. St. § 8591.

tion and damages or of purchase in excess of such original cost or present value of property owned or used by a common carrier employed in interstate commerce.¹⁸

“(1) The Commission is hereby authorized to require annual reports from all common carriers subject to the provisions of this Act, and from the owners of all railroads engaged in interstate commerce as defined in this Act, to prescribe the manner in which such reports shall be made, and to require from such carriers specific answers to all questions upon which the Commission may need information. Such annual reports shall show in detail the amount of capital stock issued, the amounts paid therefor, and the manner of payment for the same; the dividends paid, the surplus fund, if any, and the number of stockholders; the funded and floating debts and the interest paid thereon; the cost and value of the carrier's property, franchises, and equipments; the number of employees and the salaries paid each class; the accidents to passengers, employees, and other persons, and the causes thereof; the amounts expended for improvements each year, how expended, and the character of such improvements; the earnings and receipts from each branch of business and from all sources; the operating and other expenses; the balances of profit and loss; and a complete exhibit of the financial operations of the carrier each year, including an annual balance sheet. Such reports shall also contain such information in relation to rates or regulations concerning fares or freights, or agreements, arrangements, or contracts affecting the same as the Commission may require; and the Commission may, in its discretion, for the purpose of enabling it the better to carry out the purposes of this Act, prescribe a period of time within which all common carriers subject to the provisions of this Act shall have, as near as may be, a uniform system of accounts, and the manner in which such accounts shall be kept.

“(2) Said detailed reports shall contain all the required statistics for the period of twelve months ending on the thirtieth day of June in each year, or on the thirty-first day of December in each year if the commission by order substitute that

¹⁸ U. S. ex rel. Kansas City Southern Ry. Co. v. Interstate Commerce Commission, Sup. Ct., U. S., March 8, 1920.

period for the year ending June thirtieth, and shall be made out under oath and filed with the commission at its office in Washington within three months after the close of the year for which the report is made, unless additional time be granted in any case by the commission; and if any carrier, person, or corporation subject to the provisions of this Act shall fail to make and file said annual reports within the time above specified, or within the time extended by the commission, for making and filing the same, or shall fail to make specific answer to any question authorized by the provisions of this section within thirty days from the time it is lawfully required so to do, such party shall forfeit to the United States the sum of one hundred dollars for each and every day it shall continue to be in default with respect thereto. The commission shall also have authority by general or special orders to require said carriers, or any of them, to file monthly reports of earnings and expenses, and to file periodical or special, or both periodical and special, reports concerning any matters about which the commission is authorized or required by this or any other law to inquire or to keep itself informed or which it is required to enforce; and such periodical or special reports shall be under oath whenever the commission so requires; and if any such carrier shall fail to make and file any such periodical or special report within the time fixed by the commission, it shall be subject to the forfeitures last above provided.

“(3) Said forfeitures shall be recovered in the manner provided for the recovery of forfeitures under the provisions of this Act.

“(4) The oath required by this section may be taken before any person authorized to administer an oath by the laws of the State in which the same is taken.

“(5) The Commission may, in its discretion, prescribe the forms of any and all accounts, records, and memoranda to be kept by carriers subject to the provisions of this Act, including the accounts, records, and memoranda of the movement of traffic, as well as of the receipts and expenditures of moneys. The Commission shall, as soon as practicable, prescribe, for carriers subject to this Act, the classes of property for which depreciation charges may properly be included under operating expenses, and the percentages of depreciation which shall be charged

with respect to each of such classes of property, classifying the carriers as it may deem proper for this purpose. The Commission may, when it deems necessary, modify the classes and percentages so prescribed. The carriers subject to this Act shall not charge to operating expenses any depreciation charges on classes of property other than those prescribed by the Commission, or charge with respect to any class of property a percentage of depreciation other than that prescribed therefor by the Commission. No such carrier shall in any case include in any form under its operating or other expenses any depreciation or other charge or expenditure included elsewhere as a depreciation charge or otherwise under its operating or other expenses. The commission shall at all times have access to all accounts, records, and memoranda, including all documents, papers, and correspondence now or hereafter existing, and kept or required to be kept by carriers subject to this Act, and the provisions of this section respecting the preservation and destruction of books, papers, and documents shall apply thereto, and it shall be unlawful for such carriers to keep any other accounts, records, or memoranda than those prescribed or approved by the Commission, and it may employ special agents or examiners, who shall have authority under the order of the Commission to inspect and examine any and all accounts, records, and memoranda, including all documents, papers, and correspondence now or hereafter existing, and kept or required to be kept by such carriers. This provision shall apply to receivers of carriers and operating trustees. The provisions of this section shall also apply to all accounts, records, and memoranda, including all documents, papers, and correspondence now or hereafter existing, kept during the period of Federal control, and placed by the President in the custody of carriers subject to this Act.

“(6) In case of failure or refusal on the part of any such carrier, receiver, or trustee to keep such accounts, records, and memoranda on the books and in the manner prescribed by the Commission, or to submit such accounts, records, and memoranda as are kept to the inspection of the Commission or any of its authorized agents or examiners, such carrier, receiver, or trustee shall forfeit to the United States the sum of five hundred dollars for each such offense and for each and every

day of the continuance of such offense, such forfeiture to be recoverable in the same manner as other forfeitures provided for in this Act.

“(7) Any person who shall willfully make any false entry in the accounts of any book of accounts or in any record or memoranda kept by a carrier, or who shall willfully destroy, mutilate, alter, or by any other means or device falsify the record of any such account, record, or memoranda, or who shall willfully neglect or fail to make full, true, and correct entries in such accounts, records, or memoranda of all facts and transactions appertaining to the carrier's business, or shall keep any other accounts, records, or memoranda than those prescribed or approved by the Commission, shall be deemed guilty of a misdemeanor and shall be subject, upon conviction in any court of the United States of competent jurisdiction, to a fine of not less than one thousand dollars nor more than five thousand dollars, or imprisonment for a term not less than one year nor more than three years, or both such fine and imprisonment: Provided, That the commission may in its discretion issue orders specifying such operating, accounting, or financial papers, records, books, blanks, tickets, stubs, or documents of carriers which may, after a reasonable time, be destroyed, and prescribing the length of time such books, papers, or documents shall be preserved.

“(8) Any examiner who divulges any fact or information which may come to his knowledge during the course of such examination, except in so far as he may be directed by the Commission or by a court or judge thereof, shall be subject, upon conviction in any court of the United States of competent jurisdiction, to a fine of not more than five thousand dollars or imprisonment for a term not exceeding two years, or both.

“(9) That the circuit and district courts of the United States shall have jurisdiction, upon the application of the Attorney-General of the United States at the request of the Commission, alleging a failure to comply with or a violation of any of the provisions of said Act to regulate commerce or of any Act supplementary thereto or amendatory thereof by any common carrier, to issue a writ or writs of mandamus commanding such common carrier to comply with the provisions of said Acts, or any of them.

“(10) And to carry out and give effect to the provisions of said Acts, or any of them, the Commission is hereby authorized to employ special agents or examiners who shall have power to administer oaths, examine witnesses, and receive evidence.”¹³

“(1) As used in this section the term ‘carrier’ means a common carrier by railroad (except a street, suburban, or inter-urban electric railway which is not operated as a part of a general steam railroad system of transportation) which is subject to this Act, or any corporation organized for the purpose of engaging in transportation by railroad subject to this Act.

“(2) From and after one hundred and twenty days after this section takes effect it shall be unlawful for any carrier to issue any share of capital stock or any bond or other evidence of interest in or indebtedness of the carrier (hereinafter in this section collectively termed ‘securities’) or to assume any obligation or liability as lessor, lessee, guarantor, indorser, surety, or otherwise, in respect of the securities of any other person, natural or artificial, even though permitted by the authority creating the carrier corporation, unless and until, and then only to the extent that, upon application by the carrier, and after investigation by the Commission of the purposes and uses of the proposed issue and the proceeds thereof, or of the proposed assumption of obligation or liability in respect of the securities of any other person, natural or artificial, the Commission by order authorizes such issue or assumption. The Commission shall make such order only if it finds that such issue or assumption: (a) is for some lawful object within its corporate purposes, and compatible with the public interest, which is necessary or appropriate for or consistent with the proper performance by the carrier of service to the public as a common carrier, and which will not impair its ability to perform that service, and (b) is reasonably necessary and appropriate for such purpose.

“(3) The Commission shall have power by its order to grant or deny the application as made, or to grant it in part and

¹³ Act of Feb. 4, 1889, ch. 104, § 20, 24 St. at L. 386, amended June 29, 1906, ch. 3591, § 7, 34 St. at L. 593, Feb. 25, 1909, ch. 193, 35 St. at L. 649, June 18, 1910, ch. 309, § 14, 36 St. at L. 555, March 4, 1915, ch. 176, § 1, 38 St. at L. 1196, Aug. 9, 1916, ch. 301, 39 St. at L. 441, Feb. 28, 1920, ch. —, § 433, Comp. St. § 8592.

deny it in part, or to grant it with such modifications and upon such terms and conditions as the Commission may deem necessary or appropriate in the premises, and may from time to time, for good cause shown, make such supplemental orders in the premises as it may deem necessary or appropriate, and may by any such supplemental order modify the provisions of any previous order as to the particular purposes, uses, and extent to which, or the conditions under which, any securities so theretofore authorized or the proceeds thereof may be applied, subject always to the requirements of the foregoing paragraph (2).

“(4) Every application for authority shall be made in such form and contain such matters as the Commission may prescribe. Every such application, as also every certificate of notification hereinafter provided for, shall be made under oath, signed and filed on behalf of the carrier by its president, a vice president, auditor, comptroller, or other executive officer having knowledge of the matters therein set forth and duly designated for that purpose by the carrier.

“(5) Whenever any securities set forth and described in any application for authority or certificate of notification as pledged or held unencumbered in the treasury of the carrier shall, subsequent to the filing of such application or certificate, be sold, pledged, repledged, or otherwise disposed of by the carrier, such carrier shall, within ten days after such sale, pledge, repledge, or other disposition, file with the Commission a certificate of notification to that effect, setting forth therein all such facts as may be required by the Commission.

“(6) Upon receipt of any such application for authority the Commission shall cause notice thereof to be given to and a copy filed with the governor of each State in which the applicant carrier operates. The railroad commissions, public service or utilities commissions, or other appropriate State authorities of the State shall have the right to make before the Commission such representations as they may deem just and proper for preserving and conserving the rights and interests of their people and the States, respectively, involved in such proceedings. The Commission may hold hearings, if it sees fit, to enable it to determine its decision upon the application for authority.

“(7) The jurisdiction conferred upon the Commission by this section shall be exclusive and plenary, and a carrier may issue

securities and assume obligations or liabilities in accordance with the provisions of this section without securing approval other than as specified herein.

“(8) Nothing herein shall be construed to imply any guaranty or obligation as to such securities on the part of the United States.

“(9) The foregoing provisions of this section shall not apply to notes to be issued by the carrier maturing not more than two years after the date thereof and aggregating (together with all other then outstanding notes of a maturity of two years or less) not more than 5 per centum of the par value of the securities of the carrier then outstanding. In the case of securities having no par value, the par value for the purposes of this paragraph shall be the fair market value as of the date of issue. Within ten days after the making of such notes the carrier issuing the same shall file with the Commission a certificate of notification, in such form as may from time to time be determined and prescribed by the Commission, setting forth as nearly as may be the same matters as those required in respect of applications for authority to issue other securities: Provided, That in any subsequent funding of such notes the provisions of this section respecting other securities shall apply.

“(10) The Commission shall require periodical or special reports from each carrier hereafter issuing any securities, including such notes, which shall show, in such detail as the Commission may require, the disposition made of such securities and the application of the proceeds thereof.

“(11) Any security issued or any obligation or liability assumed by a carrier, for which under the provisions of this section the authorization of the Commission is required, shall be void, if issued or assumed without such authorization therefor having first been obtained, or if issued or assumed contrary to any term or condition of such order of authorization as modified by any order supplemental thereto entered prior to such issuance or assumption; but no security issued or obligation or liability assumed in accordance with all the terms and conditions of such an order of authorization therefor as modified by any order supplemental thereto entered prior to such issuance or assumption, shall be rendered void because of failure to comply with any provision of this section relating to pro-

cedure and other matters preceding the entry of such order of authorization. If any security so made void or any security in respect to which the assumption of obligation or liability is so made void, is acquired by any person for value and in good faith and without notice that the issue or assumption is void, such person may in a suit or action in any court of competent jurisdiction hold jointly and severally liable for the full amount of the damage sustained by him in respect thereof, the carrier which issued the security so made void, or assumed the obligation or liability so made void, and its directors, officers, attorneys, and other agents, who participated in any way in the authorizing, issuing, hypothecating, or selling of the security so made void or in the authorizing of the assumption of the obligation or liability so made void. In case any security so made void was directly acquired from the carrier issuing it the holder may at his option rescind the transaction and upon the surrender of the security recover the consideration given therefor. Any director, officer, attorney or agent of the carrier who knowingly assents to or concurs in any issue of securities or assumptions of obligations or liability forbidden by this section, or any sale or other disposition of securities contrary to the provisions of the Commission's order or orders in the premises, or any application not authorized by the Commission of the funds derived by the carrier through such sale or other disposition of such securities, shall be guilty of a misdemeanor and upon conviction shall be punished by a fine of not less than \$1,000 nor more than \$10,000, or by imprisonment for not less than one year nor more than three years, or by both such fine and imprisonment, in the discretion of the court.

“(12) After December 31, 1921, it shall be unlawful for any person to hold the position of officer or director of more than one carrier, unless such holding shall have been authorized by order of the Commission upon due showing, in form and manner prescribed by the Commission, that neither public nor private interests will be adversely affected thereby. After this section takes effect it shall be unlawful for any officer or director of any carrier to receive for his own benefit, directly or indirectly, any money or thing of value in respect of the negotiation, hypothecation, or sale of any securities issued or to be issued by such carrier, or to share in any of the proceeds thereof, or to

participate in the making or paying of any dividends of an operating carrier from any funds properly included in capital account. Any violation of these provisions shall be a misdemeanor, and on conviction in any United States court having jurisdiction shall be punished by a fine of not less than \$1,000 nor more than \$10,000, or by imprisonment for not less than one year nor more than three years, or by both such fine and imprisonment, in the discretion of the court.”¹⁴

“(1) Every common carrier by water in foreign commerce, whose vessels are registered under the laws of the United States, shall file with the Commission, within thirty days after this section becomes effective and regularly thereafter as changes are made, a schedule or schedules showing for each of its steam vessels intended to load general cargo at ports in the United States for foreign destinations (a) the ports of loading, (b) the dates upon which such vessels will commence to receive freight and dates of sailing, (c) the route and itinerary such vessels will follow and the ports of call for which cargo will be carried.

“(2) Upon application of any shipper a carrier by railroad shall make request for, and the carrier by water shall upon receipt of such request name, a specific rate applying for such sailing, and upon such commodity as shall be embraced in the inquiry, and shall name in connection with such rate, port charges, if any, which accrue in addition to the vessel's rates and are not otherwise published by the railway as in addition to or absorbed in the railway rate. Vessel rates, if conditioned upon quantity of shipment, must be so stated and separate rates may be provided for carload and less than carload shipments. The carrier by water, upon advices from a carrier by railroad, stating that the quoted rate is firmly accepted as applying upon a specifically named quantity of any commodity, shall, subject to such conditions as the Commission by regulation may prescribe, make firm reservation from unsold space in such steam vessel as shall be required for its transportation and shall so advise the carrier by railroad, in which advices shall be included

¹⁴ Act of Feb. 4, 1887, ch. 104,
§ 20a, as added, Feb. 28, 1920, ch.
—, § 439, Comp. St. § 8592a.

the latest available information as to prospective sailing date of such vessel.

“(3) As the matters so required to be stated in such schedule or schedules are changed or modified from time to time, the carrier shall file with the Commission such changes or modifications as early as practicable after such modification is ascertained. The Commission is authorized to make and publish regulations not inconsistent herewith governing the manner and form in which such carriers are to comply with the foregoing provisions. The Commission shall cause to be published in compact form, for the information of shippers of commodities throughout the country, the substance of such schedules, and furnish such publications to all railway carriers subject to this Act, in such quantities that railway carriers may supply to each of their agents who receive commodities for shipment in such cities and towns as may be specified by the Commission, a copy of said publication; the intent being that each shipping community sufficiently important, from the standpoint of the export trade, to be so specified by the Commission shall have opportunity to know the sailings and routes, and to ascertain the transportation charges of such vessels engaged in foreign commerce. Each railway carrier to which such publication is furnished by the Commission is hereby required to distribute the same as aforesaid and to maintain such publication as it is issued from time to time, in the hands of its agents. The Commission is authorized to make such rules and regulations not inconsistent herewith respecting the distribution and maintenance of such publications in the several communities so specified as will further the intent of this section.

“(4) When any consignor delivers a shipment of property to any of the places so specified by the Commission, to be delivered by a railway carrier to one of the vessels upon which space has been reserved at a specified rate previously ascertained, as provided herein, for the transportation by water from and for a port named in the aforesaid schedule, the railway carrier shall issue a through bill of lading to the point of destination. Such bill of lading shall name separately the charge to be paid for the railway transportation, water transportation, and port charges, if any, not included in the rail or water transportation charge; but the carrier by railroad shall not be liable to

the consignor, consignee, or other person interested in the shipment after its delivery to the vessel. The Commission shall, in such manner as will preserve for the carrier by water the protection of limited liability provided by law, make such rules and regulations not inconsistent herewith as will prescribe the form of such through bill of lading. In all such cases it shall be the duty of the carrier by railroad to deliver such shipment to the vessel as a part of its undertaking as a common carrier.

“(5) The issuance of a through bill of lading covering shipments provided for herein shall not be held to constitute ‘an arrangement for continuous carriage or shipment’ within the meaning of this Act.”¹⁵

“The Commission may, after investigation, order any carrier by railroad subject to this Act, within a time specified in the order, to install automatic train-stop or train-control devices or other safety devices, which comply with specifications and requirements prescribed by the Commission, upon the whole or any part of its railroad, such order to be issued and published at least two years before the date specified for its fulfillment: Provided, That a carrier shall not be held to be negligent because of its failure to install such devices upon a portion of its railroad not included in the order; and any action arising because of an accident happening upon such portion of its railroad shall be determined without consideration of the use of such devices upon another portion of its railroad. Any common carrier which refuses or neglects to comply with any order of the Commission made under the authority conferred by this section shall be liable to a penalty of \$100 for each day that such refusal or neglect continues, which shall accrue to the United States, and may be recovered in a civil action brought by the United States.”¹⁶

“(11) Any common carrier, railroad, or transportation company subject to the provisions of this Act receiving property for transportation from a point in one State or Territory or the District of Columbia to a point in another State, Territory, District of Columbia, or from any point in the United States

¹⁵ Act of Feb. 4, 1887, ch. 104, § 25, Feb. 28, 1920, ch. —, § 441, Comp. St. § 8596a.

¹⁶ Act of Feb. 4, 1887, ch. 104, § 26, as added, Feb. 28, 1920, ch. —, § 441, Comp. St. § 8596b.

to a point in an adjacent foreign country shall issue a receipt or bill of lading therefor, and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass within the United States or within an adjacent foreign country when transported on a through bill of lading, and no contract, receipt, rule, regulation, or other limitation of any character whatsoever, shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed; and any such common carrier, railroad, or transportation company so receiving property for transportation from a point in one State, Territory, or the District of Columbia to a point in another State or Territory, or from a point in a State or Territory to a point in the District of Columbia, or from any point in the United States to a point in an adjacent foreign country, or for transportation wholly within a Territory shall be liable to the lawful holder of said receipt, or bill of lading or to any party entitled to recover thereon, whether such receipt or bill of lading has been issued or not, for the full actual loss, damage, or injury to such property caused by it or by any such common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass within the United States or within an adjacent foreign country when transported on a through bill of lading, notwithstanding any limitation of liability or limitation of the amount of recovery or representation or agreement as to value in any such receipt or bill of lading, or in any contract, rule, regulation, or in any tariff filed with the Interstate Commerce Commission; and any such limitation, without respect to the manner or form in which it is sought to be made is hereby declared to be unlawful and void: Provided, That if the loss, damage, or injury occurs while the property is in the custody of a carrier by water the liability of such carrier shall be determined by and under the laws and regulations applicable to transportation by water, and the liability of the initial carrier shall be the same as that of such carrier by water: Provided, however, That the provisions hereof respecting liability for full actual loss, damage, or injury, notwithstanding any limitation

of liability or recovery or representation or agreement or release as to value, and declaring any such limitation to be unlawful and void, shall not apply, first, to baggage carried on passenger trains or boats, or trains or boats carrying passengers; second, to property, except ordinary live stock, received for transportation concerning which the carrier shall have been or shall hereafter be expressly authorized or required by order of the Interstate Commerce Commission to establish and maintain rates dependent upon the value declared in writing by the shipper or agreed upon in writing as the released value of the property, in which case such declaration or agreement shall have no other effect than to limit liability and recovery to an amount not exceeding the value so declared or released, and shall not, so far as relates to values, be held to be a violation of section ten of this Act to regulate commerce, as amended; and any tariff schedule which may be filed with the commission pursuant to such order shall contain specific reference thereto and may establish rates varying with the value so declared or agreed upon; and the commission is hereby empowered to make such order in cases where rates dependent upon and varying with declared or agreed values would, in its opinion, be just and reasonable under the circumstances and conditions surrounding the transportation. The term 'ordinary live stock' shall include all cattle, swine, sheep, goats, horses, and mules, except such as are chiefly valuable for breeding, racing, show purposes, or other special uses: Provided further, That nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under the existing law: Provided further, That it shall be unlawful for any such common carrier to provide by rule, contract, regulation, or otherwise a shorter period for giving notice of claims than ninety days, for the filing of claims than four months, and for the institution of suits than two years, such period for institution of suits to be computed from the day when notice in writing is given by the carrier to the claimant that the carrier has disallowed the claim or any part or parts thereof specified in the notice: Provided, however, That if the loss, damage, or injury complained of was due to delay or damage while being loaded or unloaded, or damaged in transit by

carelessness or negligence, then no notice of claim nor filing of claim shall be required as a condition precedent to recovery.”¹⁷

“(12) The common carrier, railroad, or transportation company issuing such receipt or bill of lading shall be entitled to recover from the common carrier, railroad, or transportation company on whose line the loss, damage, or injury shall have been sustained the amount of such loss, damage, or injury as it may be required to pay to the owners of such property, as may be evidenced by any receipt, judgment, or transcript thereof.”¹⁸

“(a) When used in this section—

“The term ‘carrier’ means a carrier by railroad which, during any part of the period of Federal control, engaged as a common carrier in general transportation, and competed for traffic, or connected, with a railroad under Federal control, and which sustained a deficit in its railway operating income for that portion (as a whole) of the period of Federal control during which it operated its own railroad or system of transportation; but does not include any street or interurban electric railway which has as its principal source of operating revenue urban, suburban, or interurban passenger traffic or sale of power, heat, and light, or both; and

“The term ‘test period’ means the three years ending June 30, 1917.

“(b) For the purposes of this section—

“Railway operating income or any deficit therein for the period of Federal control shall be computed in a manner similar to that provided in section 209 with respect to such income or deficit for the guaranty period; and

“Railway operating income or any deficit therein for the test period shall be computed in the manner provided in section 1 of the Federal Control Act.

“(c) As soon as practicable after March 1, 1920, the Commission shall ascertain for every carrier, for every month of

¹⁷ Act of Feb. 4, 1887, ch. 104, § 20, 24 St. at L. 386, as amended, June 29, 1906, ch. 3591, § 7, 34 St. at L. 593, Aug. 9, 1916, ch. 301, 39 St. at L. 441, Feb. 28, 1920, ch. —, §§ 436-438, Comp. St. § 8604a.

¹⁸ Act of Feb. 4, 1887, ch. 104, § 20, 24 St. at L. 386, as amended June 29, 1906, ch. 3591, § 7, 34 St. at L. 593, Feb. 28, 1920, ch. —, § 436, Comp. St. § 8604aa.

the period of Federal control during which its railroad or system of transportation was not under Federal operation, its deficit in railway operating income, if any, and its railway operating income, if any, (hereinafter called 'Federal control return'), and the average of its deficit in railway operating income, if any, and of its railway operating income, if any, for the three corresponding months of the test period taken together, (hereinafter called 'test period return'): Provided, That 'test period return,' in the case of a carrier which operated its railroad or system of transportation for at least one year during, but not for the whole of, the test period, means its railway operating income, or the deficit therein, for the corresponding month during the test period, or the average thereof for the corresponding months during the test period taken together, during which the carrier operated its railroad or system of transportation.

"(d) For every month of the period of Federal control during which the railroad or system of transportation of the carrier was not under Federal operation, the Commission shall then ascertain (1) the difference between its Federal control return, if a deficit, and its test period return, if a smaller deficit, or (2) the difference between its test period return, if an income, and its Federal control return, if a smaller income, or (3) the sum of its Federal control return, if a deficit, plus its test period return, if an income. The sum of such amounts shall be credited to the carrier.

"(e) For every such month the Commission shall then ascertain (1) the difference between the carrier's Federal control return, if an income, and its test period return, if a smaller income, or (2) the difference between its test period return, if a deficit, and its Federal control return, if a smaller deficit, or (3) the sum of its Federal control return, if an income, plus its test period return, if a deficit. The sum of such amounts shall be credited to the United States.

"(f) If the sum of the amounts so credited to the carrier under subdivision (d) exceeds the sum of the amounts so credited to the United States under subdivision (e), the difference shall be payable to the carrier. In the case of a carrier which operated its railroad or system of transportation for less than a year during, or for none of, the test period, the foregoing computations shall not be used, but there shall be payable to

such carrier its deficit in railway operating income for that portion (as a whole) of the period of Federal control during which it operated its own railroad or system of transportation.

“(g) The Commission shall promptly certify to the Secretary of the Treasury the several amounts payable to carriers under paragraph (f). The Secretary of the Treasury is hereby authorized and directed thereupon to draw warrants in favor of each such carrier upon the Treasury of the United States for the amount shown in such certificate as payable thereto. An amount sufficient to pay such warrants is hereby appropriated out of any money in the Treasury not otherwise appropriated.”¹⁹

“(a) All rates, fares, and charges, and all classifications, regulations, and practices, in any wise changing, affecting, or determining, any part or the aggregate of rates, fares, or charges, or the value of the service rendered, which on February 29, 1920, are in effect on the lines of carriers subject to the Interstate Commerce Act, shall continue in force and effect until thereafter changed by State or Federal authority, respectively, or pursuant to authority of law; but prior to September 1, 1920, no such rate, fare, or charge shall be reduced, and no such classification, regulation, or practice shall be changed in such manner as to reduce any such rate, fare, or charge, unless such reduction or change is approved by the Commission.

“(b) All divisions of joint rates, fares, or charges, which on February 29, 1920, are in effect between the lines of carriers subject to the Interstate Commerce Act, shall continue in force and effect until thereafter changed by mutual agreement between the interested carriers or by State or Federal authorities, respectively.

“(c) Any land grant railroad organized under the Act of July 28, 1866 (chapter 300), shall receive the same compensation for transportation of property and troops of the United States as is paid to land grant railroads organized under the Land Grant Act of March 3, 1863, and the Act of July 27, 1866 (chapter 278).”²⁰

“(a) When used in this section—

“The term ‘carrier’ means (1) a carrier by railroad or partly

¹⁹ Act of Feb. 28, 1920, ch. —, § 204, Comp. St., § 10071½bbb.

²⁰ Act of Feb. 28, 1920, ch. —, § 208, Comp. St. § 10071½d.

by railroad and partly by water, whose railroad or system of transportation is under Federal control at the time Federal control terminates, or which has heretofore engaged as a common carrier in general transportation and competed for traffic, or connected, with a railroad at any time under Federal control; and (2) a sleeping car company whose system of transportation is under Federal control at the time Federal control terminates; but does not include a street or interurban electric railway not under Federal control at the time Federal control terminates, which has as its principal source of operating revenue urban, suburban, or interurban passenger traffic or sale of power, heat, and light, or both;

“The term ‘guaranty period’ means the six months beginning March 1, 1920.

“The term ‘test period’ means the three years ending June 30, 1917; and

“The term ‘railway operating income’ and other references to accounts of carriers by railroad shall, in the case of a sleeping car company, be construed as indicating the appropriate corresponding accounts in the accounting system prescribed by the Commission.

“(b) This section shall not be applicable to any carrier which does not on or before March 15, 1920, file with the Commission a written statement that it accepts all the provisions of this section.

“(c) The United States hereby guarantees—

“(1) With respect to any carrier with which a contract (exclusive of so-called cooperative contracts or waivers) has been made fixing the amount of just compensation under the Federal Control Act, that the railway operating income of such carrier for the guaranty period as a whole shall not be less than one-half the amount named in such contract as annual compensation, or, where the contract fixed a lump sum as compensation for the whole period of Federal operation, that the railway operating income of such carrier for the guaranty period as a whole shall not be less than an amount which shall bear the same proportion to the lump sum so fixed as six months bears to the number of months during which such carrier was under Federal operation, including in both cases the increases in such

compensation provided for in section 4 of the Federal Control Act;

“(2) With respect to any carrier entitled to just compensation under the Federal Control Act, with which such a contract has not been made, that the railway operating income of such carrier for the guaranty period as a whole shall not be less than one-half of the annual amount estimated by the President as just compensation for such carrier under the Federal Control Act, including the increases in such compensation provided for in section 4 of the Federal Control Act. If any such carrier does not accept the President's estimate respecting its just compensation, and if in proceedings under section 3 of the Federal Control Act it is determined that a larger or smaller annual amount is due as just compensation, the guaranty under this paragraph shall be increased or decreased accordingly;

“(3) With respect to any carrier, whether or not entitled to just compensation under the Federal Control Act, with which such a contract has not been made, and for which no estimate of just compensation is made by the President, and which for the test period as a whole sustained a deficit in railway operating income, the guaranty shall be a sum equal to (a) the amount by which any deficit in its railway operating income for the guaranty period as a whole exceeds one-half of its average annual deficit in railway operating income for the test period, plus (b) an amount equal to one-half the annual sum fixed by the President under section 4 of the Federal Control Act;

“(4) With respect to any carrier not entitled to just compensation under the Federal Control Act, which for the test period as a whole had an average annual railway operating income, that the railway operating income of such carrier for the guaranty period as a whole shall not be less than one-half the average annual railway operating income of such carrier during the test period.

“(d) If for the guaranty period as a whole the railway operating income of any carrier entitled to a guaranty under paragraph (1), (2), or (4) of subdivision (c) is in excess of the minimum railway operating income guaranteed in such paragraph, such carrier shall forthwith pay the amount of such excess into the Treasury of the United States. If for the guaranty period as a whole the railway operating income of any

carrier entitled to a guaranty under paragraph (3) of subdivision (c) is in excess of one-half of the annual sum fixed by the President with respect to such carrier under section 4 of the Federal Control Act, such carrier shall forthwith pay the amount of such excess into the Treasury of the United States. The amounts so paid into the Treasury of the United States shall be added to the funds made available under section 202 for the purposes indicated in such section. Notwithstanding the provisions of this subdivision, any carrier may retain out of any such excess any amount necessary to enable it to pay its fixed charges accruing during the guaranty period.

“(e) For the purposes of this section railway operating income, or any deficit therein, for the test period shall be computed in the manner provided for in section 1 of the Federal Control Act.

“(b) In computing railway operating income, or any deficit therein, for the guaranty period for the purposes of this section—

“(1) Debits and credits arising from the accounts, called in the monthly reports to the Commission equipment rents and joint facility rents, shall be included, but debits and credits arising from the operation of such street electric passenger railways, including railways commonly called interurbans, as are not under Federal control at the time of termination thereof, shall be excluded;

“(2) Proper adjustments shall be made (a) in case any lines which were, during any portion of the period of Federal control, a part of the railroad or system of transportation of the carrier, and whose railway operating income was included in such income of the carrier for the test period, do not continue to be a part of such railroad or system of transportation during the entire guaranty period, and (b) in case of any lines acquired by, leased to, or consolidated with, the railroad or system of transportation of the carrier at any time since the end of the test period and prior to the expiration of the guaranty period, for which separate operating returns to the Commission are not made in respect to the entire portion of the guaranty period;

“(3) There shall not be included in operating expenses, for maintenance of way and structures, or for maintenance of equipment, more than an amount fixed by the Commission. In fixing

such amount the Commission shall so far as practicable apply the rule set forth in the proviso in paragraph (a) of section 5 of the 'standard contract' between the United States and the carriers (whether or not such contract has been entered into with the carrier whose railway operating income is being computed);

"(4) There shall not be included any taxes paid under Title I or II of the Revenue Act of 1917, or such portion of the taxes paid under Title II or III of the Revenue Act of 1918 as by the terms of such Act are to be treated as levied by an Act in amendment of Title I or II of the Revenue Act of 1917; and

"(5) The Commission shall require the elimination and re-statement of the operating expenses and revenues (other than for maintenance of way and structures, or maintenance of equipment) for the guaranty period, to the extent necessary to correct and exclude any disproportionate or unreasonable charge to such expenses or revenues for such period, or any charge to such expenses or revenues for such period which under a proper system of accounting is attributable to another period.

"(g) The Commission shall, as soon as practicable after the expiration of the guaranty period, ascertain and certify to the Secretary of the Treasury the several amounts necessary to make good the foregoing guaranty to each carrier. The Secretary of the Treasury is hereby authorized and directed thereupon to draw warrants in favor of each such carrier upon the Treasury of the United States, for the amount shown in such certificate as necessary to make good such guaranty. An amount sufficient to pay such warrants is hereby appropriated out of any money in the Treasury not otherwise appropriated.

"(h) Upon application of any carrier to the Commission, asking that during the guaranty period there may be advanced to it from time to time such sums, not in excess of the estimated amount necessary to make good the guaranty, as are necessary to enable it to meet its fixed charges and operating expenses, the Commission may certify to the Secretary of the Treasury the amount of, and times at which, such advances, if any, shall be made. The Secretary of the Treasury, on receipt of such certificate, is authorized and directed to make the advances in the amounts and at the times specified in the certificate, upon the

execution by the carrier of a contract, secured in such manner as the Secretary may determine, that upon final determination of the amount of the guaranty provided for by this section such carrier will repay to the United States any amounts which it has received from such advances in excess of the guaranty, with interest at the rate of 6 per centum per annum from the time such excess was paid. There is hereby appropriated, out of any money in the Treasury not otherwise appropriated, a sum sufficient to enable the Secretary of the Treasury to make the advances referred to in this subdivision.

“(a) If the American Railway Express Company shall, on or before March 15, 1920, file with the Commission a written statement that it accepts all the provisions of this subdivision; the contract of June 26, 1918, between such company and the Director General of Railroads, as amended and continued by agreement dated November 21, 1918, shall remain in full force and effect during the guaranty period in so far as the same constitutes a guaranty on the part of the United States to such company against a deficit in operating income.

“In computing operating income, and any deficit therein, for the guaranty period for the purposes of this subdivision, the Commission shall require the elimination and restatement of the operating expenses and revenues for the guaranty period, to the extent necessary to correct and exclude any disproportionate or unreasonable charge to such expenses or revenues for such period, or any charge to such expenses or revenues for such period which under a proper system of accounting is attributable to another period, and to exclude from operating expenses so much of the charge for payment for express privileges to carriers on whose lines the express traffic is carried as is in excess of 50.25 per centum of gross express revenue.

“For the guaranty period the American Railway Express Company shall pay to every carrier which accepts the provisions of this section, as provided in subdivision (b) hereof, 50.25 per centum of the gross revenue earned on the transportation of all its express traffic on the carrier's lines, and every such carrier shall accept from the American Railway Express Company such percentage of the gross revenue as its compensation. In arriving at the gross revenue on through or joint express traffic, the

method of dividing the revenue between the carriers shall be that agreed upon between the carriers and such express company and approved by the Commission.

"If for the guaranty period as a whole the American Railway Express Company does not have a deficit in operating income, it shall forthwith pay the amount of its operating income for such period into the Treasury of the United States. The amount so paid shall be added to the funds made available under section 202 for the purposes indicated in such section.

"The Commission shall, as soon as practicable after the expiration of the guaranty period, certify to the Secretary of the Treasury the amount necessary to make good the foregoing guaranty to the American Railway Express Company. The Secretary of the Treasury is hereby authorized and directed thereupon to draw warrants in favor of such company upon the Treasury of the United States for the amount shown in such certificate as necessary to make good such guaranty. An amount sufficient to pay such warrants is hereby appropriated out of any money in the Treasury not otherwise appropriated.

"Upon application of the American Railway Express Company to the Commission, asking that during the guaranty period there may be advanced to it from time to time such sums, not in excess of the estimated amount necessary to make good the guaranty, as are necessary to enable it to meet its operating expenses, the Commission may certify to the Secretary of the Treasury the amount of, and times at which, such advances, if any, shall be made. The Secretary of the Treasury, on receipt of such certificate, is authorized and directed to make the advances in the amounts and at the times specified in the certificate, upon the execution by such company of a contract, secured in such manner as the Secretary may determine, that upon final determination of the amount of the guaranty provided for by this subdivision such company will repay to the United States any amounts which it has received from such advances in excess of the guaranty, with interest at the rate of 6 per centum per annum from the time such excess was paid. There is hereby appropriated out of any money in the Treasury not otherwise appropriated a sum sufficient to enable the Secretary of the

Treasury to make the advances referred to in this subdivision."²¹

"(a) For the purpose of enabling carriers by railroad subject to the Interstate Commerce Act properly to serve the public during the transition period immediately following the termination of Federal control, any such carrier may, at any time after the passage of this Act and before the expiration of two years after the termination of Federal control, make application to the Commission for a loan from the United States, setting forth the amount of the loan and the term for which it is desired, the purpose of the loan and the uses to which it will be applied, the present and prospective ability of the applicant to repay the loan and meet the requirements of its obligations in that regard, the character and value of the security offered, and the extent to which the public convenience and necessity will be served. The application shall be accompanied by statements showing such facts and details as the Commission may require with respect to the physical situation, ownership, capitalization, indebtedness, contract obligations, operation, and earning power of the applicant, together with such other facts relating to the propriety and expediency of granting the loan applied for and the ability of the applicant to make good the obligation, as the Commission may deem pertinent to the inquiry.

"(b) If the Commission, after such hearing and investigation, with or without notice, as it may direct, finds that the making, in whole or in part, of the proposed loan by the United States is necessary to enable the applicant properly to meet the transportation needs of the public, and that the prospective earning power of the applicant and the character and value of the security offered are such as to furnish reasonable assurance of the applicant's ability to repay the loan within the time fixed therefor, and to meet its other obligations in connection with such loan, the Commission may certify to the Secretary of the Treasury its findings of fact and its recommendations as to: the amount of the loan which is to be made; the time, not exceeding five years from the making thereof, within which it is to be repaid; the character of the security which is to be offered therefor; and the terms and conditions of the loan.

²¹ Act of Feb. 28, 1920, ch. —,

§ 209 Comp. St. § 10071¼dd.

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“(c) Upon receipt of such certificate from the Commission, the Secretary of the Treasury, at any time before the expiration of twenty-six months after the termination of Federal control, is authorized to make a loan, not exceeding the maximum amount recommended in such certificate, out of any moneys in the revolving fund provided for in this section. All such loans shall bear interest at the rate of 6 per centum per annum, payable semi-annually to the Secretary of the Treasury and to be placed to the credit of the revolving fund provided for in this section. The time, not exceeding five years from the making thereof, within which such loan is to be repaid, the security which is to be taken therefor, which shall be adequate to secure the loan, the terms and conditions of the loan, and the form of the obligation to be entered into, shall be prescribed by the Secretary of the Treasury.

“(d) The Commission or the Secretary of the Treasury may call upon the Federal Reserve Board for advice and assistance with respect to any such application or loan.

“(e) There is hereby appropriated out of any moneys in the Treasury not otherwise appropriated the sum of \$300,000,000, which shall be used as a revolving fund for the purpose of making the loans provided for in this section, and for paying the judgments, decrees, and awards referred to in subdivision (e) of section 206.

“(f) A carrier may issue evidences of indebtedness to the United States pursuant to this section without the authorization or approval of any authority, State or Federal, and without compliance with any requirement, State or Federal, as to notification.”²²

The Commission has also acted as a board of arbitration between shippers and carriers in the adjustment of rates, in a few cases.²³

§ 77b. Practice and rules of the Interstate Commerce Commission. “The Commission may conduct its proceedings in

²² Act of Feb. 28, 1920, ch. —, § 210 Comp. St. § 10071½ddd.

²³ See proceedings entitled, *In the Matter of Differential Freight Rates to and from North Atlantic Ports*, decided April 27, 1905, 11

I. C. C. R. 13, and *In the Matter of Freight Rates between Memphis and points in Arkansas*, decided August 15, 1905, 11 I. C. C. R. 180, *Barnes*, Interstate Transportation.

such manner as will best conduce to the proper dispatch of business and to the ends of justice. The Commission shall have an official seal, which shall be judicially noticed. Any member of the Commission may administer oaths and affirmations and sign subpoenas. A majority of the Commission shall constitute a quorum for the transaction of business, except as may be otherwise herein provided, but no Commissioner shall participate in any hearing or proceeding in which he has any pecuniary interest. The Commission may, from time to time, make or amend such general rules or orders as may be requisite for the order and regulation of proceedings before it, or before any division of the commission, including forms of notices and the service thereof, which shall conform, as nearly as may be, to those in use in the courts of the United States. Any party may appear before the Commission or any division thereof and be heard in person or by attorney. Every vote and official act of the Commission, or of any division thereof, shall be entered of record, and its proceedings shall be public upon the request of any party interested.

“(2) The Commission is hereby authorized by its order to divide the members thereof into as many divisions (each to consist of not less than three members) as it may deem necessary, which may be changed from time to time. Such divisions shall be denominated, respectively, division one, division two, and so forth. Any Commissioner may be assigned to and may serve upon such division or division as the Commission may direct, and the senior in service of the Commissioners constituting any of said divisions, shall act as chairman thereof. In case of vacancy in any division or of absence or inability to serve thereon of any Commissioner thereto assigned, the chairman of the Commission or any Commissioner designated by him for that purpose, may temporarily serve on said division until the Commission shall otherwise order.

“(3) The Commission may by order direct that any of its work, business, or functions arising under this Act, or under any Act amendatory thereof, or supplemental thereto, or under any amendment which may be made to any of said Acts, or under any other Act or joint resolution which has been or may hereafter be approved, or in respect of any matter which has been or may be referred to the Commission by Congress or by either

branch thereof, be assigned or referred to any of said divisions for action thereon, and may by order at any time amend, modify, supplement, or rescind any such direction. All such orders shall take effect forthwith and remain in effect until otherwise ordered by the Commission."

"(4) In conformity with and subject to the order or orders of the Commission in the premises, each division so constituted shall have power and authority by a majority thereof to hear and determine, order, certify, report, or otherwise act as to any of said work, business, or functions so assigned or referred to it for action by the Commission, and in respect thereof the division shall have all the jurisdiction and powers now or then conferred by law upon the Commission, and be subject to the same duties and obligations. Any order, decision, or report made or other action taken by any of said divisions in respect of any matters so assigned or referred to it shall have the same force and effect, and may be made, evidenced, and enforced in the same manner as if made, or taken by the Commission, subject to rehearing by the Commission, as provided in section sixteen-a hereof for rehearing cases decided by the Commission. The secretary and seal of the commission shall be the secretary and seal of each division thereof.

"(5) Nothing in this section contained, or done pursuant thereto, shall be deemed to divest the Commission of any of its powers."¹

The functions of the Commission are not strictly judicial, but they are quasi-judicial in their nature.²

It has been said that its proceedings in investigation should substantially conform to those of a referee or special master in chancery, appointed to report upon the facts and the law;³ but less technicality is required.

§ 77b. ¹ Act of Feb. 4, 1887, ch. 104, § 17, 24 St. at L. 385, amended, March 2, 1889, ch. 382, § 6, 25 St. at L. § 861, Aug. 9, 1917, ch. 50, § 2, 40 St. at L. 270, Feb. 28, 1920, ch. —, §§ 430-432, Comp. St. § 8586.

² Interstate Commerce Commission v. Louisville & N. R. R. Co., 227

U. S. 88, 93; Interstate Commerce Commission v. Louisville & N. R. R. Co., 73 Fed. 409, 414; Interstate Commerce Commission v. Cincinnati, N. O. & T. P. Ry. Co., 76 Fed. 183.

³ Interstate Commerce Commission v. Louisville & N. R. R. Co., 73 Fed. 409, 414. See *infra*, Chapter XXV.

“Any person, firm, corporation, company, or association, or any mercantile, agricultural, or manufacturing society or other organization, or any body politic or municipal organization, or any common carrier complaining of anything done or omitted to be done by any common carrier subject to the provisions of this Act in contravention of the provisions thereof, may apply to said Commission by petition, which shall briefly state the facts; whereupon a statement of the complainant thus made shall be forwarded by the Commission to such common carrier, who shall be called upon to satisfy the complaint or to answer the same in writing, within a reasonable time to be specified by the Commission. If such common carrier within the time specified shall make reparation for the injury alleged to have been done, the common carrier shall be relieved of liability to the complainant only for the particular violation of law thus complained of. If such carrier or carriers shall not satisfy the complaint within the time specified or there shall appear to be any reasonable ground for investigation of said complaint, it shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall deem proper.

“(2) Said Commission shall, in like manner and with the same authority and powers, investigate any complaint forwarded by the railroad commissioner or railroad commission of any State or Territory at the request of such Commissioner or Commission, and the Interstate Commerce Commission shall have authority and power at any time to institute an inquiry, on its own motion, in any case and as to any matter or thing concerning which a complaint is authorized to be made, to or before said Commission by any provision of this Act, or concerning which any question may arise under any of the provisions of this Act, or relating to the enforcement of any of the provisions of this Act. And the said Commission shall have the same powers and authority to proceed with any inquiry instituted on its own motion as though it had appealed to by complaint or petition under any of the provisions of this Act, including the power to make and enforce any order or orders in the case, relating to the matter or thing concerning which the inquiry is

had, excepting orders for the payment of money. No complaint shall at any time be dismissed because of the absence of direct damage to the complaint."⁴

Under its statutory authority the Commission has adopted the following rules of practice. These rules regulate proceedings instituted by parties who apply for relief and not proceedings instituted by the Commission of its own motion.⁵

I.

PUBLIC SESSIONS AND HEARINGS.

"(a) Public sessions of the Commission or Divisions thereof for hearing evidence or oral arguments or for public conferences, and hearings before examiners, will be held as set upon notice by the Commission, subject to change upon such notice as may be practicable.

II.

PARTIES.

"(a) The parties to proceedings before the Commission are complainants, defendants, interveners, protestants, respondents, applicants, and petitioners, according to the nature of the proceeding and their relation thereto. Any party may appear and be heard in person or by attorney.

"(b) In complaint cases, the parties who may complain to the Commission of anything done or omitted to be done in violation of the provisions of the Act to regulate commerce, as amended, otherwise known as the Interstate Commerce Act, and in these rules referred to as the Act, by any common carrier subject to the Act are those designated in section 13 of the Act, and are styled complainants. The common carriers so complained of, and their receivers or operating trustees, if any, are styled defendants. Two or more complainants may join in one complaint if their respective causes of action are against the same defendant or defendants and involve substantially the same violation of the Act and a like state of facts.⁶

⁴ Feb. 4, 1887, ch. 104, § 13, 24 St. at L. 383, amended June 18, 1910, ch. 309, § 11, 36 St. at L. 550, Comp. St. § 8581.

⁵ *Re Alleged Excessive Freight Rates on Food Products*, 3 I. C. C. R. 151, 4 I. C. C. R. 116, 120.

⁶ See *infra*, § 140.

“(e) If complaint is made in respect of through transportation by continuous carriage or shipment all carriers subject to the Act participating therein should be made defendants.

“(d) If complaint is made of rates, fares, charges, regulations or practices of more than one carrier all carriers against which an order is sought should be made defendants.

“(e) If complaint is made of a classification or any provision thereof it will ordinarily suffice to make defendants the carriers operating one or more through routes between representative points of origin and destination.

“(f) The receiver or operating trustee of the line of a defendant must also be made defendant.

“(g) In investigation proceedings the carriers designated therein are styled respondents.

“(h) In investigation and suspension proceedings the applicants upon whose protests the proceeding was instituted are styled protestants.

“(i) In applications for relief from any provision of the Act the carriers by or on whose behalf the application is made are styled applicants.

“(j) Others seeking relief are styled petitioners.

“(k) Petitioners permitted to intervene as hereinafter provided are styled *interveners*.

“(l) Any one entitled under the Act to complain to the Commission may petition for leave to intervene in any pending proceeding prior to or at the time it is called for hearing, but not after except for good cause shown. The petition shall set forth the grounds of the proposed intervention; the position and interest of the petitioner in the proceeding; and, if affirmative relief is sought, should conform to the requirements for a formal complaint. Leave will not be granted except on allegations reasonably pertinent to the issues already presented and which do not unduly broaden them. If leave is granted, the intervener thereby becomes a party to the proceeding. When the petition is filed prior to the hearing the petitioner must furnish therewith a sufficient number of copies for service upon all parties to the proceeding and three additional copies for the use of the Commission. When not so filed prior to but tendered at the hearing sufficient copies must be provided for distribution as motion papers to the parties represented at the hearing. If

leave be granted at the hearing sufficient copies must also be furnished for service and three additional copies for the use of the Commission. It is desirable, especially where affirmative relief is sought, that the petition be filed in season to permit of service on the defendants and afford them an opportunity to answer before the hearing, thereby making it possible in some instances to grant leave which otherwise it may be necessary to deny in fairness to the parties to the proceeding.⁷

III.

"COMPLAINTS.

"(a) Complaints may be either informal or formal.

"(b) *Informal complaints* may be made by letter or other writing and as received are filed. Matters thus presented are, if their nature warrants it, taken up by correspondence with the carriers affected in an endeavor to bring about adjustment or satisfaction of the complaint without formal hearing, and are given serial numbers on the informal docket. This informal procedure has been found efficacious in the great majority of cases and is recommended.⁸

⁷ See *infra*, §§ 258-261.

⁸ "It might be well to state that while cases forward on this docket are adjusted in an informal manner, this special docket is not an informal docket in respect to the form of pleadings and the character of the hearing. The Commission cannot on the special docket exceed the authority exercised by it on the formal docket nor may it omit any requirement with respect to cases on the special docket that the law imposes on it in the disposition of cases on the formal docket. In all cases, whether on the formal or the informal docket, the law requires a complaint and answer and a full hearing, and provides that where damages are awarded the report of the Commis-

sion shall include the findings of fact on which the award is made. The Commission has endeavored to simplify the procedure on the special docket by accepting the application of the carrier as the equivalent of a complaint and answer, and by accepting as a sufficient compliance with the requirements of Section 15 for a full hearing its admission that the rate charged under the circumstances then existing was reasonable.

"It will therefore be observed that the Commission's action in special reparation cases springs from the same authority which it exercises in formal cases." Twenty-third Annual Report of Community, A. D. 1909, Barnes on Interstate Transportation, pp. 1021-1022:

"(c) No form of informal complaint is prescribed, but in substance the letter or other writing must contain the essential elements of a complaint, including name and address of the complainant, a statement that the Act has been violated by the carrier named, indicating when, where and how, and a request for affirmative relief. It is desirable that the informal complaint be accompanied by copies in sufficient number to enable the Commission to transmit one to each carrier named, and it may be accompanied by supporting papers. Proceedings thus instituted on the informal docket are without prejudice to complainant's right to file and prosecute formal complaint, whereupon the proceedings on the informal docket will be discontinued.

"(d) Sec. 16 of the Act, as amended by section 424 of the Transportation Act, 1920, provides that *all complaints for the recovery of damages shall be filed with the Commission within two years from the time the cause of action accrues,*⁹ and not after, unless the carrier, after the expiration of such two years or within ninety days before such expiration, begins an action for recovery of charges in respect of the same service, in which case such period of two years shall be extended to and including ninety days from the time such action by the carrier is begun. In either case the cause of action in respect of a shipment of property shall, for the purposes of said Sec. 16, be deemed to accrue upon delivery or tender of delivery thereof by the carrier, and not after. Sec. 206, subdivision (f), of the Transportation Act, 1920, provides that the period of Federal control shall not be computed as a part of the period of limitation in claims for reparation to the Commission for causes of action arising prior to Federal control. The period of time within which com-

⁹ See *infra*, § 180g, see *Morrisdale Coal Co. v. Penna. R. R. Co.*, 230 Fed. 304; *Meeker & Co. v. Lehigh Valley R. R. Co.*, 236 U. S. 412; *affirming Lehigh Valley R. R. Co. v. Meeker*, C. C. A., 211 Fed. 785; *A. J. Phippleps Co. v. Grand Trunk Western Ry. Co.*, 236 U. S. 662, S. C., C. C. A., 195 Fed. 12; *Arkansas Fertilizer Co. v. U. S. (Comm. Ct.)*, 193 Fed. 667; U. S.

ex. rel. *Louisville Cement Co. v. Interstate Commerce Commission Co.*, 246 U. S. 638; overruling *Carter v. New Orleans, C. C. A.*, 143 Fed. 99; *Missouri Pac. R. R. Co. v. C. Ferguson Sawmill Co.*, C. C. A., 237 Fed. 483, *Chicago & N. W. Ry. Co. v. Ziebarth*, C. C. A., 245 Fed. 334; *N. Y. Cent. R. Co. v. Mutual Orange Distributors*, 251 Fed. 230.

plaints for recovery of damages shall be filed with the Commission under these statutory provisions, and those cited in Appendix 1, will be referred to in these Rules as the statutory period.

“(e) *A complaint for the recovery of damages* may be informal but must be filed within the statutory period, and, if informal, should contain, in addition to the matters above indicated, such data¹⁰ as will serve to identify with reasonable definiteness the shipments or other transportation services in respect of which recovery is sought, the carriers participating, the kind and amount of injury sustained, when and by whom, and, if any recovery is sought on behalf of others than complainant, a statement of the capacity or authority in or by which complaint is made in their behalf. Notification to the Commission that a complaint may or will be filed later for the recovery of damages is not a filing of complaint within the meaning of the statute.

“(f) Carriers willing to pay damages for violations of the Act should make *application* in the form prescribed by the Commission *for authority to pay*. Such applications will be filed in the special docket under serial number, and, if granted, orders to that effect will be entered on the special docket. Such application, when not made upon informal complaint filed with the Commission, must be filed within the statutory period and will be deemed the equivalent of an informal complaint and an answer thereto admitting the matters stated in the application. If a carrier is unable to file such application within the statutory period and the claim is not already protected from the operation of the statute by informal complaint, a *statement* setting forth the facts may be *filed by the carrier* within the statutory period. Such statement will be deemed the equivalent of an informal complaint filed on behalf of the shipper and sufficient to stay the operation of the statute.

“(g) If it develops that the complaint for recovery of damages cannot be disposed of informally, the complainant and the

¹⁰Original note “Illustrative of pertinent data, are, in case of shipments, their dates, origins, destinations, consignors and consignees, dates of delivery or tender of delivery, car numbers and initials if in

carloads, routes of movement, if known, commodities transported, weight, charges assessed, at what rate, when and by whom paid and by whom borne.”

carriers affected will be so notified in writing by the Commission. In such case *formal complaint* must be filed with the Commission within 6 months after the date on which such notification is mailed to complainant, and, if so filed, will be deemed to relate back to the date of filing the informal complaint. If formal complaint is not so filed within 6 months after the date of mailing such notification the complainant will be deemed to have abandoned the complaint and no formal complaint for recovery of damages based on the same cause of action will thereafter be placed on file or considered unless itself filed within the statutory period.

“(h) *Formal complaints* must conform to the requirements of rule XXI. The names of all parties complainant and defendant must be stated in full without abbreviation, and the address of each complainant, with the name and address of his attorney, if any, must appear. Each formal complaint must be accompanied by copies in sufficient number to enable the Commission to serve one upon each party defendant and retain three for its own use. The Commission will serve the complaint upon each defendant by leaving a copy with its designated agent in Washington, D. C., or, if no such agent has been designated, by posting a copy in the office of the Secretary of the Commission.

“(i) Complaints should be so drawn as fully and completely to advise the parties defendant and the Commission wherein the provisions of the Act have been, are, (or and) will be violated, by a continuance of the acts or omissions complained of, and should set forth briefly and in plain language the facts claimed to constitute such violation and the relief sought.¹¹ Two or more grounds of complaint involving the same principle, subject, or state of facts, may be included in one complaint, but should be separately stated and numbered.¹² The several rates, fares, charges, classifications, regulations, or practices complained of should be set out by specific reference to the tariffs in which they appear whenever that is practicable.

¹¹ Compare *Southern Pac. Ry. Co. v. Railroad Commission of California*, 193 Fed. 699; *Atlantic Coast Line R. Co. v. Interstate Commerce Commission*, Comm. Ct., 194 Fed. 449; *Northern Pac. Ry. Co. v. Lee*, 199 Fed. 621; *Bear Bros. Mercantile Co. v. Denver & R. G. R. Co.*, 200 Fed. 614; *Louisville & N. R. Co. v. U. S.* 225 Fed. 571; cited *infra*, § 151.

¹² See *infra*, §§ 139-142.

“(j) In case violation of two or more sections of the Act is alleged the facts claimed to constitute violation of one section should be stated separately from those in respect of any other section or sections, wherever that can be done by reference or otherwise without undue repetition.

“(k) In case violation of section 1 of the Act is alleged, the complaint should show whether the rates, fares or charges assailed have been increased since January 1, 1910.

“(l) In case unjust discrimination in violation of section 2 is alleged the special rate, rebate, drawback or other device and the manner in which thereby the greater or less compensation complained of has been charged, collected or received should be specified.

“(m) In case undue or unreasonable preference or advantage, or undue or unreasonable prejudice or disadvantage, in violation of section 3 is alleged, the particular person, company, firm, corporation, locality or description of traffic affected thereby, and the particular preference or advantage, or prejudice or disadvantage, relied upon as constituting such violation, should be clearly specified.

“(n) If the complaint brings in issue any rate, fare, charge, classification, regulation or practice, made or imposed by authority of any State, or initiated by the President during the period of Federal control, as causing any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand, or any undue, unreasonable, or unjust discrimination against interstate or foreign commerce, which is forbidden and declared unlawful under Sec. 13 of the Act, as amended by Sec. 416 of the Transportation Act, 1920, the complaint should also contain appropriate allegations to present for decision the issue of the justness and reasonableness under section 1 of the rates, fares, charges, classifications, regulations or practices complained of in so far as applicable to interstate or foreign commerce, and the issue as to what should be the rate, fare or charge, or the maximum or minimum, or maximum and minimum, thereafter to be charged, and the classification, regulation or practice thereafter to be observed in order to remove such advantage, preference, prejudice or discrimination. The facts should be stated with sufficient definite-

ness to disclose fully the contention made in respect of any tariff provision prescribed, established or compelled by State authority or by the President. The Commission, before proceeding to hear and dispose of such issue, must cause the State or States interested to be notified of the proceeding and must be furnished with copies of the complaint in sufficient number for that purpose.

“(o) In case violation of section 4 of the Act is alleged the facts as to compensation charged or received, the respects in which the section was thereby violated, and the tariff provisions applicable, should be stated with particularity.

“(p) In case recovery of damages is sought the complaint should contain appropriate allegations showing, in addition to the matters indicated above, such data as will serve to identify with reasonable definiteness the shipments or other transportation services in respect of which recovery is sought, and stating (a) that complainant makes claim for reparation, (b) the name of each individual claimant asking reparation, (c) the names of defendants against which claim is made, (d) the commodities transported, the rate applied, the date when the transportation charges were paid, by whom paid, and by whom borne, (e) the period of time within which or the specific dates upon which the shipments were made, and the dates when they were delivered or tendered for delivery, (f) the points of origin and destination, either specifically, or, where they are numerous, by definite indication of a defined territorial or rate group of the points of origin and destination, and, if known, the routes of movement, (g) the nature and amount of the injury sustained by each claimant, and (h) if any reparation is sought on behalf of others than the complainant, in what capacity or by what authority complaint is made in their behalf.

“(q) The Commission will consider as in substantial compliance with the statute of limitations a complaint in which the complainant alleges that the matters complained of, if continued in the future, will constitute violations of the Act in the particulars and to the extent indicated, and prays reparation accordingly on all shipments affected thereby which may move during the pendency of the proceeding and on which the transportation charges shall be paid and borne by the complainant.

“(r) If a general rate adjustment is challenged in the com-

plaint, or many shipments or points of origin and destination are involved, it is the practice of the Commission to find and determine in its report the issues as to violation of the Act, injury thereby to complainant, and right to reparation, and thereafter to afford the parties opportunity to agree or make proof respecting the shipments and amount of reparation due under its finding before its order awarding reparation. See Rule V. In such cases freight bills and other exhibits bearing on the details of shipments, and the amount of reparation on each, need not be produced at the hearing unless called for or needed to develop other pertinent facts.

“(s) Except under unusual circumstances, and for good cause shown, reparation will not be awarded upon a complaint in which it is not specifically prayed for, or upon a new complaint by or for the same complainant which is based upon any finding in the original proceeding.

“(t) Supplemental complaints¹³ may be tendered for filing by the parties complainant against the parties defendant in the original complaint, setting forth any causes of action under the Act alleged to have accrued in favor of the complainants and against the defendants since the filing of the original complaint, and, upon leave granted, will be filed and served by the Commission as provided in cases of original complaints, and heard, considered and disposed of therewith in the same proceeding, if practicable.

“(u) If recovery of damages is sought by supplemental complaint, it must be filed with the Commission within the statutory period.

“(v) Cross complaints. See Rule IV.

“(1) Except as hereinafter provided, proceedings upon causes of action arising out of federal control will be governed by the Commission's rules of practice in so far as applicable.
* * *

“(4) If in any complaint so pending the complainant alleges that the rates, fares, charges, classifications, regulations, or practices complained of are and/or will be in violation of any provision of the interstate commerce act and seeks relief therefrom for the future, and the carriers over whose lines the rates,

¹³ *Infra*, §§ 231-234.

fares, charges, classifications, regulations, or practices complained of apply are not already defendants, the complainant should promptly file with the Commission a supplemental complaint containing appropriate allegations and naming said carriers as additional defendants, together with copies of the supplemental complaint in sufficient number for service upon all parties to the proceeding, including the new defendants named, and also three additional copies for the use of the Commission. Service thereof will be made by the Commission. If within twenty days after such service the new defendants do not notify the Commission of their desire for resetting of a hearing already set, or for further hearing if hearing has already been had, it will be understood that no resetting or further hearing is desired.

“(5) Where the complaint seeks only reparation for a cause of action arising prior to federal control the participating carrier or carriers must be made parties defendant, but neither the Director General nor the agent designated by the President is a necessary party.

“(6) Where the complaint seeks only reparation for any cause set forth in subdivision (c) the agent designated by the President is the only necessary party defendant, but the carriers whose railroads or systems of transportation were under federal control and over which the rates, etc., applied should be specified in an appropriate place in the body of the complaint. (See form 6, Rules of Practice.)

“(7) Where the complaint seeks only the establishment of rates for the future the individual carriers must be named as defendants. Neither the Director General nor the agent designated by the President should be so named.

“(8) Where the complaint seeks reparation for any cause set forth in subdivision (c) and also the establishment of rates for the future, both the agent designated by the President and the carriers should be named as defendants.”

XXII.

OFFICE AND ADDRESS OF THE COMMISSION.

“(a) Pleadings and other papers required to be filed with the Commission may be transmitted by mail or express, or

otherwise delivered, but must be received for filing at its office in Washington, D. C., within the time limit, if any, for such filing. That office is open from 9 a. m. to 4:30 p. m. of each business day.

“(b) All communications to the Commission must be addressed to Washington, D. C., unless otherwise specifically directed.”

IV.

ANSWERS.

“(a) Answers must conform to the requirements of Rule XXI.

“(b) Answers to formal complaints must be filed with the Commission within 20 days after the day on which the complaint was served. For defendants having general offices at or west of El Paso, Tex., Salt Lake City, Utah, or Spokane, Wash., said period of 20 days is extended to 30 days. The periods so fixed may be shortened or extended by the Commission when it deems advisable. The answer must in the same period be served as provided in Rule VI. Any defendant failing to file and serve answer within said period will be deemed in default and issue as to such defendant will be thereby joined.

“(c) Answers to petitions in intervention or amended complaints filed and served upon leave granted need not be separately made unless the defendants so elect, and their answers to the formal complaint will be deemed answers to the petition in intervention. Answers if separately made should be filed and served as promptly as possible, and within the same period after service of petition in intervention as is above provided for answers after service of complaints. Answers to cross-complaints filed and served upon leave granted must be filed and served within the same period after service of the cross-complaint.

“(d) All answers should be so drawn as fully and completely to advise the parties and the Commission of the nature of the defense, and should admit or deny specifically and in detail each material allegation of the pleading answered.¹⁴

¹⁴ See *infra*, § 174.

“(e) An answer denying that an alleged discrimination is unjust under section 2 of the Act, or that an alleged preference or prejudice is undue or unreasonable under section 3 of the Act, should state fully the grounds relied upon in making such denial.

“(f) Whenever it is apparent from the pleading answered, either by direct allegation or otherwise, that a departure from the requirements of the fourth section of the Act is involved, the answer should set forth by number the particular application or order, if any, which protects such departure.

“(g) It is desired that every effort be made to narrow the issues upon hearing. Matters alleged as affirmative defenses should be separately stated and numbered. Counterclaims and set-offs against shippers are not within the jurisdiction of the Commission.

“(h) *Cross-complaints* alleging violations of the Act by carriers complainant or seeking relief against them thereunder may be tendered for filing by defendants with their answers, and, upon leave granted, will be filed and served by the Commission in the manner provided in Rule III for complaints. In such cases the cross-complaint will be heard, considered and disposed of in connection with the issues raised by the complaint in the same proceeding.¹⁵

“(i) If a defendant satisfies a formal complaint, either before or after answering, a statement to that effect signed by both complainant and defendant must be filed setting forth when and how the complaint has been satisfied.

“When the carrier fails to answer the complaint the Commission will take such proof of the facts as it considers proper, and make such order as the circumstances of the case require.¹⁶

“Pleas in abatement and objections to the jurisdiction submitted before the hearing are discouraged and the decision thereupon will usually be reserved until the disposition of the whole case.¹⁷

“No replication is required.”¹⁸

¹⁵ See *infra*, §§ 197-201.

¹⁶ *Tecumseh Celery Co. v. Cincinnati J. & N. R. Co.*, 5 I. C. C. R. 663, 4 I. C. R. 318.

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¹⁷ *Re* Procedure concerning questions of law, 1 I. C. R. 224.

¹⁸ *Re* Procedure in cases at Issue, 1 I. C. C. R. 223, 1 I. C. R.

V.

REPARATION STATEMENTS.

FORMAL CLAIMS FOR REPARATION BASED UPON
FINDINGS OF THE COMMISSION.

“(a) When the Commission finds that reparation is due, but that the amount can not be ascertained upon the record before it, that complainant should immediately prepare a statement showing details of the shipments on which reparation is claimed, in accordance with Form 5. (See page 38). The statement should not include any shipment not covered by the Commission’s findings, or any shipment on which complaint was not filed with the Commission within the statutory period. See Rule III. The statement, together with the paid freight bills on the shipments, or true copies thereof, should then be forwarded to the carrier which collected the charges for checking and certification as to its accuracy. The certificate must be signed in ink by a general accounting officer of the carrier and should cover all of the information shown in the statement. If the carrier which collected the charges is not a defendant in the case its certificate must be concurred in by like signature on behalf of a carrier defendant.

“(b) If the shipments moved over more than one route a separate statement should be prepared for each route, and separately numbered, except that shipments as to which the collecting carrier is in each instance the same may be listed in a single statement is grouped according to routes.

“(c) Statements so prepared and certified shall be filed with the Commission, whereupon it will consider entry of an order for reparation. The filing of statements will not stop the running of the statute of limitations as to shipments not covered by complaint or supplemental complaint. See Rule III.

“(d) All discrepancies, duplications, or other errors in the statements should be adjusted by the parties and correct agreed statements submitted to the Commission.¹⁹ An application for

410; *Oregon Shore Line Ry. Co. v. Northern Pac. R. Co.*, 3 I. C. C. R. 264, 2 I. C. R. 639.

¹⁹ For actions upon awards of reparation see *supra*, § 32a.

reparation is not barred by a pending suit for damages in a State court."²⁰

VI.

SERVICE.

"(a) Formal complaints and, upon leave granted, petitions in intervention, supplemental complaints, cross-complaints, and amended complaints, will be served by the Commission, and copies of each must be furnished in sufficient number, as provided in Rule III in respect of complaints.

"(b) Answers, petitions, motions, applications, notices and all other papers, except depositions, in proceedings pending before the Commission upon its formal docket, must, when filed or tendered for filing by the Commission show service thereof upon all parties to the proceeding. Such service shall be made by delivering in person or by mailing, properly addressed with postage prepaid, one copy to each party.

"(c) When any party has appeared by attorney service upon such attorney will be deemed service upon the party." Where a complaint seeking reparation duly filed had been dismissed without prejudice upon the complainant's motion, the Commission decided that it had the power to reinstate this by an order *nunc pro tunc* as of the date of its first filing; but held that it could not reinstate the pleading as subsequently amended, so as to include claims not originally therein mentioned, which at the time of the application were barred by the Statutes of Limitation.²¹

VII.

AMENDMENTS.

"(a) Amendments to any pleading will be allowed or refused by the Commission at its discretion."

Amendments are allowed with great liberality.²² An amend-

²⁰ Gallody & Firestein v. Cincinnati H. & D. Ry. Co., 11 I. C. C. R. 1.

²² Delaware State Grainge v. N. Y. P. & N. Ry. Co., 2 I. C. C. R. 369, 2 I. C. R. 187.

²¹ Werner Saw Mill Co. v. I. C. C. R. Co., 17 I. C. C. R. 388, 389, 391.

ment to incorporate transactions which occur after the original complaint was filed may be allowed.²³ An amendment which substitutes a new cause of action will be denied.²⁴ When the complaint prayed merely for reparation and the facts had been stipulated; an application at the hearing for an amendment so as to include a prayer for through rates and joint rates was denied.²⁵ When the original complaint did not seek reparation and is subsequently amended so as to include a claim therefor, the statute runs from the date of the amendment.²⁶

"VIII.

CONTINUANCES AND EXTENSIONS OF TIME.

"(a) Continuances and extensions of time will be granted or denied by the Commission at its discretion.

"IX.

STIPULATIONS.

"(a) The parties may, by stipulation in writing filed with the Commission, or presented at the hearing, agree upon any facts involved in the proceeding. It is desired that the facts be thus agreed upon in so far as and whenever practicable."²⁷

When the complainant fails to appear at the hearing, or fails to offer any evidence,²⁸ his complaint will be dismissed.

A complaint will not be dismissed because there is no proof of direct damages to the complainant.²⁹

²³ Lehigh Valley R. Co. v. Am. Hay Co., 219 Fed. 539, 540. 582, 584; Virginia-Carolina Chemical Co. v. St. Louis, I. & S. Ry. Co.,

²⁴ Riddle D. & Co. v. Balt. & O. R. R. Co., 1 I. C. C. R. 372, 1 I. C.

18 I. C. C. R. 1, 2.

R. 701; Delaware State Grainge v.

²⁷ Jackson v. St. A. & T. R. Co.,

N. Y. P. & N. Ry. Co., 2 I. C. C. R.

1 I. C. R. 599. See Rapson Coal

309, 2 I. C. R. 187. See *infra*,

Mining Co. v. K. C. M. & O. Ry.

§ 210b.

Co. Unrep. Op. A-824.

²⁵ La Salle & Bursoner County R.

²⁸ Holbrook v. St. Paul M. & N.

R. Co. v. C. & N. W. R. R. Co., 13

Ry. Co., 1 I. C. C. R. 102, 1 I. C. R.

I. C. C. R. 610, 613.

323.

²⁶ Cattle Raisers' Ass'n v. C. B.

²⁹ Milk Producers' Protective

& Q. R. R. Co., 10 I. C. C. R. 83,

Ass'n v. Del. La. W. R. R. Co., 7

East St. Louis Walnut Co. v. St.

I. C. C. R. 92, 163; Burford v. L.

Louis S. W. Ry. Co., 17 I. C. C. R.

& N. R. R. Co., 31 I. C. C. R. 182,

185.

X.

HEARINGS.

“(a) When issue is joined upon formal complaint by service of answer, or by failure of defendant to answer, the Commission will assign a time and place for hearing. Witnesses will be examined orally before the Commission, a Commissioner, or one of its examiners, unless their testimony is taken by deposition or the facts are agreed upon as provided for in these rules.

“(b) At hearings on formal complaint the complainant shall open and close. At hearings upon applications for relief from any provision of the Act the applicant shall open and close. At hearings of investigation and suspension proceedings the respondent shall open and close. At hearings of all other investigations on the motion of the Commission, the Commission shall open and close, except as the Commission may prescribe a different order or the presiding commissioner or examiner may otherwise direct. In hearings of several proceedings upon a consolidated record the presiding commissioner or examiner shall designate who shall open and close. Interveners shall follow the party in whose behalf the intervention is made, and in all cases where the intervention is not in support of either original party the presiding commissioner or examiner shall designate at what stage such interveners shall be heard.”³⁰

XIV.

“BRIEFS AND ORAL ARGUMENT.

“(a) Briefs must be printed and comply with the requirements of Rule XXI. The date of each brief must appear on its front cover or title page. Each brief should contain an abstract of the evidence relied upon by the party filing it, preferably assembled by subjects, with reference to the pages of the record or exhibit where the evidence appears. It should include requests for such specific findings as the party thinks the Commission should make.

“(b) Exhibits should not be reproduced in the brief, but may, if desired, be reproduced in an appendix to the brief.

³⁰ For Rules XI-XIII on Definitions, see § 77c, *infra*.

Analyses of such exhibits should be included in the abstract of evidence under the subjects to which they pertain. The abstract of evidence should follow the statement of the case and precede the argument. Every brief of more than 20 pages shall contain on its front flyleaves a subject index with page references, the subject index to be supplemented by a list of all cases cited, alphabetically arranged, with references to the pages where the citations appear. In proceedings upon complaint alleging undue prejudice to or preference of any locality as contrasted with another locality, or otherwise attacking a rate relationship, the complainant should insert in his brief opposite the statement of the case a small map or chart of the territory showing the situation involved.

“(c) Briefs not filed with the Commission and served on or before the dates fixed therefor will not be received except by special permission of the Commission. All briefs must be accompanied by notice, showing service upon all other parties or their attorneys who appeared at the hearing or on brief, and 20 copies of each brief shall be furnished for the use of the Commission. Applications for extension of time in which to file briefs shall be by petition, in writing, stating the facts on which the application rests, which must be filed with the Commission at least five days before the time fixed for filing such briefs.

“(d) For application in cases designated in the notices setting them for hearing as ‘proposed report’ cases, the following procedure will govern, superseding that prescribed elsewhere in these Rules in so far as conflicting therewith:

“1. If oral argument before the presiding commissioner or examiner is desired he should be so notified at or before the hearing and may arrange to hear the argument at the close of the testimony within such limits of time as he may determine, having regard to other assignments for hearing before him. Such argument will be transcribed and bound with the transcript of testimony, and will be available to the Commission for consideration in deciding the case. The making of such argument shall not preclude oral argument before the Commission, or a Division thereof, and application therefor may be made as hereinafter provided.

“2. Only one initial brief shall be filed by each party. The presiding commissioner or examiner shall fix for all parties the

same time within which to file their briefs. Reply briefs are not permitted at this stage.

"3. After expiration of the time set for briefs the presiding or participating examiner will prepare his proposed report containing the statement of the issues and facts and the findings and conclusions which he thinks should be made. This proposed report will be served by mailing copies to the parties or attorneys who appeared at the hearing or upon brief, except that in general investigations copies may also be mailed in the Commission's discretion to other parties whose appearances are noted of record.

"4. Within 20 days after service of the proposed report any party may file and serve, in the manner prescribed for briefs, exceptions to the examiner's proposed report and brief in support of the exceptions. Exceptions and brief should be contained in one print. Within 10 days after expiration of the time so fixed briefs in reply to the exception briefs may be filed and served, but will not be received later except under leave granted upon application therefor. Applications for oral argument before the Commission or a Division thereof if made by a party filing exceptions must accompany the exceptions, or if made by a party not filing exceptions must be filed not later than 10 days after the time fixed for filing and service of exceptions.

"Parties or attorneys at El Paso, Tex., Salt Lake City, Utah, Spokane, Wash., or points west thereof, who appeared at the hearing or upon brief, will be allowed 5 days' additional time for filing and serving exceptions, exception briefs and reply briefs, respectively.

"5. Exceptions to the examiner's proposed report either as to statements of fact or matters of law should be specific. If exception is taken to matters of law or conclusions the points relied upon should be stated separately and clearly. If exception is taken to any statement of fact reference should be made to the pages or parts of the record relied upon and a corrected statement incorporated in the exception brief.

"6. In the absence of exceptions that are sustained or of ascertained error the statement of the issues and of the facts by the examiner will ordinarily be taken by the Commission as the basis of its report.

“(e) Except as hereinabove provided in subdivision (d) of this rule, briefs for the various parties shall be filed in the same order as governs in the taking of their testimony at hearings. At the close of the testimony in each case the presiding commissioner or examiner will fix the time for filing and service of the respective briefs as follows, unless good cause for variation therefrom is shown: For the opening brief, 30 days from close of testimony; for the brief of the opposing party, 15 days after the date fixed for the opening brief; for reply brief, 10 days after the date fixed for the brief of the opposing party. Briefs of interveners shall be filed and served within the time fixed for the brief of the party in whose behalf the intervention is made, or within such other time as may be fixed by the presiding commissioner or examiner. Parties who fail to file opening brief, as required by this rule, will not be permitted to file reply to brief of opposing party. Except as provided in subdivision (d) of this Rule applications for oral argument before the Commission or a Division thereof shall be made at the hearing or in writing within 10 days after the close of testimony.”

By the Interstate Commerce Act: (1) Whenever an investigation shall be made by said Commission, it shall be its duty to make a report in writing in respect thereto, which shall state the conclusions of the Commission, together with its decision, order or requirement in the premises; and in case damages are awarded such report shall include the findings of fact on which the award is made.

“(2) All reports of investigations made by the Commission shall be furnished to the party who may have complained, and to any common carrier that may have been complained of.

“(3) The Commission may provide for the publication of its reports and decisions in such form and manner as may be best adapted for public information and use, and such authorized publications shall be competent evidence of the reports and decisions of the Commission therein contained in all courts of the United States and of the several States without any further proof or authentication thereof. The Commission may also cause to be printed for early distribution its annual reports.”³¹

³¹ Act of Feb. 4, 1887, ch. 104, § 3, 34 St. at L. 589, Feb. 28, 1920, § 14, 24 St. at L. 384, amended, ch. —, § 417, Comp. St. § 8582; March 2, 1889, ch. 382, § 4, 25 St. Meeker & Co. v. Lehigh Valley R. at L. 859, June 29, 1906, ch. 3591, Co., 236 U. S. 412; *infra*, § 333h.

"After a decision, order, or requirement has been made by the Commission in any proceeding any party thereto may at any time make application for rehearing of the same, or any matter determined therein, and it shall be lawful for the Commission in its discretion to grant such a rehearing if sufficient reason therefor be made to appear. Applications for rehearing shall be governed by such general rules as the Commission may establish. No such application shall excuse any carrier from complying with or obeying any decision, order, or requirement of the Commission, or operate in any manner to stay or postpone the enforcement thereof, without the special order of the Commission. In case a rehearing is granted the proceedings thereupon shall conform as nearly as may be to the proceedings in an original hearing, except as the Commission may otherwise direct; and if, in its judgment, after such rehearing and the consideration of all facts, including those arising since the former hearing, it shall appear that the original decision, order, or requirement is in any respect unjust or unwarranted, the Commission may reverse, change, or modify the same accordingly. Any decision, order, or requirement made after such rehearing, reversing, changing, or modifying the original determination shall be subject to the same provisions as an original order."

"XV.

APPLICATIONS FOR REHEARINGS OR MODIFICATION OF ORDERS.

"(a) Applications for further hearing in a proceeding before final submission, for reopening a proceeding after final submission, or for rehearing or reargument after decision, must be made by petition, stating specifically the grounds relied upon, filed with the Commission and served by the petitioner upon all parties or attorneys who appeared at the hearing, or oral argument if had, or on brief.

"(b) If the application be for further hearing before final submission, or for reopening the proceeding to take further evidence, the nature and purpose of the evidence to be adduced

must be briefly stated and must appear not to be merely cumulative.

“(c) If the application be for rehearing or reargument, the matters claimed to have been erroneously decided must be specified and the alleged errors briefly stated. If thereby any order of the Commission is sought to be vacated, reversed or modified by reason of matters which have arisen since the hearing, or of consequences which would result from compliance therewith, the matters relied upon by the petitioner must be fully set forth in the petition.

“(d) Applications for modification of orders which seek only change in the date when they shall take effect or in the period of notice thereby prescribed must be made by petition seasonably filed and served in like manner as other applications under this rule, except that, in case of unforeseen emergency satisfactorily shown by the applicant, such relief may be sought informally, by telegram or otherwise, upon notice thereof to all parties or attorneys who appeared as aforesaid.

“(e) A petition for rehearing that part of any case relating to reparation must be filed within 60 days after service of the finding or order therein.

“(f) Each petition filed under this rule shall be accompanied by 15 copies thereof for the use of the Commission, and by notice showing service upon the parties or attorneys who appeared as aforesaid. Within 10 days after such service any adverse party may file and serve in like manner a reply to the petition, the reply so filed to be accompanied by like number of copies for use by the Commission.”³³

An application for a rehearing because of error in finding of a fact must be supported by proof, establishing a presumption of such an error.³³

“XVII.

COMPLIANCE WITH ORDERS.

“(a) When an order has been issued the defendants or respondents named therein must promptly notify the Commission

³³ For Rule XVI as to transcripts of Testimony, see *infra*, § 77a.

³³ *Myers v. Penn. Co.*, 3 I. C. C. R. 130; 2 I. C. R. 544, *Procter &*

on or before the date upon which such order becomes effective whether or not compliance has been made therewith. If a change in rates is required the notification must be given in addition to the filing of proper tariffs, and must specify the I. C. C. numbers of the tariffs so filed."

XVIII.

APPLICATIONS UNDER FOURTH SECTION.

"(a) Any common carrier subject to the Act may apply to the Commission, under the proviso clause of the fourth section, for such authorization as it is empowered to grant thereunder. Such application must conform to Rule XXI. The application should specify the places and traffic involved, the rates, fares, or charges on such traffic for the shorter and longer distances, the carriers other than the applicant which may be interested in the traffic, the special nature of the case, the character of the hardship claimed to exist, and the extent of the relief sought by the applicant. Upon the filing of such application the Commission will take such action as the circumstances of the case require."

XIX.

SUSPENSIONS.

"(a) Suspensions of tariff schedules under section 15 of the Act will not ordinarily be considered unless protest and application therefor is made in writing or by telegram at least 10 days before the effective date named in the schedule. Applications for suspensions must indicate the schedule affected by its I. C. C. number and give specific reference to the items against which protest is made, together with a statement of the grounds thereof. If such application is made by telegram it must be confirmed and followed by application in writing and should succinctly state the substance of the matters to be set forth in

G. v. Cincinnati H. & D. R. R. Co., 1 I. C. R. 773; Cattle Raisers' Ass'n
4 I. C. C. R. 443, 30 I. C. R. 374; v. Chicago B. & Q. Ry. Co., 12 I. C.
see Riddle D. & Co. v. Pittsburg & C. R. 6.
L. E. R. R. Co., 1 I. C. C. R. 490,

the written application. Seven copies of each written application should be furnished to the Commission."

XX.

INFORMATION TO PARTIES.

"(a) The secretary of the Commission will, upon request, advise as to the form of complaint, answer, or other paper to be filed in any proceeding."

XXI.

SPECIFICATIONS AS TO COMPLAINTS, ANSWERS, PETITIONS, APPLICATIONS, BRIEFS, ETC.

"(a) All formal complaints, answers, motions, petitions, applications, notices, depositions, or other papers to be filed, must be typewritten or printed.

"(b) If typewritten they must be on paper not more than 8½ inches wide or 12 inches long, weighing not less than 16 pounds to the ream, folio base 17 by 22 inches, with left-hand margin not less than 1½ inches wide. The impression must be on only one side of the paper.

"(c) If printed they, as well as briefs, must be in 10 or 12 point type, on good unglazed paper, 5⅞ inches wide by 9 inches long, with inside margin not less than 1 inch wide, and with double-leaded text and single-leaded citations.

"(d) Complaints, answers, motions, petitions, applications and notices must be signed in ink by the party, petitioner or applicant, or by his or its duly authorized attorney, and must show the office and postoffice address of the signer."

XXII.

OFFICE AND ADDRESS OF THE COMMISSION.

"(a) Pleadings and other papers required to be filed with the Commission may be transmitted by mail or express, or otherwise delivered, but must be received for filing at its office in Washington, D. C., within the time limit, if any, for such filing. That office is open from 9 a. m. to 4:30 p. m. of each business day.

"(b) All communications to the Commission must be ad-

dressed to Washington, D. C., unless otherwise specifically directed." ²⁴

§ 77c. Evidence and depositions before the Interstate Commerce Commission. The investigations of the Commission are not narrowly restrained by technical rules as to the relevancy of evidence, nor is a strict correspondence between allegations and proof required.¹ The essential rules of evidence by which rights are asserted or defended must be observed.² The commissioners cannot act upon their own information.³ All parties must be fully apprised of the evidence to be considered. They must be given an opportunity to cross examine witnesses,⁴ except possibly in the case of expert evidence,⁵ to inspect documents offered or considered and to offer evidence in explanation or rebuttal.⁶ Hearsay evidence is insufficient to justify an order.⁷ The Supreme Court has disapproved the practice on the part of a carrier to withhold a greater part of its evidence from the Commission and introduce it for the first time in the court in opposition to an application to enforce the Commission's order.⁸

The Statute provides: "The Commission hereby created shall have authority to inquire into the management of the business of all common carriers subject to the provisions of this act, and shall keep itself informed as to the manner and method in which the same is conducted, and shall have the right to obtain from such common carriers full and complete information necessary to enable the Commission to perform the duties and carry out the objects for which it was created; and the Commission is hereby authorized and required to execute and enforce the provisions of this act.

²⁴ The forms drafted by the Commission are printed in the Appendix of this work.

¹ 77c. ¹ Interstate Commerce Commission v. Baird, 194 U. S. 25, 44; 24 Sup. Ct. 563, 48 L. ed. 860.

² Interstate Commerce Commission v. Louisville & N. R. R. Co., 227 U. S. 88, 93.

³ Ibid.

⁴ Ibid.

⁵ Atlantic Coast Line R. Co. v. Interstate Commerce Commission, Comm. Ct., 194 Fed. 449.

⁶ Interstate Commerce Commission v. Louisville & N. R. R. Co., 227 U. S. 88, 93, *supra*, § 151.

⁷ Dales Freight Fuel Co. v. Missouri K. & T. Ry. Co., 12 I. C. C. R. 427 (a secretary of a freight association).

⁸ Cincinnati N. O. & T. P. Ry. Co. v. Interstate Commerce Commission, 162 U. S. 184, 196, 16 Sup. Ct. 700, 40 L. ed. 935.

“(2) Such attendance of witnesses, and the production of such documentary evidence, may be required from any place in the United States, at any designated place of hearing. And in case of disobedience to a subpoena the Commission, or any party to a proceeding before the Commission, may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of books, papers, and documents under the provisions of this section.

“(3) And any of the circuit courts of the United States within the jurisdiction of which such inquiry is carried on may, in case of contumacy or refusal to obey a subpoena issued to any common carrier subject to the provisions of this act, or other person, issue an order requiring such common carrier or other person to appear before said Commission (and produce books and papers if so ordered) and give evidence touching the matter in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof. The claim that any such testimony or evidence may tend to criminate the person giving such evidence shall not excuse such witness from testifying; but such evidence or testimony shall not be used against such person on the trial of any criminal proceeding.

“(4) The testimony of any witness may be taken, at the instance of a party, in any proceeding or investigation depending before the Commission, by deposition, at any time after a cause or proceeding is at issue on petition and answer. The Commission may also order testimony to be taken by deposition in any proceeding or investigation pending before it, at any stage of such proceeding or investigation. Such depositions may be taken before any judge of any court of the United States, or any commissioner of a circuit, or any clerk of a district or circuit court, or any chancellor, justice, or judge of a supreme or superior court, mayor or chief magistrate of a city, judge of a county court, or court of common pleas of any of the United States, or any notary public, not being of counsel or attorney to either of the parties, nor interested in the event of the proceeding or investigation. Reasonable notice must first be given in writing by the party or his attorney proposing to take such deposition to the opposite party or his attorney of record, as either may be nearest, which notice shall state the name of the

witness and the time and place of the taking of his deposition. Any person may be compelled to appear and depose, and to produce documentary evidence, in the manner as witnesses may be compelled to appear and testify and produce documentary evidence before the Commission as hereinbefore provided.

“(5) Every person deposing as herein provided shall be cautioned and sworn (or affirm, if he so request) to testify the whole truth, and shall be carefully examined. His testimony shall be reduced to writing by the magistrate taking the deposition, or under his direction, and shall, after it has been reduced to writing, be subscribed by the deponent.

“(6) If a witness whose testimony may be desired to be taken by deposition be in a foreign country, the deposition may be taken before an officer or person designated by the Commission, or agreed upon by the parties by stipulation in writing to be filed with the Commission. All depositions must be promptly filed with the Commission.

“(7) Witnesses whose depositions are taken pursuant to this act, and the magistrate or other officer taking the same, shall severally be entitled to the same fees as are paid for like services in the courts of the United States.”⁹

“No person shall be excused from attending and testifying or from producing books, papers, tariffs, contracts, agreements and documents before the Interstate Commerce Commission, or in obedience to the subpoena of the Commission, whether such subpoena be signed or issued by one or more Commissioners, or in any cause or proceeding, criminal or otherwise, based upon or growing out of any alleged violation of the act of Congress, entitled, ‘An act to regulate commerce,’ approved February fourth, eighteen hundred and eighty-seven, or of any amendment thereof on the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him, may tend to criminate him or subject him to a penalty or forfeiture. But no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing, concerning which he may testify, or produce evi-

⁹ Feb. 4, 1887, ch. 104, § 12, 24 St. at L. 383, amended, March 2, 1889, ch. 382, § 3, 25 St. at L. 858, Feb. 10, 1891, ch. 128, 26 St. at L. 743, Feb. 28, 1920, ch. —, § 415, Comp. St. § 8576.

dence, documentary or otherwise, before said Commission, or in obedience to its subpoena, or the subpoena of either of them, or in any such case or proceeding: Provided, That no person so testifying shall be exempt from prosecution and punishment for perjury committed in so testifying.

"Any person who shall neglect or refuse to attend and testify, or to answer any lawful inquiry, or to produce books, papers, tariffs, contracts, agreements and documents, if in his power to do so, in obedience to the subpoena or lawful requirement of the Commission shall be guilty of an offense and upon conviction thereof by a court of competent jurisdiction shall be punished by fine not less than one hundred dollars nor more than five hundred dollars, or by imprisonment for not more than one year or by both such fine and imprisonment." ¹⁰

"No person shall be prosecuted or be subject to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may testify or produce evidence, documentary or otherwise, in any proceeding, suit, or prosecution under said Acts; Provided further, That no person so testifying shall be exempt from prosecution or punishment for perjury committed in so testifying." ¹¹

"Immunity shall extend only to a natural person who in obedience to a subpoena, gives testimony under oath or procures evidence, documentary or otherwise under oath." ¹²

The Commission is expressly authorized to employ special agents or examiners with power to administer oaths, examine witnesses and receive evidence. ¹³

"Witnesses summoned before the Commission shall be paid the same fees and mileage that are paid witnesses in the courts of the United States." ¹⁴

¹⁰ See *infra*, §§ 339a, 339b, 27 St. at L. 443, Comp. St. § 8577.

¹¹ Act of Feb. 25, 1903, ch. 755, § 1, 32 St. at L. 904, Comp. St. § 8578.

¹² Act of June 30, 1906, ch. 3920, 34 St. at L. 595, Comp. St. § 8579.

¹³ Act of Feb. 4, 1887, ch. 104, § 20, 24 St. at L. 386, amended June 29, 1906, ch. 3591, § 7, 34 St. at L. 593, Feb. 25, 1909, ch. 193, 35

St. at L. 649, June 18, 1910, ch. 309, § 14, 36 St. at L. 555, March 4, 1915, ch. 176, § 1, 38 St. at L. 1196, Aug. 9, 1916, ch. 301, 39 St. at L. 441, Comp. St. § 8592.

¹⁴ Act of Feb. 4, 1887, ch. 104, § 18, 24 St. at L. 386, amended March 2, 1889, ch. 382, § 7, 25 St. at L. 86, Feb. 28, 1920, § 433, Comp. St. § 8587.

"The copies of schedules and classifications and tariffs of rates, fares and charges, and of all contracts, agreements, and arrangements between common carriers filed with the commission as herein provided and the statistics, tables, and figures contained in the annual or other reports of carriers made to the commission as required under the provisions of this Act shall be preserved as public records in the custody of the secretary of the commission, and shall be received as prime facie evidence of what they purport to be for the purpose of investigations by the commission and in all judicial proceedings; and copies of and extracts from any of said schedules, classifications, tariffs, contracts, agreements, arrangements, or reports, made public records, as aforesaid, certified by the secretary, under the commission's seal, shall be received in evidence with like effect as the originals."¹⁵

DEPOSITIONS.

"(a) The deposition of a witness for use in a proceeding pending before the Commission may, after issue joined, be taken in compliance with the following rules of procedure, prescribed under section 17 of the Act, but not otherwise.

"(b) Such depositions may be taken before a special agent or examiner of the Commission, or any judge or commissioner of any court of the United States, or any clerk of a district court, or any chancellor, justice, or judge of a supreme or superior court, mayor or chief magistrate of a city, judge of a county court or court of common pleas of any of the United States, or any notary public not being of counsel or attorney to either of the parties nor interested in the event of the proceeding or investigation, according to such designation as the Commission may make in any order made by it in the premises, except that where such deposition is taken in a foreign country it may be taken before an officer or person designated by the Commission or agreed upon by the parties by stipulation in writing to be filed with the Commission.

"Any party desiring to take the deposition of a witness in

¹⁵ Act of Feb. 4, 1887, ch. 104, § 5, 34 St. at L. 590, June 28, 1910, § 16, 24 St. at L. 384, amended ch. 309, § 13, 36 St. at L. 554, Feb. March 2, 1889, ch. 382, § 5, 25 St. 28, 1920, ch. —, §§ 423-429, Comp. at L. 859, June 29, 1906, ch. 3591, St. § 8584.

such a proceeding shall notify the Commission to that effect, and in such notice shall state the time when, the place where, and the name and post-office address of the party before whom it is desired that the deposition be taken, the name and post-office address of the witness and the subject matter or matters concerning which the witness is expected to testify, whereupon the Commission will make and serve upon the parties or their attorneys an order wherein the Commission shall name the witness whose deposition is to be taken, and specify the time when, the place where, and the party before whom the witness is to testify, but such time and place, and the party before whom the deposition is to be taken, so specified in the Commission's order, may or may not be the same as those named in said notice to the Commission.¹⁶

“(c) Every person whose deposition is so taken shall be cautioned and sworn (or affirmed, if he so request) testify the whole truth and nothing but the truth concerning the matter about which he shall testify, and shall be carefully examined. His testimony shall be reduced to typewriting by the officer before whom the deposition is taken, or under his direction, after which the deposition shall be subscribed by the witness and certified in usual form by the officer. After the deposition has been so subscribed and certified it shall, together with two copies thereof made by such officer or under his direction, be forwarded by such officer under seal in an envelope addressed to the Commission at its office in Washington, D. C. Upon receipt of the deposition and copies the Commission will file in the record in said proceeding such deposition and forward one copy to the complainant or his attorney and the other copy to the defendant or its attorney, except that where there are more than one complainant or defendant the copies will be forwarded by the Commission to the parties designated by such complainants or defendants as the case may be.

“(d) Such depositions must conform to the specifications of Rule XXI.

“(e) No deposition shall be taken except after 6 days' notice to the parties, and where the deposition is taken in a foreign country such notice shall be at least 15 days.

¹⁶ See *infra* (e) and § 354a.

“(f) No such deposition shall be taken either before the proceeding is at issue, or, unless under special circumstances and for good cause shown, within 10 days prior to the date of the hearing thereof assigned by the Commission, and where the deposition is taken in a foreign country it shall not be taken after 30 days prior to such date of hearing.

“(g) Witnesses whose depositions are taken pursuant to these rules and the magistrate or other officer taking the same, unless he be a special agent or examiner of the Commission, shall severally be entitled to the same fees as are paid for like service in the courts of the United States, which fees shall be paid by the party or parties at whose instance the depositions are taken.

“XII.

WITNESSES AND SUBPŒNAS.

“(a) Subpœnas requiring the attendance of witnesses from any place in the United States at any designated place of hearing may be issued by any member of the Commission.

“(b) Subpœnas for the production of books, papers, or documents, unless directed by the Commission upon its own motion, will issue only upon application in writing. Application to compel witnesses who are not parties to the proceedings, or agents of such parties, to produce documentary evidence must be verified and must specify, as nearly as may be, the books, papers, or documents desired and the facts to be proven by them. Applications to compel a party to the proceeding to produce books, papers, or documents should set forth the books, papers, or documents sought, with a showing that they will be of service in the determination of the proceeding.¹⁷

“(c) Witnesses who are summoned are entitled to the same fees as are paid for like service in the courts of the United States, such fees to be paid by the party at whose instance the testimony is taken.¹⁸

XIII.

DOCUMENTARY EVIDENCE.

“(a) Where revelant and material matter offered in evidence by any party is embraced in a book, paper or document contain-

¹⁷ See *infra*, §§ 341, 349, 350.

¹⁸ See *infra*, §§ 340-343.

ing other matter, not material or relevant, the party must plainly designate the matter so offered. If the other matter is in such volume as would unnecessarily cumber the record, such book, paper or document will not be received in evidence but may be marked for identification and, if properly authenticated, the relevant and material matter may be read into the record, or, if the presiding commissioner or examiner so directs, a true copy of such matter, in proper form, shall be received as an exhibit, and like copies delivered by the party offering the same to opposing parties or their attorneys appearing at the hearing, who shall be afforded opportunity to examine the book, paper or document, and to offer in evidence in like manner other portions thereof if found to be material and relevant.

“(b) In case any portion of a tariff, report, circular, or other document on file with the Commission is offered in evidence, the party offering the same must give specific reference to the items or pages and lines thereof to be considered. The Commission will take notice of items in tariffs and annual or other periodical reports of carriers properly on file with it or in annual, statistical, and other official reports of the Commission.¹⁹ When it is desired to direct the Commission's attention to such tariffs or reports upon hearing or in briefs or argument it must be done with the precision specified in the second preceding sentence. In case any testimony in proceedings other than the one on hearing is offered in evidence, a copy of such testimony must be presented as an exhibit. When exhibits of a documentary character are to be offered in evidence, copies must be furnished to opposing counsel.

“(c) All exhibits showing rates or distances must, by proper I. C. C. number reference, indicate the tariff authority for the rates, and must also show by lines and junction points the routes via which the distances are computed, as well as the authority for the distances used.

“(d) All exhibits received in evidence are bound with the rest of the record in covers of uniform size. It thus becomes desirable that, wherever practicable, they should be on one side only of sheets not exceeding 12½ inches from top to bottom by 22 inches in width, and imperative that a sufficient margin for

¹⁹ See *infra*, § 329a.

binding, preferably 1½ inches, be left blank on the left side of each sheet. They must be on paper of good quality and so prepared as to be plainly legible and durable, whether printed, typewritten, mimeographed, planographed, photographed or otherwise. The use of hectograph and white-line blue prints is discouraged.

“(e) The sheets of each exhibit and the lines of each sheet should be numbered, wherever practicable. The first sheet, or title page should be confined to a brief statement of what the exhibit purports to show, with reference by sheet and line to illustrative or typical examples contained in the exhibit. It is desirable that, wherever practicable, rate comparisons and other evidence should be condensed into tables.

“(f) Where agreed upon by the parties at or after the hearing, the presiding commissioner or examiner, if he deems advisable, may receive specified documentary evidence as a part of the record within a time to be fixed by him, but which shall expire not less than 10 days before the date fixed for filing and serving briefs.

“(g) Except as above provided, or as may be expressly permitted in particular instances, the Commission will not receive in evidence or consider as part of the record and documents, letters or other writings submitted for consideration in connection with the proceeding after the close of the testimony, and will return the same to the sender.

XVI.

TRANSCRIPT OF TESTIMONY.

“(a) One copy of the transcript of testimony will be furnished by the Commission without charge for the use of the complainant and one copy for the use of the defendant. If two or more complainants or defendants have appeared at the hearing, such complainants or defendants must designate to whom the copy for their use shall be delivered. A similar course will be pursued in proceedings involving the suspension of tariffs.

“(b) In proceedings instituted by the Commission on its own motion, other than proceedings involving the suspension of tariffs, no copies of the transcript will be furnished by the Commission.”

§ 77d. Enforcement of orders of Interstate Commerce Commission. "Upon the request of the Commission, it shall be the duty of any district attorney of the United States to whom the Commission may apply to institute in the proper court and to prosecute under the direction of the Attorney-General of the United States all necessary proceedings for the enforcement of the provisions of this act and for the punishment of all violations thereof, and the costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States; and for the purposes of this act of the Commission shall have power to require, by subpoena, the attendance and testimony of witnesses and the production of all books, papers, tariffs, contracts, agreements, and documents relating to any matter under investigation."¹

"Except as otherwise provided in this Act, all orders of the Commission, other than orders for the payment of money, shall take effect within such reasonable time, not less than thirty days, and shall continue in force until its further order, or for a specified period of time, according as shall be prescribed in the order, unless the same shall be suspended or modified or set aside by the Commission, or be suspended or set aside by a court of competent jurisdiction."^{1a}

"If any carrier fails or neglects to obey any order of the commission other than for the payment of money, while the same is in effect, the Interstate Commerce Commission or any party injured thereby, or the United States, by its Attorney-General, may apply to the appropriate district court for the enforcement of such order. If, after hearing, that court determines that the carrier is in disobedience of the same, the court shall enforce obedience to such order by a writ of injunction or other proper process mandatory or otherwise, to restrain such carrier, its officers, agents or representatives, from further disobedience of such order, or to enjoin upon it or them obedience to the same."²

· § 77d. ¹ Act of Feb. 4, 1887, ch. 104, § 20, 24 St. at L. 386, as amended June 29, 1906, ch. 3591, § 7, 34 St. at L. 593, Feb. 25, 1909, 35 St. at L. 649, June 18, 1910, ch. 309, § 14, 36 St. at L. 555, March 4, 1915, ch. 176, § 1, 38 St. at L. 1196, Aug. 9, 1916, ch. 301, 39 St. at L. 441, Feb. 28, 1920, § 434, 436, Comp. St. § 8592.
^{1a} Ibid. § 13 Act of Feb. 28, 1920, §§ 418, 421.
² March 2, 1889, ch. 382, § 8, 25 St. at L. 862, Comp. St. § 8593.

“Whenever the Interstate Commerce Commission shall have reasonable ground for belief that any common carrier is engaged in the carriage of passengers or freight traffic between given points at less than the published rates on file, or is committing any discrimination forbidden by law, a petition may be presented alleging such facts to the district court of the United States sitting in equity having jurisdiction; and when the act complained of is alleged to have been committed or as being committed in part in more than one judicial district or State, it may be dealt with, inquired of, tried, and determined in either such judicial district or State, whereupon it shall be the duty of the court summarily to inquire into the circumstances, upon such notice and in such manner as the court shall direct and without the formal pleadings and proceedings applicable to ordinary suits in equity, and to make such other persons or corporations parties thereto as the court may deem necessary, and upon being satisfied of the truth of the allegations of said petition said court shall enforce an observance of the published tariffs or direct and require a discontinuance of such discrimination by proper orders, writs, and process, which said orders, writs, and process may be enforceable as well against the parties interested in the traffic as against the carrier, subject to the right of appeal as now provided by law. It shall be the duty of the several district attorneys of the United States, whenever the Attorney-General shall direct, either of his own motion or upon the request of the Interstate Commerce Commission, to institute and prosecute such proceedings, and the proceedings provided for by this Act shall not preclude the bringing of suit for the recovery of damages by any party injured, or any other action provided by said Act approved February fourth, eighteen hundred and eighty-seven, entitled An Act to regulate commerce and the Acts amendatory thereof.”³

“It shall be the duty of every common carrier subject to the provisions of this Act, to designate in writing an agent in the city of Washington, District of Columbia, upon whom service of all notices and processes may be made for and on behalf of said common carrier in any proceeding or suit pending before

³ Act of Feb. 19, 1903, ch. 708,
§ 3, 32 St. at L. 848, Comp. St.
§ 8599.

the Interstate Commerce Commission (or before said commerce court) and to file designation in the office of the secretary of the Interstate Commerce Commission, which designation may from time to time be changed by like writing similarly filed; and thereupon service of all notices and processes may be made upon such common carrier by leaving a copy thereof with such common carrier by leaving a copy thereof with such designated agent at his office or usual place of residence in the city of Washington, with like effect as if made personally upon such common carrier, and in default of such designation of such agent, service of any notice or other process in any proceeding before said Interstate Commerce Commission (or commerce court) may be made by posting such notice or process in the office of the secretary of the Interstate Commerce Commission."⁴

"That in any proceeding for the enforcement of the provisions of the statutes relating to interstate commerce, whether such proceedings be instituted before the Interstate Commerce Commission or be begun originally in any circuit court of the United States, it shall be lawful to include as parties, in addition to the carrier, all persons interested in or affected by the rate, regulation, or practice under consideration, and inquiries, investigations, orders, and decrees may be made with reference to and against such additional parties in the same manner, to the same extent, and subject to the same provisions as are or shall be authorized by law with respect to carriers."⁵

The District Courts of the United States "have jurisdiction, upon the application of the Attorney-General of the United States at the request of the Commission, alleging a failure to comply with or a violation of any of the provisions of said Act to regulate commerce or of any Act supplementary thereto or amendatory thereof by any common carrier, to issue a writ or writs of mandamus commanding such common carrier to comply with the provisions of said Acts, or any of them,"⁶

⁴ Act of June 18, 1910, ch. 309, June 29, 1906, ch. 3591, § 7, 34 St. § 6, 36 St. at L. 544, Comp. St. at L. 593, Feb. 25, 1909, 35 St. at L. 649, June 18, 1910, ch. 309, § 14, § 8600.

⁵ Act of Feb. 19, 1903, ch. 708, 36 St. at L. 555, March 4, 1915, ch. § 2, 32 St. at L. 848, Comp. St. 176, § 1, 38 St. at L. 1196, Aug. 9, § 8598.

⁶ Act of Feb. 4, 1887, ch. 104, 28, 1920, § 434, 436, Comp. St. § 20, 24 St. at L. 386, as amended § 8592.

The District Courts of the United States "have jurisdiction upon the relation of any person or persons, firm, or corporation, alleging such violation by a common carrier, of any of the provisions of the act to which this is a supplement and all acts amendatory thereof, as prevents the relator from having interstate traffic moved by said common carrier at the same rates as are charged, or upon terms or conditions as favorable as those given by said common carrier for like traffic under similar conditions to any other shipper, to issue a writ or writs of mandamus against said common carrier, commanding such common carrier to move and transport the traffic, or to furnish cars or other facilities for transportation for the party applying for the writ; Provided, That if any question of fact as to the proper compensation to the common carrier for the service to be enforced by the writ is raised by the pleadings, the writ of peremptory mandamus may issue, notwithstanding such question of fact is undetermined, upon such terms as to security, payment of money into the court, or otherwise, as the court may think proper, pending the determination of the question of the question of fact; Provided, That the remedy hereby given by writ of mandamus shall be cumulative, and shall not be held to exclude or interfere with other remedies provided by this act or the act to which it is a supplement." ⁷

The Act of March 1, 1913, providing for the physical valuation of property of carriers provides, "that the District Courts of the United States shall have jurisdiction upon the application of the Attorney-General of the United States at the request of the commission, alleging a failure to comply with or a violation of any of the provisions of this section by any common carrier to issue a writ or writs of mandamus commanding such common carrier to comply with the provisions of this section." ⁸ The Supreme Court of the District of Columbia may issue a mandamus against the commission in a proper case. ⁹

⁷ Act of March 2, 1889, ch. 382, § 6, 25 St. at L. 862, Comp. St. § 8593.

⁸ Act of Feb. 4, 1887, ch. 104, § 19a, added March 1, 1913, ch. 92, 37 St. at L. 701, Feb. 28, 1920, § 433, Comp. St. § 8591.

⁹ U. S. ex rel. Kansas City Southern Ry. Co. v. Interstate Commerce Commission, s. c., U. S., March 8, 1920.

“(1) If, after hearing on a complaint made as provided in section thirteen of this Act, the Commission shall determine that any party complainant is entitled to an award of damages under the provisions of this Act for a violation thereof, the Commission shall make an order directing the carrier to pay to the complainant the sum to which he is entitled on or before a day named.”¹⁰

“(2) If a carrier does not comply with an order for the payment of money within the time limit in such order, the complainant, or any person for whose benefit such order was made, may file in the” (District Court) “of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the road of the carrier runs, or in any State court of general jurisdiction having jurisdiction of the parties, a petition setting forth briefly the causes for which he claims damages, and the order of the commission in the premises. Such suit in the” District Court “of the United States shall proceed in all respects like other civil suits for damages, except that on the trial of such suit, the finding of an order of the commission shall be *prima facie* evidence of the facts, therein stated,¹¹ and except that the petitioner shall not be liable for costs in the” District Court “nor for costs at any subsequent stage of the proceedings unless they accrue upon his appeal. If the petitioner shall finally prevail he shall be allowed a reasonable attorney’s fee to be taxed and collected as a part of the costs of the suits.”¹²

“(3) All actions at law by carriers subject to this Act for recovery of their charges, or any part thereof, shall be begun within three years from the time the cause of action accrues, and not after. All complaints for the recovery of damage shall be filed with the Commission within two years from the time the cause of action accrues, and not after, unless the carrier, after the expiration of such two years or within ninety days before such expiration begins an action for recovery of charges in respect of the same service in which case such period for two years shall be extended to and including ninety days

¹⁰ Act of Feb. 4, 1887, ch. 104, § 16, as amended, Act of March 2, 1889, ch. 382, § 5, Act of June 29, 1906, ch. 3591, § 5, Act of June 18, 1910, ch. 309, § 13, Act of Feb. 28, 1920, §§ 423-429, Comp. St. § 8584.
¹¹ See *supra*, § 32a; *infra*, § 333g.
¹² See *infra*, § 416a.

from the time such action by the carrier is begun. In either case the cause of action in respect of a shipment of property shall, for the purposes of this section, be deemed to accrue upon delivery or tender of delivery thereof by the carrier, and not after. A petition for the enforcement of an order for the payment of money shall be filed in the District Court or State court within one year from the date of the order, and not after.¹⁸

“(4) In such suits all parties in whose favor the Commission may have made an award for damages by a single order may be joined as plaintiffs and all of the carriers parties to such an order awarding such damages may be joined as defendants, and such suit may be maintained by such joint plaintiffs and against such joint defendants in any district where any one of such joint plaintiffs could maintain such suit against any one of such joint defendants; and service of process against any one of such defendants as may not be found in the district where the suit is brought may be made in any district where such defendant carrier has its principal operating office. In case of such joint suit the recovery, if any, may be by judgment in favor of any one of such plaintiffs, against the defendant found to be liable to such plaintiff.

“(5) Every order of the Commission shall be forthwith served upon the designated agent of the carrier in the city of Washington or in such other manner as may be provided by law.

“(6) The Commission shall be authorized to suspend or notify its orders upon such notice and in such manner as it shall deem proper.”

“(7) It shall be the duty of every common carrier, its agents and employees, to observe and comply with such orders so long as the same shall remain in effect.

“(8) Any carrier, any officer, representative, or agent of a carrier, or any receiver, trustee, lessee, or agent of either of them, who knowingly fails or neglects to obey any order made under the provisions of sections 3, 13, or 15 of this Act shall forfeit to the United States the sum of \$5,000 for each offense. Every distinct violation shall be a separate offense, and in case

¹⁸ See *infra*, § 180.

of a continuing violation each day shall be deemed a separate offense.

“(9) The forfeiture provided for in this Act shall be payable into the Treasury of the United States, and shall be recoverable in a civil suit in the name of the United States, brought in the district where the carrier has its principal operating office, or in any district through which the road of the carrier runs.

“(10) It shall be the duty of the various district attorneys, under the direction of the Attorney-General of the United States, to prosecute for the recovery of forfeitures. The costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States.

“(11) The Commission may employ such attorneys as it finds necessary for proper legal aid and service of the Commission or its members in the conduct of their work, or for proper representation of the public interests in investigations made by it or cases or proceedings pending before it, whether at the Commission's own instance or upon complaint, or to appear for or represent the Commission in any case in court; and the expenses of such employment shall be paid out of the appropriation for the Commission.”¹⁴

“The orders, writs, and processes of the District Courts may in these cases, run, be served, and be returnable anywhere in the United States.”¹⁵

Suits to review, to set aside, and to restrain the enforcement of orders of the Commission, are subsequently considered.¹⁶

§ 77e. Jurisdiction of the Railroad Boards of Labor Adjustment. The Transportation Act of February 28, 1920, provides:

“(1) The term ‘carrier’ includes any express company, sleeping car company, and any carrier by railroad, subject to the Interstate Commerce Act, except a street, interurban, or suburban electric railway not operating as a part of a general steam railroad system of transportation;

“(2) The term ‘Adjustment Board’ means any Railroad Board of Labor Adjustment established under section 302:

¹⁴ Act of Feb. 4, 1887, ch. 104, § 16, 24 St. at L. 384, amended March 2, 1889, ch. 382, § 5, 25 St. at L. 859, June 29, 1906, ch. 3591, § 5, 34 St. at L. 590, June 18, 1910, ch. 309, § 13, 36 St. at L. 554. Comp. St. § 8584.
¹⁵ 38 St. at L. 219.
¹⁶ See *infra*, §§ 100b, 151

“(3) The term ‘Labor Board’ means the Railroad Labor Board;

“(4) The term ‘commerce’ means commerce among the several States or between any State, Territory, or the District of Columbia and any foreign nation, or between any Territory or the District of Columbia and any State, or between any Territory and any other Territory, or between any Territory and the District of Columbia, or within any Territory or the District of Columbia, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign nation; and

“(5) The term ‘subordinate official’ includes officials of carriers of such class or rank as the Commission shall designate by regulation formulated and issued after such notice and hearing as the Commission may prescribe, to the carriers, and employees and subordinate officials of carriers, and organizations thereof, directly to be affected by such regulations.”¹

“It shall be the duty of all carriers and their officers, employees, and agents to exert every reasonable effort and adopt every available means to avoid any interruption to the operation of any carrier growing out of any dispute between the carrier and the employees or subordinate officials thereof. All such disputes shall be considered and, if possible, decided in conference between representatives designated and authorized so to confer by the carriers, or the employees or subordinate officials thereof, directly interested in the dispute. If any dispute is not decided in such conference, it shall be referred by the parties thereto to the board which under the provisions of this title is authorized to hear and decide such dispute.”²

“Railroad Boards of Labor Adjustment may be established by agreement between any carrier, group of carriers, or the carriers as a whole, and any employees or subordinate officials of carriers, or organization or group of organizations thereof.”³

“Each such adjustment Board shall, (1) upon the application of the chief executive of any carrier or organization of employees or subordinate officials whose members are directly inter-

¹ 77e. 1 Act of Feb. 28, 1920, ch. —, § 300, Comp. St. § 10071½ee. ² Act of Feb. 28, 1920, ch. —, § 302, Comp. St. § 10071½f.

³ Act of Feb. 28, 1920, ch. —, § 301, Comp. St. § 10071½ee.

ested in the dispute, (2) upon the written petition signed by not less than 100 unorganized employees or subordinate officials directly interested in the dispute, (3) upon the Adjustment Board's own motion, or (4) upon the request of the Labor Board whenever such board is of the opinion that the dispute is likely substantially to interrupt commerce, receive for hearing, and as soon as practicable and with due diligence decide, any dispute involving only grievances, rules, or working conditions, not decided as provided in section 301, between the carrier and its employees or subordinate officials, who are, or any organization thereof which is, in accordance with the provisions of section 302, represented upon any such adjustment Board."⁴

§ 77f. Jurisdiction of the Railroad Labor Board. "There is hereby established a board to be known as the "Railroad Labor Board" and to be composed of nine members as follows:

"(1) Three members constituting the labor group, representing the employees and subordinate officials of the carriers, to be appointed by the President, by and with the advice and consent of the Senate, from not less than six nominees whose nominations shall be made and offered by such employees in such manner as the Commission shall by regulation prescribe; -

"(2) Three members, constituting the management group, representing the carriers, to be appointed by the President, by and with the advice and consent of the Senate, from not less than six nominees whose nominations shall be made and offered by the carriers in such manner as the Commission shall by regulation prescribe; and

"(3) Three members, constituting the public group, representing the public, to be appointed directly by the President, by and with the advice and consent of the Senate.

"Any vacancy on the Labor Board shall be filled in the same manner as the original appointment."¹

"If either the employee or the carriers fail to make nominations and offer nominees in accordance with the regulations of the Commission, as provided in paragraphs (1) and (2) of section 304, within thirty days after the passage of this Act in case of any original appointment to the office of member of the Labor Board, or in case of a vacancy in any such office within fifteen

⁴ Act of Feb. 28, 1920, ch. —, § 77f. ¹ Act of Feb. 28, 1920, ch. § 303, Comp. St., § 10071¼ff. —, § 304, Comp. St. § 10071¼fff.

days after such vacancy occurs, the President shall thereupon directly make the appointment, by and with the advice and consent of the Senate. In making any such appointment the President shall, as far as he deems it practicable, select an individual associated in interest with the carriers or employees thereof, whichever he is to represent.”^a

“(a) Any member of the Labor Board who during his term of office is an active member or in the employ of or holds any office in any organization of employees or subordinate officials, or any carrier, or owns any stock or bond thereof, or is pecuniarily interested therein, shall at once become ineligible for further membership upon the Labor Board; but no such member is required to relinquish honorary membership in, or his rights in any insurance or pension or other benefit fund maintained by organization of employees or subordinate officials or by a carrier.

“(b) Of the original members of the Labor Board, one from each group shall be appointed for a term of three years, one for two years, and one for one year. Their successors shall hold office for terms of five years, except that any member appointed to fill a vacancy shall be appointed only for the unexpired term of the member whom he succeeds. Each member shall receive from the United States an annual salary of \$10,000. A member may be removed by the President for neglect of duty or malfeasance in office, but for no other cause.”^a

“(a) The Labor Board shall hear, and as soon as practicable and with due diligence decide, any dispute involving grievances, rules, or working conditions, in respect to which any Adjustment Board certifies to the Labor Board that in its opinion the Adjustment Board has failed or will fail to reach a decision within a reasonable time, or in respect to which the Labor Board determines that any Adjustment Board has so failed or is not using due diligence in its consideration thereof. In case the appropriate Adjustment Board is not organized under the provisions of section 302, the Labor Board, (1) upon the application of the chief executive of any carrier organization of employees or subordinate officials whose members are directly interested in the dispute, (2) upon a written petition signed by not less than

^a Act of Feb. 28, 1920, ch. —, § 306, Comp. St. § 10071½gg. Act of Feb. 28, 1920, ch. —, § 307, § 305, Comp. St. § 10071½g.

^a Act of Feb. 28, 1920, ch. —, Comp. St. § 10071½ggg.

100 unorganized employees or subordinate officials directly interested in the dispute, or (3) upon the Labor Board's own motion if it is of the opinion that the dispute is likely substantially to interrupt commerce, shall receive for hearing, and as soon as practicable and with due diligence decide, any dispute involving grievances, rules, or working conditions which is not decided as provided in section 301 and which Adjustment Board would be required to receive for hearing and decision under the provisions of section 303.

“(b) The Labor Board, (1) upon the application of the chief executive of any carrier or organization of employees or subordinate officials whose members are directly interested in the dispute, (2) upon a written petition signed by not less than 100 unorganized employees or subordinate officials directly interested in the dispute, or (3) upon the Labor Board's own motion if it is of the opinion that the dispute is likely substantially to interrupt commerce, shall receive for hearing, and as soon as practicable and with due diligence decide, all disputes with respect to the wages or salaries of employees or subordinate officials of carriers, not decided as provided in section 301. The Labor Board may upon its own motion within ten days after the decision, in accordance with the provisions of section 301, of any dispute with respect to wages or salaries of employees or subordinate officials of carriers, suspend the operation of such decision if the Labor Board is of the opinion that the decision involves such an increase in wages or salaries as will be likely to necessitate a substantial readjustment of the rates of any carrier. The Labor Board shall hear any decision so suspended and as soon as practicable and with due diligence decide to affirm or modify such suspended decision.

“(c) A decision by the Labor Board under the provisions of paragraph (a) or (b) of this section shall require the concurrence therein of at least 5 of the 9 members of the Labor Board: Provided, That in case of any decision under paragraph (b), at least one of the representatives of the public shall concur in such decision. All decisions of the Labor Board shall be entered upon the records of the board and copies thereof, together with such statement of facts bearing thereon as the board may deem proper, shall be immediately communicated to the parties to the dispute, the President, each Adjustment Board, and the Commis-

sion, and shall be given further publicity in such manner as the Labor Board may determine.

“(d) All the decisions of the Labor Board in respect to wages or salaries and of the Labor Board or an Adjustment Board in respect to working conditions of employees or subordinate officials of carriers shall establish rates of wages and salaries and standards of working conditions which in the opinion of the board are just and reasonable. In determining the justness and reasonableness of such wages and salaries or working conditions the board shall, so far as applicable, take into consideration among other relevant circumstances:

“(1) The scales of wages paid for similar kinds of work in other industries;

“(2) The relation between wages and the cost of living;

“(3) The hazards of the employment;

“(4) The training and skill required;

“(5) The degree of responsibility;

“(6) The character and regularity of the employment; and

“(7) Inequalities of increases in wages or of treatment, the result of previous wage orders or adjustments.”⁴

“The Labor Board—

“(1) Shall elect a chairman by majority vote of its members;

“(2) Shall maintain central offices in Chicago, Illinois, but the Labor Board may, whenever it deems it necessary, meet at such other place as it may determine;

“(3) Shall investigate and study the relations between carriers and their employees, particularly questions relating to wages, hours of labor, and other conditions of employment and the respective privileges, rights, and duties of carriers and employees, and shall gather, compile, classify, digest, and publish, from time to time, data and information relating to such questions to the end that the Labor Board may be properly equipped to perform its duties under this title and that the members of the Adjustment Boards and the public may be properly informed;

“(4) May make regulations necessary for the efficient execution of the functions vested in it by this title; and

“(5) Shall at least annually collect and publish the decisions

⁴ Act of Feb. 28, 1920, ch. —,
§ 307, Comp. St. § 10071½h.

and regulations of the Labor Board and the Adjustment Boards and all regulations of the Labor Board and the Adjustment Boards and all court and administrative decisions and regulations of the Commission in respect to this title, together with a cumulative index-digest thereof.”⁵

“Any party to any dispute to be considered by an Adjustment Board or by the Labor Board shall be entitled to a hearing either in person or by counsel.”⁶

“(a) For the efficient administration of the functions vested in the Labor Board by this title, any member thereof may require, by subpoena issued and signed by himself, the attendance of any witness and the production of any book, paper, document, or other evidence from any place in the United States at any designated place of hearing, and the taking of a deposition before any designated person having power to administer oaths. In the case of a deposition the testimony shall be reduced to writing by the person taking the deposition or under his direction, and shall then be subscribed to by the deponent. Any member of the Labor Board may administer oaths and examine any witness. Any witness summoned before the board and any witness whose deposition is taken shall be paid the same fees and mileage as are paid witnesses in the courts of the United States.

“(b) In case of failure to comply with any subpoena or in case of the contumacy of any witness appearing before the Labor Board, the board may invoke the aid of any United States District Court. Such court may thereupon order the witness to comply with the requirements of such subpoena, or to give evidence touching the matter in question, as the case may be. Any failure to obey such order may be punished by such court as a contempt thereof.

“(c) No person shall be excused from so attending and testifying or deposing, nor from so producing any book, paper, document, or other evidence on the ground that the testimony or evidence, documentary or otherwise, required of him may tend to incriminate him or subject him to a penalty or forfeiture; but no natural person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction,

⁵ Act of Feb. 28, 1920, ch. —, § 308, Comp. St. § 10071¼hh.

⁶ Act of Feb. 28, 1920, ch. —, § 309, Comp. St. § 10071¼hhh.

matter, or thing, as to which in obedience to a subpoena and under oath, he may so testify or produce evidence, documentary or otherwise. But no person shall be exempt from prosecution and punishment for perjury committed in so testifying.”⁷

“(a) When necessary to the efficient administration of the functions vested in the Labor Board by this title, any member, officer, employee, or agent thereof, duly authorized in writing by the board, shall at all reasonable times for the purpose of examination have access to and the right to copy any book, account, record, paper, or correspondence relating to any matter which the board is authorized to consider or investigate. Any person who upon demand refuses any duly authorized member, officer, employee, or agent of the Labor Board such right of access or copying, or hinders, obstructs, or resists him in the exercise of such right, shall upon conviction thereof be liable to a penalty of \$500 for each such offense. Each day during any part of which such offense continues shall constitute a separate offense. Such penalty shall be recoverable in a civil suit brought in the name of the United States, and shall be covered into the Treasury of the United States as miscellaneous receipts.

“(b) Every officer or employee of the United States, whenever requested by any member of the Labor Board or an Adjustment Board duly authorized by the board for the purpose, shall supply to such board any data or information pertaining to the administration of the functions vested in it by this title, which may be contained in the records of his office.

“(c) The President is authorized to transfer to the Labor Board any books, papers, or documents pertaining to the administration of the functions vested in the board by this title, which are in the possession of any agency, or railway board of adjustment in connection therewith, established for executing the powers granted the President under the Federal Control Act and which are no longer necessary to the administration of the affairs of such agency.”⁸

“Prior to September 1, 1920, each carrier shall pay to each employee or subordinate official thereof wages or salary at a rate not less than that fixed by the decision of any agency, or

⁷ Act of Feb. 28, 1920, ch. —, § 310, Comp. St. § 10071½i.

⁸ Act of Feb. 28, 1920, ch. —, § 311, Comp. St. § 10071½ii.

railway board of adjustment in connection therewith, established for executing the powers granted the President under the Federal Control Act, in effect in respect to such employee or subordinate official immediately preceding 12.01 a. m. March 1, 1920. Any carrier acting in violation of any provision of this section shall upon conviction thereof be liable to a penalty of \$100 for each offense. Each such action with respect to any such employee or subordinate official and each day or portion thereof during which the offense continues shall constitute a separate offense. Such penalty shall be recoverable in a civil suit brought in the name of the United States, and shall be covered into the Treasury of the United States as miscellaneous receipts.”⁹

“The Labor Board, in case it has reason to believe that any decision of the Labor Board or of an Adjustment Board is violated by any carrier, or employee or subordinate official, or organization thereof, may upon its own motion after due notice and hearing to all persons directly interested in such violation, determine whether in its opinion such violation has occurred and make public its decision in such manner as it may determine.”¹⁰

“The Labor Board may (1) appoint a secretary, who shall receive from the United States an annual salary of \$5,000; and (2) subject to the provisions of the civil-service laws, appoint and remove such officers, employees, and agents; and make such expenditures for rent, printing, telegrams, telephone, law books, books of reference, periodicals, furniture, stationery, office equipment, and other supplies and expenses, including salaries, traveling expenses of its members, secretary, officers, employees, and agents, and witness fees, as are necessary for the efficient execution of the functions vested in the board by this title and as may be provided for by Congress from time to time. All of the expenditures of the Labor Board shall be allowed and paid upon the presentation of itemized vouchers therefor approved by the chairman of the Labor Board.”¹¹

“There is hereby appropriated for the fiscal year ending June 30, 1920, out of any money in the Treasury not otherwise appropriated, the sum of \$50,000, or so much thereof as may be

⁹ Ibid., § 312.

¹¹ Act of Feb. 28, 1920, ch. —,

¹⁰ Act of Feb 28, 1920, ch. —, § 314, Comp. St. § 10071¼j.
§ 313, Comp. St. § 10071¼iii.

necessary, to be expended by the Labor Board, for defraying the expenses of the maintenance and establishment of the board, including the payment of salaries as provided in this title."¹²

"The powers and duties of the Board of Mediation and Conciliation created by the Act approved July 15, 1913, shall not extend to any dispute which may be received for hearing and decision by any Adjustment Board or the Labor Board."¹³

§ 77g. Jurisdiction of the United States Board of Mediation and Conciliation. The United States Board of Mediation and Conciliation is thus composed, "There shall be a Commissioner of Mediation and Conciliation, who shall be appointed by the President, by and with the advice and consent of the Senate, and whose salary shall be \$7,500 per annum, who shall hold his office for a term of seven years and until a successor qualifies, and who shall be removable by the President only for misconduct in office. The President shall also designate not more than two other officials of the Government who have been appointed by and with the advice and consent of the Senate and the officials thus designated, together with the Commissioner of Mediation and Conciliation, shall constitute a board to be known as the United States Board of Mediation and Conciliation."

"There shall be an Assistant Commissioner of Mediation and Conciliation who shall be appointed by the President, by and with the advice of the Senate, and whose salary shall be \$5,000 per annum. In the absence of the Commissioner of Mediation and Conciliation, or when that office shall become vacant, the assistant commissioner shall exercise the functions and perform the duties of that office. Under the direction of the Commissioner of Mediation and Conciliation, the assistant commissioner shall assist in the work of mediation and conciliation and when acting alone in any case he shall have the right to take acknowledgments, receive agreements of arbitration, and cause the notices to be served upon the arbitrators chosen by the respective parties to the controversy, as provided for in section five of this Act."¹

"(1) The provisions of this act shall apply to any common

¹² Act of Feb. 28, 1920, ch. —. § 77g. ¹ Act of July 15, 1913, § 315, Comp. St. § 10071½jj. ch. 6 § 11, 38 St. at L. 108, Comp.

¹³ Act of Feb. 28, 1920, ch. —, St. § 8676.
§ 316, Comp. St. § 10071½jjj.

carrier or carriers, and their officers, agents, and employees, except masters of vessels and seamen, as defined in section forty-six hundred and twelve. Revised Statutes of the United States, engaged in the transportation of passengers or property wholly by railroad, or partly by railroad and partly by water, for continuous carriage or shipment from one State or Territory of the United States or the District of Columbia to any other State or Territory of the United States or the District of Columbia, or from any place in the United States to an adjacent foreign country, or from any place in the United States through a foreign country to any place in the United States.

“(2) The term ‘railroad’ as used in this Act shall include all bridges and ferries used or operated in connection with any railroad, and also all the road in use by any corporation operating a railroad, whether owned or operated under a contract, agreement, or lease; and the terms ‘transportation’ shall include all instrumentalities of shipment or carriage.

“(3) The term ‘employees’ as used in this Act shall include all persons actually engaged in any capacity in train operation or train service of any description and notwithstanding that the cars upon or in which they are employed may be held and operated by the carrier under lease or other contract; Provided, however, That this Act shall be held to apply to employees of street railroads and shall apply only to employees engaged in railroad train service. In every such case the carrier shall be responsible for the acts and defaults of such employees in the same manner and to the same extent as if said cars were owned by it and said employees directly employed by it, and any provisions to the contrary of any such lease or other contract shall be binding only as between the parties thereto and shall not affect the obligations of said carrier either to the public or to the private parties concerned.

“(4) A common carrier subject to the provisions of this Act is hereinafter referred to as an ‘employer’ and the employees of one or more of such carriers are hereinafter referred to as ‘employees.’ ”²

“(1) Whenever a controversy concerning wages, hours, of

² July 15, 1913, ch. 6, § 1, 38 St.
at L. 103, Comp. St. § 8666.

labor, or conditions of employment shall arise between an employer or employers subject to this Act interrupting or threatening to interrupt the business of said employer or employers to the serious detriment of the public interest, either party to such controversy may apply to the Board of Mediation and Conciliation created by this Act and invoke services for the purpose of bringing about an amicable adjustment of the controversy; and upon the request of either party the said board shall with all practicable expedition put itself in communication with the parties to such controversy and shall use its best efforts, by mediation and conciliation, to bring them to an agreement; and if such efforts to bring about an amicable adjustment through mediation and conciliation shall be unsuccessful, the said board shall at once endeavor to induce the parties to submit their controversy to arbitration in accordance with the provisions of this Act.

“(2) In any case in which an interruption of traffic is imminent and fraught with serious detriment to the public interest, the Board of Mediation and Conciliation may, if in its judgment such action seem desirable, proffer its services to the respective parties to the controversy.

“(3) In any case in which a controversy arises over the meaning or the application of any agreement reached through mediation under the provisions of this Act either party to the said agreement may apply to the Board of Mediation and Conciliation for an expression of opinion from such board as to the meaning or application of such agreement and the said board shall upon receipt of such request give its opinion as soon as may be practicable.”³

“Whenever a controversy shall arise between an employer or employers subject to this Act, which can not be settled through mediation and conciliation in the manner provided in the preceding section, such controversy may be submitted to the arbitration of a board of six, or, if the parties to the controversy prefer so to stipulate, to a board of three persons, which board shall be chosen in the following manner: In the case of a board of three, the employer or employers and the employees.

³ July 15, 1913, ch. 6, § 2, 38 St.
at L. 104, Comp. St. § 8667.

parties respectively to the agreement to arbitrate, shall each name one arbitrator; and the two arbitrators thus chosen shall select the third arbitrator; but in the event of their failure to name the third arbitrator within five days after their first meeting, such third arbitrator shall be named by the Board of Mediation and Conciliation. In the case of a board of six, the employer or employers and employees, parties respectively to the agreement to arbitrate, shall each name two arbitrators, and the four arbitrators thus chosen shall, by a majority vote, select the remaining two arbitrators: but in the event of their failure to name the two arbitrators within the fifteen days after their first meeting the said two arbitrators, or as many of them as have not been named, shall be named by the Board of Mediation and Conciliation.

"In the event that the employees engaged in any given controversy are not members of a labor organization, such employees may select a committee which shall have the right to name the arbitrator, or the arbitrators, who are to be named by the employees as provided above in this section."⁴

"The agreement to arbitrate:

"First. Shall be in writing;

"Second. Shall stipulate that the arbitration is had under the provisions of this Act;

"Third. Shall state whether the board of arbitration is to consist of three or six members;

"Fourth. Shall be signed by duly accredited representatives of the employer or employers and of the employees;

"Fifth. Shall state specifically the question to be submitted to the said board for decision;

"Sixth. Shall stipulate that a majority of said board shall be competent to make a valid and binding award;

"Seventh. Shall fix a period from the date of the appointment of the arbitrator or arbitrators necessary to complete the board as provided for in the agreement, within which the said board shall commence its hearings;

"Eighth. Shall fix a period from the beginning of the hearings within which the said board shall make and file its award:

⁴ July 15, 1913, ch. 6, § 3, 38 St.
at L. 104, Comp. St. § 8668.

Provided, That this period shall be thirty days unless a different period be agreed to;

"Ninth. Shall provide for the date from which the award shall become effective and shall fix the period during which the said award shall continue in force;

"Tenth. Shall provide that the respective parties to the award will each faithfully execute the same;

"Eleventh. Shall provide that the award and the papers and proceedings, including the testimony relating thereto, certified under the hands of the arbitrators and which shall have the force and effect of a bill of exceptions, shall be filed in the clerk's office of the District Court of the United States for the district wherein the controversy arises or the arbitration is entered into, and shall be final and conclusive upon the parties to the agreement unless set aside for error of law apparent on the record;

"Twelfth. May also provide that any difference arising as to the meaning or the application of the provisions of an award made by a board of arbitration shall be referred back to the same board or to a sub-committee of such board for a ruling, which ruling shall have the same force and effect as the original award: and if any member of the original board is unable or unwilling to serve another arbitrator shall be named in the same manner as such original member was named."⁵

"For the purposes of this Act the arbitrators herein provided for, or either of them, shall have power to administer oaths and affirmations, sign subpoenas, require the attendance and testimony of witnesses, and the production of such books, papers, contracts, agreements, and documents material to a just determination of the matters under investigation as may be ordered by the court; and may invoke the aid of the United States courts to compel witnesses to attend and testify and to produce such books, papers, contracts, agreements, and documents to the same extent and under the same conditions and penalties as is provided for in the Act to regulate commerce approved February fourth, eighteen hundred and eighty-seven and the amendments thereto."⁶

⁵ July 15, 1913, ch. 6, § 4, 38 St.
at L. 104, Comp. St. § 8669.

⁶ July 15, 1913, ch. 6, § 5, 38 St.
at L. 104, Comp. St. § 8670.

“(1) Every agreement of arbitration under this Act shall be acknowledged by the parties thereto before a notary public or a clerk of the District of Circuit Court of Appeals of the United States, or before a member of the Board of Mediation and Conciliation, the members of which are hereby authorized to take such acknowledgment; and when so acknowledged shall be delivered to a member of said board or transmitted to said board to be filed in its office.

“(2) When such agreement of arbitration has been filed with the said board, or one of its members, and when the said board, or a member thereof has been furnished the names of the arbitrators chosen by the respective parties to the controversy, the board, or a member thereof, shall cause a notice in writing to be served upon the said arbitrators notifying them of their appointment, requesting them to meet promptly to name the remaining arbitrator or arbitrators necessary to complete the board, and advising them of the period to complete the board, and advising them of the period within which, as provided in the agreement of arbitration, they are empowered to name such arbitrator or arbitrators.

“(3) When the arbitrators selected by the respective parties have agreed upon the remaining arbitrator or arbitrators they shall notify the Board of Mediation and Conciliation; and in the event of their failure to agree upon any or upon all of the necessary arbitrators within the period fixed by this Act they shall, at the expiration of such period, notify the Board of Mediation and Conciliation of the arbitrators selected, if any, or of their failure to make or to complete such selection.

“(4) If the parties to an arbitration desire the reconvening of a board to pass upon any controversy arising over the meaning or application of an award, they shall jointly so notify the Board of Mediation and Conciliation and shall state in such written notice the question or questions to be submitted to such reconvened board. The Board of Mediation and Conciliation shall thereupon promptly communicate with the members of the board of arbitration or a subcommittee of such board appointed for such purpose pursuant to the provisions of the agreement of arbitration, and arrange for the reconvening of said board or subcommittee, and shall notify the respective parties to the

controversy of the time and place at which the board will meet for hearings upon the matters in controversy.”⁷

“(1) The board of arbitration shall organize and select its own chairman and make all necessary rules for conducting its hearing; but in its award or awards the said board shall confine itself to findings or recommendations as to the questions specifically submitted to it or matters directly bearing thereon. All testimony before said board shall be given under oath or affirmation, and any member of the board of arbitration shall have the power to administer oaths or affirmations. It may employ such assistants as may be necessary in carrying on its work. It shall, whenever practicable be supplied with suitable quarters in any Federal building located at its place of meeting or at any place where the board may adjourn for its deliberations. The board of arbitration shall furnish a certified copy of its awards to the respective parties to the controversy and shall transmit the original, together with the papers and proceedings, and a transcript of the testimony taken at the hearings, certified under the hands of the arbitrators to the clerk of the District Court of the United States for the district wherein the controversy arose or the arbitration is entered into, to be filed in said clerk’s office as provided in paragraph eleven of section four of this Act. And said board shall also furnish a certified copy of its award, and the papers and proceedings including the testimony relating thereto, to the Board of Mediation and Conciliation, to be filed in its office.

“(2) The United States Commerce Court, the Interstate Commerce Commission, and the Bureau of Labor Statistics are hereby authorized to turn over to the Board of Mediation and Conciliation upon its request any papers and documents heretofore filed with them and bearing upon mediation or arbitration proceedings held under the provisions of the Act approved June first, eighteen hundred and ninety-eight, providing for mediation and arbitration.”⁸

“(1) The award, being filed in the clerk’s office of a district court of the United States as hereinbefore provided, shall go into practical operation, and judgment shall be entered thereon ac-

⁷ July 15, 1913, ch. 6, § 6, 38 St. at L. 104, Comp. St. § 8671.

⁸ July 15, 1913, ch. 6, § 7, 38 St. at L. 104, Comp. St. § 8672.

cordingly at the expiration of ten days from such filing, unless within such ten days either party shall file exceptions thereto for matter of law apparent upon the record, in which case said award shall go into practical operation, and judgment be entered accordingly, when such exceptions shall have been finally disposed of either by said district court or on appeal therefrom.

“(2) At the expiration of ten days from the decision of the District Court upon exceptions taken to said award as aforesaid judgment shall be entered in accordance with said decision, unless during said ten days either party shall appeal therefrom to the Circuit Court of Appeals. In such case only such portion of the record shall be transmitted to the Appellate Court as is necessary to the proper understanding and consideration of the questions of law presented by said exceptions and to be decided.

“(3) The determination of said Circuit Court of Appeals upon said questions shall be final, and, being certified by the clerk thereof to said District Court, judgment pursuant thereto shall thereupon be entered by said District Court.

“(4) If exceptions to an award are finally sustained, judgment shall be entered setting aside the award in whole or in part; but in such case the parties may agree upon a judgment to be entered disposing of the subject matter of the controversy, which judgment when entered shall have the same force and effect as judgment entered upon an award.

“(5) Nothing in this Act contained shall be construed to require an employee to render personal service without his consent, and no injunction or other legal process shall be issued which shall compel the performance by any employee against his will of a contract for personal labor or service.”⁹

“Each member of the board of arbitration created under the provisions of this Act shall receive such compensation as may be fixed by the Board of Mediation and Conciliation, together with his traveling and other necessary expenses.”¹⁰

§ 77h. Jurisdiction and practice of Federal Trade Commission. The Act of September 26th, 1914, provides: “That a commission is hereby created and established, to be known as the

⁹ July 15, 1913, ch. 6, § 8, 38 St. at L. 104, Comp. St. § 8673.

¹⁰ July 15, 1913, ch. 6, § 9, 38 St. at L. 104, Comp. St. § 8675.

Federal Trade Commission (hereinafter referred to as the commission), which shall be composed of five commissioners, who shall be appointed by the President, by and with the advice and consent of the Senate. Not more than three of the commissioners shall be members of the same political party. The first commissioners appointed shall continue in office for terms of three, four, five, six, and seven years, respectively, from the date of the taking effect of this Act, the term of each to be designated by the President, but their successors shall be appointed for terms of seven years, except that any person chosen to fill a vacancy shall be appointed only for the unexpired term of the commissioner whom he shall succeed. The commission shall choose a chairman from its own membership. No commissioner shall engage in any other business, vocation, or employment. Any commissioner may be removed by the President for inefficiency, neglect of duty, or malfeasance in office. A vacancy in the commission shall not impair the right of the remaining commissioners to exercise all the powers of the commission.

"The commission shall have an official seal, which shall be judicially noticed.

"Sec. 2. That each commissioner shall receive a salary of \$10,000 a year, payable in the same manner as the salaries of the judges of the courts of the United States. The commission shall appoint a secretary, who shall receive a salary of \$5,000 a year, payable in like manner, and it shall have authority to employ and fix the compensation of such attorneys, special experts, examiners, clerks, and other employees as it may from time to time find necessary for the proper performance of its duties and as may be from time to time appropriated for by Congress.

"With the exception of the secretary, a clerk to each commissioner, the attorneys, and such special experts and examiners as the commission may from time to time find necessary for the conduct of its work, all employees of the commission shall be a part of the classified civil service, and shall enter the service under such rules and regulations as may be prescribed by the commission and by the Civil Service Commission.

"All of the expenses of the commission, including all necessary expenses for transportation incurred by the commissioners or by their employees under their orders, in making any investigation,

or upon official business in any other places than in the city of Washington, shall be allowed and paid on the presentation of itemized vouchers therefor approved by the commission.

“Until otherwise provided by law, the commission may rent suitable offices for its use.

“The Auditor for the State and Other Departments shall receive and examine all accounts of expenditures of the commission.

“SEC. 3. That upon the organization of the commission and election of its chairman, the Bureau of Corporations and the offices of Commissioner and Deputy Commissioner of Corporations shall cease to exist; and all pending investigations and proceedings of the Bureau of Corporations shall be continued by the commission.

“All clerks and employees of the said bureau shall be transferred to and become clerks and employees of the commission at their present grades and salaries. All records, papers, and property of the said bureau shall become records, papers, and property of the commission, and all unexpended funds and appropriations for the use and maintenance of the said bureau, including any allotment already made to it by the Secretary of Commerce from the contingent appropriation for the Department of Commerce for the fiscal year nineteen hundred and fifteen, or from the departmental printing fund for the fiscal year nineteen hundred and fifteen, shall become funds and appropriations available to be expended by the commission in the exercise of the powers, authority, and duties conferred on it by this Act.

“The principal office of the commission shall be in the city of Washington, but it may meet and exercise all its powers at any other place. The commission may, by one or more of its members, or by such examiners as it may designate, prosecute any inquiry necessary to its duties in any part of the United States.

“SEC. 4. That the words defined in this section shall have the following meaning when found in this Act, to wit:

“‘Commerce’ means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or

foreign nation, or between the District of Columbia and any State or Territory or foreign nation.

“ ‘Corporation’ means any company or association incorporated or unincorporated, which is organized to carry on business for profit and has shares of capital or capital stock, and any company or association, incorporated or unincorporated, without shares of capital or capital stock, except partnerships, which is organized to carry on business for its own profit or that of its members.

“ ‘Documentary evidence’ means all documents, papers, and correspondence in existence at and after the passage of this Act.

“ ‘Acts to regulate commerce’ means the Act entitled ‘An Act to regulate commerce,’ approved February fourteenth, eighteen hundred and eighty-seven, and all Acts amendatory thereof and supplementary thereto.

“ ‘Antitrust acts’ means the Act entitled ‘An Act to protect trade and commerce against unlawful restraints and monopolies,’ approved July second, eighteen hundred and ninety; also the sections seventy-three to seventy-seven, inclusive, of an Act entitled ‘An Act to reduce taxation, to provide revenue for the Government, and for other purposes,’ approved August twenty-seventh, eighteen hundred and ninety-four; and also the Act entitled ‘An Act to amend sections seventy-three and seventy-six of the Act of August twenty-seventh, eighteen hundred and ninety-four, entitled ‘An Act to reduce taxation, to provide revenue for the Government, and for other purposes,’ approved February twelfth, nineteen hundred and thirteen.

“Sec. 5. That unfair methods of competition in commerce are hereby declared unlawful.

“The commission is hereby empowered and directed to prevent persons, partnerships, or corporations, except banks, and common carriers subject to the Acts to regulate commerce, from using unfair methods of competition in commerce.

“Whenever the commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition in commerce, and if it shall appear to the commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve upon such person, partnership, or corporation a complaint stating its charges in that respect, and containing a notice of a

hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. The person, partnership, or corporation so complained of shall have the right to appear at the place and time so fixed and show cause why an order should not be entered by the commission requiring such person, partnership, or corporation to cease and desist from the violation of the law so charged in said complaint. Any person, partnership, or corporation may make application, and upon good cause shown may be allowed by the commission, to intervene and appear in said proceeding by counsel or in person. The testimony in any such proceeding shall be reduced to writing and filed in the office of the commission. If upon such hearing the commission shall be of the opinion that the method of competition in question is prohibited by this Act, it shall make a report in writing in which it shall state its findings as to the facts, and shall issue and cause to be served on such person, partnership, or corporation an order requiring such person, partnership, or corporation to cease and desist from using such method of competition. Until a transcript of the record in such hearing shall have been filed in a circuit court of appeals of the United States, as hereinafter provided, the commission may at any time, upon such notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any report or any order made or issued by it under this section.

"If such person, partnership, or corporation fails or neglects to obey such order of the commission while the same is in effect, the commission may apply to the circuit court of appeals of the United States, within any circuit where the method of competition in question was used or where such person, partnership, or corporation resides or carries on business, for the enforcement of its order, and shall certify and file with its application a transcript of the entire record in the proceeding, including all the testimony taken and the report and order of the commission. Upon such filing of the application and transcript the court shall cause notice thereof to be served upon such person, partnership, or corporation and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree affirming, modifying, or setting aside the order of the commission. The

findings of the commission as to the facts, if supported by testimony, shall be conclusive.

"If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the commission, the court may order such additional evidence to be taken before the commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The commission may modify its findings as to the facts, or make new findings, by reason of the additional evidence so taken, and it shall file such modified or new findings, which, if supported by testimony, shall be conclusive, and its recommendation, if any, for the modification or setting aside of its original order, with the return of such additional evidence. The judgment and decree of the court shall be final, except that the same shall be subject to review by the Supreme Court upon certiorari as provided in section two hundred and forty of the Judicial Code.¹

"Any party required by such order of the commission to cease and desist from using such method of competition may obtain a review of such order in said circuit court of appeals by filing in the court a written petition praying that the order of the commission be set aside. A copy of such petition shall be forthwith served upon the commission, and thereupon the commission forthwith shall certify and file in the court a transcript of the record as hereinbefore provided. Upon the filing of the transcript the court shall have the same jurisdiction to affirm, set aside, or modify the order of the commission as in the case of an application by the commission for the enforcement of its order, and the findings of the commission as to the facts, if supported by testimony, shall in like manner be conclusive.

"The jurisdiction of the circuit court of appeals of the United States to enforce, set aside, or modify orders of the commission shall be exclusive.²

§ 77h. ¹ See *infra*, § 689.

² It has been held by the Supreme Court of the District of Columbia per Bailey, J. in *Maynard Coal Co. v. Federal Trade Commission* that

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the Commission has no power to inquire into that part of the business of a coal mining company which is purely intrastate.

"The mere fact," said Justice

"Such proceedings in the circuit court of appeals shall be given precedence over other cases pending therein, and shall be in every way expedited. No order of the commission or judgment of the court to enforce the same shall in any wise relieve or absolve any person, partnership, or corporation from any liability under the antitrust acts.

"Complaints, orders, and other processes of the commission under this section may be served by anyone duly authorized by the commission, either (a) by delivering a copy thereof to the person to be served, or to a member of the partnership to be served, or to the president, secretary, or other executive officer or a director of the corporation to be served; or (b) by leaving a copy thereof at the principal office or place of business of such person, partnership, or corporation; or (c) by registering and mailing a copy thereof addressed to such person, partnership, or corporation at his or its principal office or place of business. The verified return by the person so serving said complaint, order, or other process setting forth the manner of said service shall be proof of the same, and the return post-office receipt for said complaint, order, or other process registered and mailed as aforesaid shall be proof of the service of the same.

"SEC. 6. That the commission shall also have power—

"(a) To gather and compile information concerning, and to investigate from time to time the organization, business, conduct, practices, and management of any corporation engaged in commerce, excepting banks and common carriers subject to the Act to regulate commerce, and its relation to other corporations and to individuals, associations, and partnerships.³

"(b) To require, by general or special orders, corporations engaged in commerce, excepting banks, and common carriers subject to the Act to regulate commerce, or any class of them, or any of them, respectively, to file with the commission in such form as the commission may prescribe annual or special, or both annual and special, reports or answers in writing to specific questions, furnishing to the commission such information as it

Bailey, "that a corporation engaged in mining ships a portion of its products to other States does not subject its business of production or its intrastate commerce to the visi-

torial powers of Congress over corporations' interstate commerce." N. Y. Sun, April 20, 1920.

³ According to the newspapers, on April 19, 1920, in Maynard

may require as to the organization, business, conduct, practices, management, and relation to other corporations, partnerships, and individuals of the respective corporations filing such reports or answers in writing. Such reports and answers shall be made under oath, or otherwise, as the commission may prescribe, and shall be filed with the commission within such reasonable period as the commission may prescribe, unless additional time be granted in any case by the commission.

“(c) Whenever a final decree has been entered against any defendant corporation in any suit brought by the United States to prevent and restrain any violation of the antitrust Acts, to make investigation, upon its own initiative, of the manner in which the decree has been or is being carried out, and upon the application of the Attorney General it shall be its duty to make such investigation. It shall transmit to the Attorney General a report embodying its findings and recommendations as a result of any such investigation, and the report shall be made public in the discretion of the commission.

“(d) Upon the direction of the President or either House of Congress to investigate and report the facts relating to any alleged violations of the antitrust Acts by any corporation.

“(e) Upon the application of the Attorney General to investigate and make recommendations for the readjustment of the business of any corporation alleged to be violating the antitrust Acts in order that the corporation may thereafter maintain its organization, management, and conduct of business in accordance with law.

“(f) To make public from time to time such portions of the information obtained by it hereunder, except trade secrets and names of customers, as it shall deem expedient in the public interest; and to make annual and special reports to the Congress and to submit therewith recommendations for additional legislation; and to provide for the publication of its reports and decisions in such form and manner as may be best adapted for public information and use.

Coal Co. v. Federal Trade Commission an injunction was granted by the Supreme Court of the District of Columbia per Bailey, J. against an in-

vestigation of the Commission into the intrastate business of a coal mining company. N. Y. Sun, April 20, 1920.

“(g) From time to time to classify corporations and to make rules and regulations for the purpose of carrying out the provisions of this Act.

“(h) To investigate, from time to time, trade conditions in and with foreign countries where associations, combinations, or practices of manufacturers, merchants, or traders, or other conditions, may affect the foreign trade of the United States, and to report to Congress thereon, with such recommendations as it deems advisable.

“SEC. 7. That in any suit in equity brought by or under the direction of the Attorney General as provided in the antitrust Acts, the court may, upon the conclusion of the testimony therein, if it shall be then of opinion that the complainant is entitled to relief, refer said suit to the commission, as a master in chancery, to ascertain and report an appropriate form of decree therein. The commission shall proceed upon such notice to the parties and under such rules of procedure as the court may prescribe, and upon the coming in of such report such exceptions may be filed and such proceedings had in relation thereto as upon the report of a master in other equity causes, but the court may adopt or reject such report, in whole or in part, and enter such decree as the nature of the case may in its judgment require.

“SEC. 8. That the several departments and bureaus of the Government when directed by the President shall furnish the commission, upon its request, all records, papers, and information in their possession relating to any corporation subject to any of the provisions of this Act, and shall detail from time to time such officials and employees to the commission as he may direct.

“SEC. 9. That for the purposes of this Act the commission, or its duly authorized agent or agents, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any documentary evidence of any corporation being investigated or proceeded against; and the commission shall have power to require by subpoena the attendance and testimony of witnesses and the production of all such documentary evidence relating to any matter under investigation. Any member of the commission may sign subpoenas, and members and examiners of the commission may administer oaths and affirmations, examine witnesses, and receive evidence.

"Such attendance of witnesses, and the production of such documentary evidence, may be required from any place in the United States, at any designated place of hearing. And in case of disobedience to a subpoena the commission may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of documentary evidence.

"Any of the district courts of the United States within the jurisdiction of which such inquiry is carried on may, in case of contumacy or refusal to obey a subpoena issued to any corporation or other person, issue an order requiring such corporation or other person to appear before the commission, or to produce documentary evidence if so ordered, or to give evidence touching the matter in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof.

"Upon the application of the Attorney General of the United States, at the request of the commission, the district courts of the United States shall have jurisdiction to issue writs of mandamus commanding any person or corporation to comply with the provisions of this Act or any order of the commission made in pursuance thereof.

"The commission may order testimony to be taken by deposition in any proceeding or investigation pending under this Act at any stage of such proceeding or investigation. Such depositions may be taken before any person designated by the commission and having power to administer oaths. Such testimony shall be reduced to writing by the person taking the deposition, or under his direction, and shall then be subscribed by the deponent. Any person may be compelled to appear and depose and to produce documentary evidence in the same manner as witnesses may be compelled to appear and testify and produce documentary evidence before the commission as hereinbefore provided.

"Witnesses summoned before the commission shall be paid the same fees and mileage that are paid witnesses in the courts of the United States, and witnesses whose depositions are taken and the persons taking the same shall severally be entitled to the same fees as are paid for like services in the courts of the United States.

"No person shall be excused from attending and testifying

or from producing documentary evidence before the commission or in obedience to the subpoena of the commission on the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him may tend to criminate him or subject him to a penalty or forfeiture. But no natural person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may testify, or produce evidence, documentary or otherwise, before the commission in obedience to a subpoena issued by it: *Provided*, That no natural person so testifying shall be exempt from prosecution and punishment for perjury committed in so testifying.

“SEC. 10. That any person who shall neglect or refuse to attend and testify, or to answer any lawful inquiry, or to produce documentary evidence, if in his power to do so, in obedience to the subpoena or lawful requirement of the commission, shall be guilty of an offense and upon conviction thereof by a court of competent jurisdiction shall be punished by a fine of not less than \$1,000 nor more than \$5,000, or by imprisonment for not more than one year, or by both such fine and imprisonment.

“Any person who shall willfully make, or cause to be made, any false entry or statement of fact in any report required to be made under this Act, or who shall willfully make, or cause to be made, any false entry in any account, record, or memorandum kept by any corporation subject to this Act, or who shall willfully neglect or fail to make, or to cause to be made, full, true, and correct entries in such accounts, records, or memoranda of all facts and transactions appertaining to the business of such corporation, or who shall willfully remove out of the jurisdiction of the United States, or willfully mutilate, alter, or by any other means falsify any documentary evidence of such corporation, or who shall willfully refuse to submit to the commission or to any of its authorized agents, for the purpose of inspection and taking copies, any documentary evidence of such corporation in his possession or within his control, shall be deemed guilty of an offense against the United States, and shall be subject, upon conviction in any court of the United States of competent jurisdiction, to a fine of not less than \$1,000 nor more than \$5,000, or to imprisonment for a term of not more than three years, or to both such fine and imprisonment.

"If any corporation required by this Act to file any annual or special report shall fail so to do within the time fixed by the commission for filing the same, and such failure shall continue for thirty days after notice of such default, the corporation shall forfeit to the United States the sum of \$100 for each and every day of the continuance of such failure, which forfeiture shall be payable into the Treasury of the United States, and shall be recoverable in a civil suit in the name of the United States brought in the district where the corporation has its principal office or in any district in which it shall do business. It shall be the duty of the various district attorneys, under the direction of the Attorney General of the United States, to prosecute for the recovery of forfeitures. The costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States.

"Any officer or employee of the commission who shall make public any information obtained by the commission without its authority, unless directed by a court, shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be punished by a fine not exceeding \$5,000, or by imprisonment not exceeding one year, or by fine and imprisonment, in the discretion of the court.

"SEC. 11. Nothing contained in this Act shall be construed to prevent or interfere with the enforcement of the provisions of the antitrust Acts or the Acts to regulate commerce, nor shall anything contained in the Act be construed to alter, modify, or repeal the said antitrust Acts or the Acts to regulate commerce or any part or parts thereof."⁴

The practice before the commission is regulated by the following rules adopted June 17th, 1915:

"I. SESSIONS.

The principal office of the Commission at Washington, D. C., is open each business day from 9 a. m. to 4:30 p. m. The Commission may meet and exercise all its powers at any other

⁴ Act of Sept. 26, 1914, ch. 331,
311-38 St. et. L. act 717 Comp. St.
§§ 8836a-8836¼e.

place and may, by one or more of its members, or by such examiners as it may designate, prosecute any inquiry necessary to its duties in any part of the United States.

Sessions of the Commission for hearing contested proceedings will be held as ordered by the Commission.

Sessions of the Commission for the purpose of making orders and for the transaction of other business, unless otherwise ordered, will be held at the office of the Commission at Washington, D. C., on each business day at 10:30 a. m. Three members of the Commission shall constitute a quorum for the transaction of business.

All orders of the Commission shall be signed by the Secretary.

II. COMPLAINTS.

Any person, partnership, corporation, or association may apply to the Commission to institute a proceeding in respect to any violation of law over which the Commission has jurisdiction.

Such application shall be in writing, signed by or in behalf of the applicant, and shall contain a short and simple statement of the facts constituting the alleged violation of law and the name and address of the applicant and of the party complained of.

The Commission shall investigate the matters complained of in such application, and if upon investigation the Commission shall have reason to believe that there is a violation of law over which the Commission has jurisdiction, the Commission shall issue and serve upon the party complained of a complaint stating its charges and containing a notice of a hearing upon a day and at a place therein fixed, at least 40 days after the service of said complaint.

III. ANSWERS.

Within 30 days from the service of the complaint, unless such time be extended by order of the Commission, the defendant shall file with the Commission an answer to the complaint. Such answer shall contain a short and simple statement of the facts which constitute the ground of defense. It shall spe-

cifically admit or deny or explain each of the facts alleged in the complaint, unless the defendant is without knowledge, in which case he shall so state, such statement operating as a denial. Answers in typewriting must be on one side of the paper only, on paper not more than 8½ inches wide and not more than 11 inches long, and weighing not less than 16 pounds to the ream, folio base, 17 by 22 inches, with left-hand margin not less than 1½ inches wide, or they may be printed in 10 or 12 point type on good unglazed paper 8 inches wide by 10½ inches long, with inside margins not less than 1 inch wide.

IV. SERVICE.

Complaints, orders, and other processes of the Commission may be served by anyone duly authorized by the Commission, either (a) by delivering a copy thereof to the person to be served, or to a member of the partnership to be served, or to the president, secretary, or other executive officer, or a director, of the corporation or association to be served; or (b) by leaving a copy thereof at the principal office or place of business of such person, partnership, corporation, or association; or (c) by registering and mailing a copy thereof addressed to such person, partnership, corporation, or association at his or its principal office or place of business. The verified return by the person so serving said complaint, order, or other process, setting forth the manner of said service, shall be proof of the same, and the return post-office receipt for said complaint, order, or other process, registered and mailed as aforesaid, shall be proof of the service of the same.

V. INTERVENTION.

Any person, partnership, corporation, or association desiring to intervene in a contested proceeding shall make application in writing, setting out the grounds on which he or it claims to be interested. The Commission may, by order, permit intervention by counsel or in person to such extent and upon such terms as it shall deem just.

Applications to intervene must be on one side of the paper only, on paper not more than 8½ inches wide and not more

than 11 inches long, and weighing not less than 16 pounds to the ream, folio base, 17 by 22 inches, with left-hand margin not less than 1½ inches wide, or they may be printed in 10 or 12 point type on good unglazed paper 8 inches wide by 10½ inches long, with inside margins not less than 1 inch wide.

VI. CONTINUANCES AND EXTENSIONS OF TIME.

Continuances and extensions of time will be granted at the discretion of the Commission.

VII. WITNESSES AND SUBPŒNAS.

Witnesses shall be examined orally, except that for good and exceptional cause for departing from the general rule the Commission may permit their testimony to be taken by deposition.

Subpœnas requiring the attendance of witnesses from any place in the United States at any designated place of hearing may be issued by any member of the Commission.

Subpœnas for the production of documentary evidence (unless directed to issue by a Commissioner upon his own motion) will issue only upon application in writing, which must be verified and must specify, as near as may be, the documents desired and the facts to be proved by them.

Witnesses summoned before the Commission shall be paid the same fees and mileage that are paid witnesses in the courts of the United States, and witnesses whose depositions are taken, and the persons taking the same, shall severally be entitled to the same fees as are paid for like services in the courts of the United States.

VIII. TIME FOR TAKING TESTIMONY.

Upon the joining of issue in a proceeding by the Commission the examination of witnesses therein shall proceed with all reasonable diligence and with the least practicable delay. Not less than five nor more than ten days' notice shall be given by the Commission to counsel or parties of the time and place of examination of witnesses before the Commission, a Commissioner, or an Examiner.

IX. OBJECTIONS TO EVIDENCE.

Objections to the evidence before the Commission, a Commissioner, or an Examiner shall, in any proceeding, be in short form, stating the grounds of objections relied upon, and no transcript filed shall include argument or debate.

X. MOTIONS.

A motion in a proceeding by the Commission shall briefly state the nature of the order applied for, and all affidavits, records, and other papers upon which the same is founded, except such as have been previously filed or served in the same proceeding, shall be filed with such motion and plainly referred to therein.

XI. HEARINGS ON INVESTIGATIONS.

When a matter for investigation is referred to a single Commissioner for examination or report, such Commissioner may conduct or hold conferences or hearings thereon, either alone or with other Commissioners who may sit with him, and reasonable notice of the time and place of such hearings shall be given to parties in interest and posted.

The General Counsel or one of his assistants, or such other attorney as shall be designated by the Commission, shall attend and conduct such hearings, and such hearings may, in the discretion of the Commissioner holding same, be public.

XII. DEPOSITIONS IN CONTESTED PROCEEDINGS.

The Commission may order testimony to be taken by deposition in a contested proceeding.

Depositions may be taken before any person designated by the Commission and having power to administer oaths.

Any party desiring to take the deposition of a witness shall make application in writing, setting out the reasons why such deposition should be taken, and stating the time when, the place where, and the name and post-office address of the person before whom it is desired the deposition be taken; the name and post-office address of the witness, and the subject matter

or matters concerning which the witness is expected to testify. If good cause be shown, the Commission will make and serve upon the parties, or their attorneys, an order wherein the Commission shall name the witness whose deposition is to be taken and specify the time when, the place where, and the person before whom the witness is to testify, but such time and place, and the person before whom the deposition is to be taken, so specified in the Commission's order, may or may not be the same as those named in said application to the Commission.

The testimony of the witness shall be reduced to writing by the officer before whom the deposition is taken, or under his direction, after which the deposition shall be subscribed by the witness and certified in usual form by the officer. After the deposition has been so certified it shall, together with a copy thereof made by such officer or under his direction, be forwarded by such officer under seal in an envelope addressed to the Commission at its office in Washington, D. C. Upon receipt of the deposition and copy the Commission shall file in the record in said proceeding such deposition and forward the copy to the defendant or the defendant's attorney.

Such depositions shall be typewritten on one side only of the paper, which shall be not more than 8½ inches wide and not more than 11 inches long and weighing not less than 16 pounds to the ream, folio base, 17 by 22 inches, with left-hand margin not less than 1½ inches wide.

No deposition shall be taken except after at least 6 days' notice to the parties, and where the deposition is taken in a foreign country such notice shall be at least 15 days.

No deposition shall be taken either before the proceeding is at issue, or, unless under special circumstances and for good cause shown, within 10 days prior to the date of the hearing thereof assigned by the Commission, and where the deposition is taken in a foreign country it shall not be taken after 30 days prior to such date of hearing.

XIII. DOCUMENTARY EVIDENCE.

Where relevant and material matter offered in evidence is embraced in a document containing other matter not material or relevant and not intended to be put in evidence, such docu-

ment will not be filed, but a copy only of such relevant and material matter shall be filed.

XIV. BRIEFS.

Unless otherwise ordered, briefs may be filed at the close of the testimony in each contested proceeding. The presiding Commissioner or examiner shall fix the time within which briefs shall be filed and service thereof shall be made upon the adverse parties.

All briefs must be filed with the Secretary and be accompanied by proof of service upon the adverse parties. Fifteen copies of each brief shall be furnished for the use of the Commission, unless otherwise ordered.

Application for extension of time in which to file any brief shall be by petition in writing, stating the facts upon which the application rests, which must be filed with the Commission at least 5 days before the time for filing the brief.

Every brief shall contain, in the order here stated—

- (1) A concise abstract, or statement of the case.
- (2) A brief of the argument, exhibiting a clear statement of the points of fact or law to be discussed, with the reference to the pages of the record and the authorities relied upon in support of each point.

Every brief of more than 10 pages shall contain on its top fly leaves a subject index with page references, the subject index to be supplemented by a list of all cases referred to, alphabetically arranged, together with references to pages where the cases are cited.

Briefs must be printed in 10 or 12 point type on good unglazed paper 8 inches by 10½ inches, with inside margins not less than 1 inch wide, and with double-leaded text and single-leaded citations.

Oral arguments will be had only as ordered by the Commission.

XV. ADDRESS OF THE COMMISSION.

All communications to the Commission must be addressed to Federal Trade Commission, Washington, D. C., unless otherwise specifically directed.

CHAPTER II.

JURISDICTION IN EQUITY.

§ 78. **Equitable jurisdiction in general.** Equity is that system of jurisprudence which was administered by the High Court of Chancery of England in the exercise of its extraordinary jurisdiction,¹ and which has been amplified and extended by the more modern decisions of the English and American courts. It owed its origin to a desire upon the part of the English sovereigns and their chancellors to supplement the deficiencies and soften the rigors of the common law; and whereas the well-springs of this were such of the customs of the German tribes as had been brought with them from their Fatherland by the Jutes and Angles;² those of that, which was administered at first exclusively by ecclesiastics, are in the canon, which was itself derived from the greatest monument of the genius of ancient Rome, the civil law.³ Since the time of Nottingham, before whom each succeeding chancellor had decided the cases brought before him in accordance with his own notions of what was proper, or in the language of Selden,⁴ measured justice out by the length of his foot, the same respect has been paid to precedent in the courts of equity and common law. But the rules regulating the remedies administered by the former are much more plastic. And even at the present time cases often occur where the judges sitting at equity, with the approval and assistance of the profession, invent and adopt new remedies suited to a state of society and of civilization unknown and not anticipated when the procedure in chancery first assumed the form that it still substantially retains.⁵ The chronicles of the

§ 78. ¹ Mitford's Pleadings; Bishop's Equity, § 1.

² Holmes' Com. Law.

³ Langdell's Eq. Pl., Introduction.

⁴ Selden's Table Talk, Title "Equity."

⁵ Kennedy v. St. Paul & Pacific R. Co., 2 Dill. 448; Wallace v. Loomis, 97 U. S. 146, 24 L. ed. 895; Joy v. St. Louis, 138 U. S. 1, 50, 34 L. ed. 843, 859; Toledo, A. A. & N. M. Ry. Co. v. Pennsylvania Co.,

growth and development of equity abound with names well known to the students, as well of general history as of jurisprudence. Among them Wolsey, More, Bacon, Clarendon, Somers, and Erskine are the most familiar to the former, while the members of the profession look back with especial admiration upon the careers of Nottingham, Hardwicke, Eldon, Westbury, Kent, Story, and Taney. Although originally no one could seek their aid who was not denied justice by the courts of common law; yet after he had once shown a title to their assistance, courts of equity would almost always give a suitor complete relief in the matter about which he complained.⁶ And now that since the time of Mansfield the courts of common law have, abandoning their former jealousy, in many instances of their own accord as well as under the compulsion of statutes, accepted doctrines first created by courts of equity,⁷ the latter have not felt obliged to relinquish the jurisdiction which they formerly acquired.⁸ One of the marked characteristics which distinguish equity from the common law, is that, while the latter, as a general rule, acts against and exercises control over property alone; has but a very limited and merely incidental power, mostly borrowed from chancery, to enforce obedience to a personal command, its procedure being founded upon the theory that the parties to an action owe no obedience to the court;⁹ and is consequently restricted in its operation when the property which is the subject of a contention is beyond the reach of its writs; equity acts directly against and exercises complete control over persons, and does not lose jurisdiction when the parties are subject to its process, because the property over which it thereby assumes control is beyond the territory under those laws whence its own power is derived.¹⁰

19 L.R.A. 395, 5 Inters. Com. Rep. 545, 54 Fed. 746, 751; Wallworth v. Holt, 4 Mylne & Cr. 619.

⁶ 1 Fonblanque's Equity, b. i, ch. i, § 3, note (f); Motteux v. London Assur. Co., 1 Atk. 545; Tayloe v. Merchants' Fire Ins. Co., 9 How. 390, 405, 13 L. ed. 187.

⁷ Moses v. Macferlan, 2 Burr. 1005; Dickerson v. Colgrove, 100 U. S. 578, 25 L. ed. 618.

⁸ Putnam v. New Albany, 4 Biss. 365.

⁹ Langdell's Eq. Pl., § 40.

¹⁰ Archer v. Preston, 1 Eq. Cas. Ab. 133, pl. 3, cited and followed in Arglasse v. Muschamp, 1 Vern. 75; s. c., 1 Vern. 135; Penn. v. Lord Baltimore, 1 Ves. Sr. 444; Massie v. Watts, 6 Cranch, 148, 3 L. ed. 181; Muller v. Dows, 94 U. S. 443, 24 L. ed. 207, at pages 449-450. The au-

§ 79. General survey of the jurisdiction of courts of equity.

The jurisdiction of courts of equity is exercised either for the protection of rights which the common law does not recognize; or for the prevention or redress of wrongs for which the common law affords no adequate remedy. A full consideration of this topic is beyond the scope of this treatise. The following summary, although imperfect, may occasionally assist the reader. The rights which a court of equity alone respects are: the rights of beneficiaries under a trust,¹ either express or

thorities are well collected in a learned opinion by Judge, subsequently Chief Judge, Henry E. Davies, in *Gardner v. Ogden*, 22 N. Y. 827, 78 Am. Dec. 192. Cf. *Carpenter v. Strange*, 141 U. S. 87, 106, 35 L. ed. 640, 647, cited *infra*, § 399.

§ 79. 1 *Stuart v. Mellish*, 2 Atk. 610; *New Orleans v. Morris*, 105 U. S. 600, 26 L. ed. 1184; *Smith v. Am. Nat. Bank, C. C. A.*, 89 Fed. 832; *Humphreys v. Walsh, C. C. A.*, 248 Fed. 414. By a legatee against an executor, *Mayer v. Foulkrod*, 4 Wash. C. C. 349; *Speckart v. Schmidt, C. C. A.*, 190 Fed. 499; and by one of the next of kin against an administrator and his sureties, *Payne v. Hook*, 7 Wall. 425, 19 L. ed. 260; *Pratt v. Northam*, 5 Mason, 95, *supra*, § 54; to recover the complainant's share of a decedent's estate. So may an executor to establish his individual claim against the estate. *Glover v. Patten*, 165 U. S. 394, 41 L. ed. 760. By a married woman to recover money which belongs to her separate estate, *Hunt v. Danforth*, 2 Curt. 592. By a municipal corporation to enjoin the sale on execution of property held by it in trust, *New Orleans v. Morris*, 105 U. S. 600, 26 L. ed. 1184. By a trustee and his beneficiary to obtain possession of

land subject to the trust, *Harrison v. Rowan*, 4 Wash. C. C. 202. To recover from a bank money of the plaintiff deposited by a third person in the latter's name, *Union S. Y. Bank v. Gillespie*, 137 U. S. 411, 420, 34 L. ed. 724, 727; *National Bank v. Insurance Co.*, 104 U. S. 54, 26 L. ed. 658. To compel the assignment to a principal by his agent of judgments recovered by the latter for the benefit of the former, *Burke v. Davis*, 63 Fed. 456. But not a bill by the assignee of a cause of action to enforce for his own use the legal right of his assignor, when he seeks the aid of equity merely upon the ground that he cannot maintain an action at law in his own name, *Hayward v. Andrews*, 106 U. S. 672, 27 L. ed. 271; *New York Guaranty Co. v. Memphis Water Co.*, 107 U. S. 205, 27 L. ed. 484. In the absence of any statutory restrictions, by a resident taxpayer in a county to prevent an illegal disposition of the county funds, or the illegal creation of a debt which he in common with the other property holders there may be compelled to pay, *Field, J.*, in *Crampton v. Zabriskie*, 101 U. S. 601, 609, 25 L. ed. 1070, 1071. By the beneficiary of a trust against his trustee and a debtor of the trust estate to enforce a cause of action

implied, which latter term includes those which are result-

belonging to the trust estate, upon which the trustee has refused to sue, *U. S. v. Myers*, 2 Brock. 516; *Davis v. Davis*, 89 Fed. 532; *Brun v. Mann*, 12 L.R.A.(N.S.) 154, 151 Fed. 145. By a stockholder in a corporation to recover its money fraudulently misappropriated by its directors, *Gindrat v. Dane*, 4 Cliff. 260. See *infra*, § 145. But not, by a stockholder, to recover damages for a depreciation of his stock, by an injury to the property or business of the corporation, *Kelly v. Mississippi River Coaling Co.*, 175 Fed. 482. For a case where a minority dissenting stockholder was refused a decree for an accounting by a consolidated railroad company, when he objected to the merger of his corporation therein, see *Miller v. Chicago & A. R. Co.*, 198 Fed. 695. By a stockholder against a corporation to compel the transfer of stock fraudulently transferred to another, *Kilgour v. N. O. Gas-Light Co.*, 2 Woods, 144; and to compel the transfer of stock to its equitable owners, *Mechanics' Bank v. Seton*, 1 Pet. 299, 7 L. ed. 152; *Jessup v. Chicago & N. W. Ry. Co.*, 188 Fed. 931, unless it has been acquired unconscientiously or for speculative purposes, *Mississippi & Mo. R. Co. v. Cromwell*, 91 U. S. 643, 23 L. ed. 367; *Foll's Appeal*, 91 Pa. St. 434, 438, 36 Am. Rep. 671; *Randolph's Ex'r v. Quidnick Co.*, 135 U. S. 457, 34 L. ed. 200. "It has been held that a person may purchase stock in a corporation for the very purpose of bringing a stockholder's suit, and that the law will not inquire into the motive which actuated his purchase. *Bloxom v. Met. Railway*, L. R. 3

Ch. App. 337; *Seaton v. Grant*, L. R. 2 Ch. App. 459; *Elkins v. Camden & Atlantic Railroad*, 36 N. J. Eq. 5." *Brown, J.*, in *Dickerman v. Northern Trust Co.*, 176 U. S. 181, 192, 44 L. ed. 423, 430. See *Jahu v. Champagne Lumber Co.*, 147 Fed. 631. It has been said, that a suit against a depository of securities which have been pooled or deposited under a syndicate agreement, when not a party to the agreement, although named therein as a trustee, cannot ordinarily be sued in equity by the owner of the securities because of its refusing to make a distribution after the date specified in the agreement and its permitting the managers of the pool or syndicate to exchange the securities for other stocks and bonds and to cancel those deposited, but that when the defendant admitted that it held on complainant the securities received in exchange and claimed a lien thereupon, the depositor might sue in equity for a delivery of his proportionate share of the new securities free from any lien. *Kelly v. Illinois State Tr. Co.*, C. C. A., 215 Fed. 567. Where officers of the corporation had agreed, to increase its capital stock and to place a part of the increase in escrow for the benefit of the complainant, when he had increased the earnings to a specified amount; and then issued the increased stock to new subscribers who were parties to the agreement, it was held that equity might entertain a suit to foreclose his lien. *Wright v. Barnard*, 248 Fed. 756. To establish an attorney's lien, *Coram v. Ingersoll*, 211 U. S. 335. By the holder of a corporate bond or other claim to enforce his

ing² or constructive:³ the right to be relieved from an obligation which has been entered into, or to recover a right which has been lost by accident,—⁴ which expression is said to include the cases where one has become subject to a penalty or forfeiture,⁵ or has lost a document the possession of which was essential to his success in an action at common law,⁶ and is also often used to bolster up a weak equity of another kind—;⁷ by mistake,⁸— which must be mutual, material, and not caused by the negligence of the party seeking relief,⁹ and which, if

lien upon tolls or other income pledged to secure its payment. *Good Templars' L. Ass'n v. United L. I. Ass'n*, 59 Fed. 220; *Grand Trunk Ry. Co. v. Central Vt. Ry. Co.*, 85 Fed. 87. See *Townsend v. Vanderwerker*, 160 U. S. 171, 40 L. ed. 383; *Vallette v. White W. V. C. Co.*, 4 McLean, 192.

² *Dyer v. Dyer*, 2 Cox Eq. Cas. 92; *Hoxie v. Carr*, 1 Sumn. 173.

³ *National Bank v. Insurance Co.*, 104 U. S. 54, 64-71, 26 L. ed. 693, 698-700.

⁴ *L. Bucki & Son Lumber Co. v. Atlantic Coast Line Co.*, C. C. A., 116 Fed. 1. To enjoin a township from setting up, as a defense to an action upon bonds issued by it, the accidental omission of the town seal thereon. *Bernard's Township v. Stebbins*, 109 U. S. 341, 27 L. ed. 956.

⁵ 1 Spence Eq., §§ 629, 630; *Bispham's Eq.*, § 178. Mortgages are included under this head. *Mitford's Pl.* 118-276; *Story's Eq. Jur.*, § 89. To set aside a contract entered into by a mistake of law, the execution of which would subject the complainant to penalties under the anti-trust law. *Chalmers Chemical Co. v. Chadeloid Chemical Co.*, 175 Fed. 995.

⁶ *Savannah Nat. Bank v. Haskins*, 101 Mass. 370, 3 Am. Rep. 373;

Donaldson v. Williams, 50 Mo. 408; *Story's Eq. Jur.*, § 84; *Bispham's Eq.* §§ 176, 177. But not, it has been said, to assist in maintaining an action for a tort. *Security S. & L. Ass'n v. Buchanan*, C. C. A., 66 Fed. 799.

⁷ *Story's Eq. Jur.*, §§ 90-99; *Bispham's Eq.*, §§ 182, 183. Cases where this head of equity is invoked for relief against a defective execution of a power are included here.

⁸ For a case where relief was denied because of negligence, see *Armour & Co. v. Renaker*, 191 Fed. 48. The court refused to set aside a judgment recovered in favor of the United States through an alleged misunderstanding between the defendant and the district attorney. *Buckley v. U. S.*, 196 Fed. 429. Since money paid under a mistake of fact can be recovered in an action of assumpsit for money had and received, a bill in equity for the same relief will not lie. *U. S. v. D'Olier Eng. Co.*, 215 Fed. 209.

⁹ *Bispham's Eq.*, § 191; *Whittemore v. Farrington*, 76 N. Y. 452; *McFerran v. Taylor*, 3 Cranch, 281, 2 L. ed. 440; *Elliott v. Sackett*, 108 U. S. 132, 27 L. ed. 678; *Williams v. U. S.*, 138 U. S. 514, 34 L. ed. 1026; *Duke of Beaufort v. Neeld*, 12 Cl. & Fin. 248, 286; *Stephenson v. Wilson*, 2 Vern. 325; *New River*

solely of a point of law, will very rarely release one from his contractual obligations—;¹⁰ by fraud, whether actual¹¹ or

Mineral Co. v. Seeley, C. C. A., 120 Fed. 193. To reform an instrument executed by mistake. *Walden v. Skinner*, 101 U. S. 577, 25 L. ed. 963.

¹⁰ *Hunt v. Rousmanier's Adm'rs*, 8 Wheat. 174, 215, 5 L. ed. 589, 599; s. c., 1 Pet. 1, 14, 7 L. ed. 33; *Snell v. Insurance Co.*, 98 U. S. 85, 25 L. ed. 52; *Pitcher v. Hennessey*, 48 N. Y. 415; *Adair v. Brimmer*, 74 N. Y. 539; *Relief F. Ins. Co. v. Shaw*, 94 U. S. 574, 24 L. ed. 291; *Allen v. Galloway*, 30 Fed. 406; *Cooper v. Phibbs*, L. R. 2 H. L. 170; *Elliott v. Sackett*, 108 U. S. 132, 142, 27 L. ed. 678, 682; *Taylor v. Holmes*, 127 U. S. 489, 32 L. ed. 179; *Pope Mfg. Co. v. Gormully*, 144 U. S. 224, 36 L. ed. 414; *Pope Mfg. Co. v. Gormully & Jeffery Co.*, 144 U. S. 238, 36 L. ed. 420; *Griswold v. Hazard*, 141 U. S. 260, 35 L. ed. 678; *Mutual Life Ins. Co. v. Phinney*, 178 U. S. 327, 342, 44 L. ed. 1088, 1095; *Hamblin v. Bishop*, 41 Fed. 74; *Bailey v. Am. Cent. Ry. Co.*, 13 Fed. 250; *Sias v. Roger Williams Ins. Co.*, 8 Fed. 183; *Sampson v. Mudge*, 13 Fed. 260; *Hudson v. Glens Falls I. & S. Co.*, 218 N. Y. 133.

¹¹ *Cobbeltiom v. William*, Chan. Cal. II; *Stonehouse v. Starishaw*, Chan. Cal. XXIX; *Bief v. Dyer*, Chan. Cal. XI; *Bacon v. Bronson*, 7 Johns' Ch. (N. Y.) 194, 11 Am. Dec. 449; *Jones v. Bolles*, 9 Wall. 364, 19 L. ed. 734. A bill was sustained when filed by the Consul of Austria and Hungary, to restrain a beneficial association from using the name of the Emperor of Austria and Hungary, as a part of its corporate

name, and the use of his portrait as a part of its advertising literature, in order fraudulently to induce his subjects, residents in the United States, to believe that the association is conducted under the customs of their own country, and that their Emperor is identified with the same and a patron thereof. *Von Thororovich v. Franz Josef Beneficial Ass'n*, 154 Fed. 911. But not a bill to recover damages for a fraudulent misrepresentation. *Russell v. Clark*, 7 Cranch, 69, 3 L. ed. 271; *White v. Boyce*, 21 Fed. 228. "In cases of fraud and mistake, as under any other head of chancery jurisdiction, a court of the United States will not sustain a bill in equity to obtain only a decree for the payment of money by way of damages, when the like amount can be recovered in an action sounding in tort or for money had and received." Per Gray, J., in *Buzard v. Houston*, 119 U. S. 347, 352, 30 L. ed. 451, 453; *Curriden v. Middleton*, 232 U. S. 633. See *infra*, § 81a. Even when sought as an alternative to a prayer for a rescission. *Alger v. Anderson*, 92 Fed. 696. But see *Reid v. Shaffer*, C. C. A., 249 Fed. 553. Nor for a fraudulent conspiracy. *Ambler v. Choteau*, 107 U. S. 586, 27 L. ed. 322. Nor by a stockholder to recover the purchase price of his stock which he had been induced to buy through fraud. *Watson v. Huntington*, C. C. A., 215 Fed. 472. Nor, it has been held, a bill filed by an insurance company, after a loss has occurred, to obtain the cancellation of a policy procured by fraud. *Home Ins. Co.*

constructive;¹² or by duress;¹³ and the rights of those who are justly entitled to compel election under a will,¹⁴ to partition,¹⁵ subrogation¹⁶ or an adjustment of liabilities,—under which term are included set-off,¹⁷ contribution,¹⁸ exoneration,¹⁹ and marshaling of securities.²⁰

v. Stanchfield, 1 Dill. 424; Insurance Co. v. Bailey, 13 Wall. 616, 20 L. ed. 501; Mutual Life Ins. Co. v. Griesa, 156 Fed. 398; Griesa v. Mutual Life Ins. Co., C. C. A., 169 Fed. 509. Not even where the State courts of equity took jurisdiction of bills of a similar character. Niagara Fire Ins. Co. v. Adams, C. C. A., 198 Fed. 822. *Contra*, U. S. Life Ins. Co. v. Cable, C. C. A., 98 Fed. 761; Mutual Life Ins. Co. v. Pearson, 114 Fed. 395. Nor a bill to recover money paid under a mistake of fact which could be collected by assumpsit for money had and received. U. S. v. D'Olier Engineering Co., 215 Fed. 209.

¹² Mackreth v. Fox, 4 Bro. P. C. 258; *Ex parte* Lacey, 6 Ves. 625; Villa v. Rodriguez, 12 Wall. 323, 339, 20 L. ed. 406, 410; Adams v. Cowen, 177 U. S. 471, 484, 44 L. ed. 851, 855.

¹³ Nicholls v. Nicholls, 1 Atk. 409; Gould v. Okeden, 4 Bro. P. C. 198; Baker v. Morton, 12 Wall. 150, 20 L. ed. 262.

¹⁴ Arnold v. Kempstead, 1 Amb. 466; James v. Collier, 2 Amb. 730; Herbert v. Wren, 7 Cranch, 370, 378, 3 L. ed. 374, 377.

¹⁵ Gilbert v. Hopkins, C. C. A., 204 Fed. 196. A suit for partition cannot be maintained when a stranger to the suit is in possession of the land. Reina v. Bracho, C. C. A., 256 Fed. 834. Relief in equity was denied to the creditor of a corporation who sued another company which had assumed the indebtedness of the

former Blue Ridge El. Co. v. American Bank Note Co., C. C. A., 237 Fed. 755.

¹⁶ First Nat. Bank v. City Tr., S. D. & Surety Co., C. C. A., 114 Fed. 529; Escanaba Traction Co. v. Burns, 257 Fed. 898.

¹⁷ Chapman v. Derby, 2 Vern. 117; Lord Lanesborough v. Jones, 1 P. Wms. 325; 2 Story's Eq. Jur., § 1433; Story, J., in *Greene v. Darling*, 5 Mason, 201, 207-213; North Chicago R. M. Co. v. St. Louis O. & S. Co., 152 U. S. 596, 38 L. ed. 565; Anglo-Am. Provision Co. v. Davis Pr. Co., 112 Fed. 574; Sutherland Innes Co. v. American Wired Hoop Co., C. C. A., 113 Fed. 183; L. Bucki & Son Lumber Co. v. Atlantic Lumber Co., C. C. A., 116 Fed. 1. Loy v. Alston, C. C. A., 172 Fed. 90. See *supra*, § 51; *infra*, § 197-201.

¹⁸ Laver v. Nelson, 1 Vern. 456; Howards v. Selden, 5 Fed. 465, 473. A bill for an account of general average and decree of contribution has been sustained. *Sturgess v. Cary*, 2 Curt. 59. It has been held, where the suit is brought by several insurers, the liability of each being proportioned to the total amount of valid insurance, and an accounting between them is prayed. *Mechanics' Ins. Co. v. C. A. Hoover Distilling Co.*, C. C. A., 173 Fed. 888, 32 L.R.A. (N.S.) 940. But see *Empire City Fire Ins. Co. v. American Cent. Ins. Co.*, C. C. A., 218 Fed. 774.

¹⁹ Galton v. Hancock, 2 Atk. 425; Walker v. Jackson, 2 Atk. 625;

The cases where the jurisdiction of equity is exercised merely for the sake of the remedy are: where its interposition is needed to assist in obtaining a judgment at law by compelling a discovery from a defendant,²¹ or the perpetuation of the testimony of witnesses,²² or their examination abroad,²³ when it is feared that on account of death, illness, or absence, they cannot be obliged to attend upon the trial; in rare cases to grant a new trial.²⁴ To set aside a judgment obtained by accident, mistake, or fraud.²⁵ To set aside an award by arbitrators upon allegations of misconduct not apparent on the face of the award, nor affecting the jurisdiction of the arbitrators.²⁶

Bank of U. S. v. Beverly, 1 How. 134, 151, 11 L. ed. 75, 82.

²⁰ *Aldrich v. Cooper*, 8 Ves. 394; *Trimmer v. Bayne*, 9 Ves. 209; *Re Metropolitan Railway Receivership*, 208 U. S. 90, 52 L. ed. 403. A bill may be sustained when the defendant's land is so encumbered, by different liens, that it does not appear probable that it could be sold advantageously without an adjustment of the priority and rights of the several lienholders. *Huff v. Bidwell*, C. C. A., 151 Fed. 563.

Where municipal bonds have been issued to an amount beyond the constitutional limit, a bondholder may sue to obtain a judicial determination as to what part, if any, of the debt thus created can be enforced. *Everett v. Independent School District*, 109 Fed. 697, 702; *Truman v. Inhabitants of Town of Harmony*, 198 Fed. 557.

²¹ *Finch v. Finch*, 2 Ves. Sr. 491; *Moodalay v. Morton*, 1 Bro. C. C. 469; *Brown v. Swann*, 10 Pet. 497, 500, 9 L. ed. 508; *Heath v. Erie Ry. Co.*, 9 Blatchf. 316.

²² *Earl of Suffolk v. Green*, 1 Atk. 450; *Pearson v. Ward*, 1 Cox Eq. 177; *Lord Dursley v. Berkeley*, 6 Ves. 251; *Richter v. Union Tr. Co.*, 115 U. S. 55, 29 L. ed. 345; *N. Y.*

& B. C. P. Co. v. N. Y. C. P. Co., 9 Fed. 578. See U. S. R. S., §§ 863-867, and *infra*, § 345.

²³ *Moodalay v. Morton*, 1 Bro. C. C. 469.

²⁴ *Folsom v. Ballard*, C. C. A., 70 Fed. 12; *McLaurin v. McLauchlin*, C. C. A., 215 Fed. 345.

²⁵ *Metcalf v. Williams*, 104 U. S. 93, 95, 26 L. ed. 665, 666; *Coleman v. U. S.*, 181 Fed. 599.

²⁶ *Hartford Fire Ins. Co. v. Bonner Mercantile Co.*, 44 Fed. 151, 156.

Nor, in the absence of a State statute authorizing such a proceeding, a bill to set aside the probate of a will. *Broderick's Will*, 21 Wall. 503, 22 L. ed. 599; *Ellis v. Davis*, 109 U. S. 485, 27 L. ed. 1006; *Simmons v. Saul*, 138 U. S. 439, 34 L. ed. 1054; *Farrell v. O'Brien*, 199 U. S. 89, 50 L. ed. 101; *Goodrich v. Ferris*, 145 Fed. 844. *Cf. supra*, § 54; nor to cancel a will itself. *Oakley v. Taylor*, 64 Fed. 245; on account of a mistake, undue influence, forgery or other fraud. For a case where it was held that the suit was an action at law for damages for fraud and not in equity to set aside the probate, see *Murphy v. Mitchell*, 245 Fed. 219. But a Federal court may entertain a bill for the construction of a will duly es-

But not to set aside or enjoin proceedings to enforce a judgment at law because of fraud; unless the complainant had a defense to the action upon the merits,²⁷ and either the fraud was extrinsic to the matter tried and not in issue in the former suit, nor then known to the complainant, or else some unconscientious advantage was taken of the successful judgment debtor during the progress of the suit without any fault or negligence upon his part.²⁸ Nor to set aside a judgment at law²⁹ or a decree in equity for an omission to serve a party³⁰ to the same, except perhaps when the record shows an apparent service.^{30a} Where a party refused to carry out a lost stipulation, that a judgment should abide the result of a writ of error to another judgment, but did not deny that he had made the same, it was held that a bill in equity to vacate the judgment could not be sustained, because the complainant had an adequate remedy at law.³¹ Nor it was held in one case to set aside a judgment recovered in favor of the United States through an alleged misunderstanding between the defendant and the district attorney.³² Nor for newly discovered evidence, unless the complainant shows that his failure to discover the same before the former trial was not attributable to his own want of diligence; nor when the evidence ought to have been within

established. *Wood v. Paine*, 66 Fed. 807. See § 54 *Supra*.

²⁷ *White v. Crow*, 110 U. S. 183, 28 L. ed. 113. *Contra*, *Mills v. Scott*, 43 Fed. 452. The bill must show that the judgment debtor had a good defense upon the merits. *Christy v. Atchison, T. & S. F. Ry. Co.* 214 Fed. 101. Where after judgment in an action for breach of a covenant of seisin the plaintiff's title was made good by the statute of limitations, defendant was allowed to maintain a suit in equity to enjoin the judgment's enforcement. *Mather v. Stokely, C. C. A.*, 236 Fed. 124.

²⁸ *Life Ins. Co. v. Banks*, 103 U. S. 780, 782, 26 L. ed. 608, 609; *Cragin v. Lovell*, 109 U. S. 194,

27 L. ed. 903; *Nat. Surety Co. v. State Bank, C. C. A.*, 61 L.R.A. 394; 120 Fed. 593; *Aldrich v. Crump*, 128 Fed. 984; *Hudgens v. Baugh*, 225 Fed. 899; *Scotten v. Rosenblum*, 231 Fed. 358. See *Knox County v. Harshman*, 133 U. S. 152, 33 L. ed. 586; *Leavenworth County Com'rs v. Chicago, R. I. & P. Ry. Co.*, 134 U. S. 688, 33 L. ed. 1064; *Sanford v. White*, 132 Fed. 531.

²⁹ *Lewis v. Cocks*, 23 Wall. 466.

³⁰ *Yeatman v. Bradford*, 44 Fed. 536.

^{30a} *Simon v. Southern Ry. Co.*, 236 U. S. 115.

³¹ *Brown v. Arnold*, 127 Fed. 387.

³² *Buckley v. U. S.*, 196 Fed. 429.

the knowledge of the party when he made his defense to the action at law.³³

To satisfy judgment out of property of a debtor which cannot be reached by an execution;³⁴ to prevent a threatened breach of a right,³⁵ or compel the performance of a duty,³⁶

³³ *Pickford v. Talbott*, 225 U. S. 651, 56 L. ed. 1240.

³⁴ *Angell v. Draper*, 1 Vern. 399; *Scottish Am. Mtg. Co. v. Follansbee*, 14 Fed. 125. See *infra*, § 151d.

³⁵ *Robinson v. Lord Byron*, 1 Bro. C. C. 588; *Osborn v. Bank of U. S.*, 9 Wheat. 738, 6 L. ed. 204; *Vicksburg Water Works Co. v. Vicksburg*, 185 U. S. 65, 82, 46 L. ed. 808, 815. Bills may be sustained; to enjoin the head of a department of the national government from acting beyond the scope of his authority to the prejudice of the complainant. *Noble v. Union River Logging R. Co.*, 147 U. S. 165, 37 L. ed. 123. See *infra*, § 100. To enjoin a State officer from revoking a permit authorizing a foreign corporation to transact business within the State. *Greenwich Ins. Co. v. Carroll*, 125 Fed. 121. *Infra*, § 105. By a railroad company, to enjoin scalpers from selling non-transferable return tickets, already issued by complainant, and all tickets of a similar nature which complainant may issue in the future. *Bitterman v. Louisville & N. B. R. Co.*, 207 U. S. 205, 52 L. ed. 171. But not a bill to protect rights which are purely political, even though right of property may be thereby incidentally affected. *Mississippi v. Johnson*, 4 Wall. 475, 18 L. ed. 437. *Georgia v. Stanton*, 6 Wall. 50, 18 L. ed. 721; *Green v. Mills*, C. C. A., 30 L.R.A. 90, 69 Fed. 852; *Anthony v. Burrow*, 129 Fed. 783; *Dallas v. Dallas Consol. El. St. Ry. Co.*, (S. C., Texas, June 1912) 148

S. W. 292. Nor a bill to enjoin the removal of an officer of the United States or of the State, or a municipality, *In re Sawyer*, 124 U. S. 200, 31 L. ed. 402; *White v. Berry*, 171 U. S. 366, 376-378, 43 L. ed. 199. Nor a bill to enjoin the refusal to examine an applicant for a license. *Williams v. Potter*, C. C. A., 223 Fed. 423. Nor a bill by the United States to enjoin a corporation from opening an exhibition on Sunday, where Congress has made an appropriation toward the expense of the enterprise upon the express condition that it shall be closed on the first day of each week. *World's Columbian Exposition v. U. S.*, 56 Fed. 654.

Nor a bill to enforce an "abstract right" which the complainant asserts, and which he may never practically exercise; as, for example, the right to remove an obstruction from a navigable river, when he does not allege that he is about to navigate the same. *Spooner v. McConnell*, 1 McLean, 337.

A bill for an adjudication of a right to a fund was dismissed because the fund had not then come into existence. *Reina v. Bracho*, C. C. A., 256 Fed. 834.

A statute providing for compensation to a stockholder who refuses to exchange his stock upon a consolidation does not afford an adequate remedy to a suit by one to restrain a consolidation not authorized by law. *General Inv. Co. v. Lake Shore & M. S. Ry. Co.*, C. C. A., 250 Fed. 160

the commission or omission of which, respectively, would inflict such an irreparable injury upon a person; that a judgment for damages,³⁷ or the cumbrous legal process of ejectment,³⁸ replevin,³⁹ detinue, or account rendered,⁴⁰ would be

Nor, except in a very extraordinary case, a bill to enjoin slanders or libels. *Francis v. Flinn*, 118 U. S. 385, 30 L. ed. 165; *Baltimore Car Wheel Co. v. Bemis*, 29 Fed. 95. *Contra*, *Emack v. Kane*, 34 Fed. 46; *Fourgeres v. Murbarger*, 44 Fed. 292. See *infra*, § 284a.

Nor to enjoin an action at law to which the complainant has a clear legal defense. *Grand Chute v. Winegar*, 15 Wall. 373, 21 L. ed. 174; *Francis v. Flinn*, 118 U. S. 385; *Hapgood v. Hewitt*, 119 U. S. 226, 30 L. ed. 369. See *Drexel v. Berney*, 122 U. S. 241, 30 L. ed. 1219.

Nor, it has been said, upon the mere allegation of insolvency of the defendant. *Strang v. Richmond, P. & C. R. Co.*, 93 Fed. 71, 74.

³⁶ *Stribley v. Hawkie*, 3 Atk. 275; *Huguenin v. Baseley*, 15 Ves. 180; *Hunt v. Rousmanier's Adm'rs*, 1 Pet. 1, 7 L. ed. 27; *Willard v. Tayloe*, 8 Wall. 557, 19 L. ed. 501. But not a bill to compel a public officer to perform a ministerial duty. *Craig v. Leitensdorfer*, 123 U. S. 189, 31 L. ed. 114. Nor to fix the freight rates charged by railroads in intrastate commerce. *Montana, W. & S. R. Co. v. Mopley*, 198 Fed. 991. Nor, in the absence of statutory authority for the collection of taxes, *Preston v. Chicago, St. L. & N. O. R. Co.*, 175 Fed. 487, *aff'd as Preston v. Sturgis Milling Co.*, C. C. A., 183 Fed. 1. Nor a bill to compel municipal, county or State officers to levy a tax; *Walkley v. Muscatine*, 6 Wall. 481, 18 L. ed. 930, to issue

bonds, even in the case of a contract; *Smith v. Bourbon County*, 127 U. S. 105, 32 L. ed. 73; or since the remedy, when it exists at all, is by mandamus. Nor a bill for the appointment of a receiver to levy taxes, or to collect taxes previously levied, *Rees v. Watertown*, 19 Wall. 107, 22 L. ed. 72; *Heine v. Levee Com'rs*, 19 Wall. 655, 22 L. ed. 223; *Meriwether v. Garrett*, 102 U. S. 472, 26 L. ed. 197. Nor a bill to enjoin an insolvent municipality from expending its funds for other municipal purposes, *Thompson v. Allen County*, 115 U. S. 550, 29 L. ed. 472, *Safe Deposit & T. Co. v. City of Aniston*, 96 Fed. 661, 663.

Nor to collect the amount of an insurance policy, *Graves v. Boston Marine Ins. Co.*, 2 Cranch, 419, 2 L. ed. 324. See *Houston Oil Co. of Texas v. Drake*, C. C. A., 182 Fed. 202. Nor to collect a note from its maker, *Dowell v. Mitchell*, 105 U. S. 430, 26 L. ed. 1142, or an indorsee, *Shields v. Barrow*, 17 How. 130, 15 L. ed. 158. *Special School Dist. v. Jones*, C. C. A., 250 Fed. 440.

³⁷ *Dumont v. Fry*, 12 Fed. 21. In the case of special and peculiar chattels, papers and documents which cannot be replaced; for example, a certificate of admission to the bar or a license to practice medicine the plaintiff may be entitled to a decree in equity for their return. *Keown v. Keown*, 257 Fed. 851. See § 151d *infra*.

³⁸ A landlord, after cancelling a mining lease, may file a bill against his lessee, to establish his right to

no adequate remedy for the loss thereby occasioned; to pre-

possession, and to enjoin the latter from committing waste while mining ore upon the premises. *Big Six Development Co. v. Mitchell*, C. C. A., 1 L.R.A. (N.S.) 332; 138 Fed. 279. Independently of statute, it was held that a Federal court had jurisdiction of a bill to quiet title by a complainant out of possession; where the questions in issue included the establishment of the fact of an administratorship and the interpretation and effect of an administrator's deed, under which the complainant claimed. *Butterfield v. Miller*, C. C. A., 195 Fed. 200; and where the complainant alleged title to a tract of land embracing 147,000 acres against a number of defendants, each of whom claimed title to a separate portion thereof and was in possession of the same. *Buchanan Co. v. Adkins*, C. C. A., 175 Fed. 692. But see *infra*, § 141. But not solely for purposes that could be accomplished by an action in ejectment, *Hipp v. Babin*, 19 How. 271, 15 L. ed. 663; *Lewis v. Cocks*, 23 Wall. 466, 23 L. ed. 70; *Ellis v. Davis*, 109 U. S. 485, 27 L. ed. 1006; *Killian v. Effinghaus*, 110 U. S. 568, 28 L. ed. 246; U. S. v. *Wilson*, 118 U. S. 86, 30 L. ed. 110; *Speigle v. Meredith*, 4 Bliss. 120. *South Penn Oil Co. v. Miller*, C. C. A., 175 Fed. 729. Nor a bill for a partition filed by a tenant in common out of possession; who has been disseised by his co-tenant, *Frey v. Willoughby*, C. C. A., 63 Fed. 865; nor where the complainant's title is denied, *American Ass'n v. Eastern Ky. Land Co.*, 68 Fed. 721, but see *Fuller v. Montague*, 59 Fed. 212; except when the complainant's title

is not recognized at common law, *Hopkins v. Grimshaw*, 165 U. S. 342, 358; nor to quiet the title to real estate when the complainant's rights are purely equitable, *Frost v. Spitley*, 121 U. S. 552; nor, in the absence of a State statute authorizing such a suit, when he is not in possession of the land, U. S. v. *Wilson*, 118 U. S. 86, 30 L. ed. 110; *Frost v. Spitley*, 121 U. S. 552, 30 L. ed. 1010; §§ 82, 83, *infra*. *New Jersey Land & Lumber Co. v. Gardener Lacy Lumber Co.*, 190 Fed. 861, but, in such a case, it may be presumed that the possession of unclosed woodland follows the legal title, and in such a case equity has intervened, *Graves v. Ashburn*, 215 U. S. 331, 54 L. ed. 217.

³⁰ Since imported goods in the custody of the collector cannot be replevied, U. S. R. S., § 934, a bill in equity may be maintained to recover their possession, *Pollard v. Reardon*, 65 Fed. 848. But not usually, to restrain the seizure or to compel the return of personal property, *Knox v. Smith*, 4 How. 298, 11 L. ed. 983; *Van Norden v. Morton*, 99 U. S. 378, 25 L. ed. 453; *Jones v. MacKenzie*, C. C. A., 122 Fed. 390; but see *Crane v. McCoy*, 1 Bond, 422; unless its loss by the owner would result in irreparable injury by the destruction of his business and commercial credit, *Watson v. Sutherland*, 5 Wall. 74, 18 L. ed. 580; *North v. Peters*, 138 U. S. 271, 34 L. ed. 936; or by rendering it impossible for him to manage his farm, *Breeden v. Lee*, 2 Hughes, 484; or on account of its unique value, *Pusey v. Pusey*, 1 Vern. 273; *Duke of Somerset v. Cookson*, 3 P. Wms. 389.

vent a needless multiplicity of suits;⁴¹ and to compel the can-

But see *Lawrence v. Times Printing Co.*, 90 Fed. 24, or if it be held in trust, *New Orleans v. Morris*, 105 U. S. 600, 26 L. ed. 1184; *Reynes v. Dumont*, 130 U. S. 354, 32 L. ed. 934. That the value of the property is so great that the complainant is unable to give the bond required in an action of replevin affords no ground for the interference of equity. In re *Oregon Iron Works*, 4 Saw. 169, 170; s. c., 17 N. B. R. 404.

⁴⁰ *Gunn v. Brinckley C. W. & M. Co.*, 66 Fed. 382. Bills for accounting are discussed subsequently under § 151a.

⁴¹ *Freeman v. Pontrell*, Chan. Cal. XIII; *Earl of Bath v. Sherwin*, 4 Bro. P. C. 373; *Woods v. Monroe*, 17 Mich. 238; *Cummings v. National Bank*, 101 U. S. 153, 25 L. ed. 903; *Dodge v. Briggs*, 27 Fed. 161; *Hale v. Allison*, 188 U. S. 56, 47 L. ed. 380; *Donovan v. Pennsylvania Co.*, 199 U. S. 279, 50 L. ed. 192; *General Film Co. v. Sampliner*, C. C. A., 252 Fed. 143. The licensor was permitted to sue in equity to enjoin the licensee from violating its covenant against infringement of several of these patents. *Reece Folding Mach. Co. v. Earl V. Wilson*, 205 Fed. 539. See § 146 *infra*.

Bills in equity may be filed to set aside a land patent, issued in violation of a statute, when the bill is filed by the party entitled to the land, *Southern Pac. R. Co. v. Wigga*, 43 Fed. 333, but not, it has been held, to decree a forfeiture of a land grant, and to recover the land so granted for a breach of a condition subsequent, in the absence of a declaration of forfeiture by Con-

gress or of express statutory authority from Congress to institute the suit, *U. S. v. Washington Improvement & Development Co.*, 189 Fed. 674. Cf. *U. S. v. Northern Pac. R. R. Co.*, 177 U. S. 435, 20 Sup. Ct. 706, 44 L. ed. 836. *Contra*, *U. S. v. Whitney*, 176 Fed. 593. To procure an adjudication that a land patent, which has been obtained from the United States through an error of law or a gross mistake of fact or fraud, belongs to the original owner of the equitable title of the land, *Howe v. Parker*, C. C. A., 190 Fed. 738. But not when the bill is filed by one who has never placed himself in privity with the United States by the acceptance of a grant, or settlement, and improvement, or occupation, entry or payment. *Campbell v. Weyerhaeuser*, C. C. A., 161 Fed. 332. A person whose application to purchase has been rejected by the Land Department cannot bring such a suit. *Ibid*. "It is possible that one who holds land under grant from the United States, who has done everything in his power to entitle him to a patent (which he cannot compel the United States to issue him), and is deemed the legal owner, so far as to render the land taxable to him by the State in which it lies, may be considered as having sufficient title to sustain a bill in equity to quiet his right and possession." *Gray, J.*, in *Frost v. Spitley*, 121 U. S. 552, 556, 30 L. ed. 1010; citing *Carroll v. Safford*, 3 How. 441, 463, 11 L. ed. 671; *Van Wyck v. Knevals*, 106 U. S. 360, 370, 27 L. ed. 201; *Van Brocklin v. Tennessee*, 117 U. S. 151, 169, 29 L. ed. 845, 851.

cellation or execution of instruments,⁴² the existence or want of which is a cloud upon, or an apparent flaw in, a person's title, or would render it difficult for him to resist an unjust demand, or to dispose of property by sale.

"Mere complication of facts alone and difficulty of proof are not a basis of equitable jurisdiction."⁴³ Nor is it sufficient ground for the interference of a court of equity that the evidence in a cause is voluminous and tedious.⁴⁴ It has been said: "To give a court of equity jurisdiction, the nature of the relief asked must be equitable, even when the suit is based on an equitable title."⁴⁵ The inadequacy of the remedy at law which will justify relief in equity does not consist merely in its failure to produce the relief sought,—that is a not unusual result of all remedies,—but that in its nature or character it is not fitted or adapted to the end in view.⁴⁶ An adequate remedy in a foreign court is not sufficient to deprive the court of equitable jurisdiction.⁴⁷ Where a bill rightfully invokes the equitable jurisdiction of the court, the court cannot refuse to entertain it because of conditions that came into existence after it was filed,⁴⁸ unless they were caused by the fault of the complainant.⁴⁹

⁴² *Pierce v. Webb & Stalker*, note to *Ryan v. Mackmath*, 3 Bro. C. C. 15; *Peake v. Highfield*, 1 Russ. 559, and cases cited; *Bunce v. Gallagher*, 5 Blatchf. C. C. 481; *Quinby v. Consumers' Gas Trust Co.*, 140 Fed. 362. Bills may be filed to set aside a contract obtained by fraud, *Boyce v. Grundy*, 3 Pet. 210, 7 L. ed. 655. To set aside a conveyance obtained for a grossly inadequate consideration from a man in a state of intoxication, partly caused by the acts of the defendant, *Thackrah v. Haas*, 119 U. S. 499, 30 L. ed. 486. To establish a deed which has been destroyed by the defendant. *Midkiff v. Colton*, C. C. A., 252 Fed. 420. *Gildner v. Hall*, 227 Fed. 704. See *infra*, § 151f.

⁴³ *Curriden v. Middleton*, 232 U. S. 633, per *Holmes, J.*

⁴⁴ *Bowen v. Chase*, 94 U. S. 812, 824, 24 L. ed. 184, 187.

⁴⁵ *Fussell v. Gregg*, 113 U. S. 550, 554, 28 L. ed. 993, 994, per *Woods, J.*

⁴⁶ *Miller, J.*, in *Thompson v. Allen County*, 115 U. S. 550, 554, 29 L. ed. 472, 473. Cf. *Texas & P. Ry. Co. v. Marshall*, 136 U. S. 393, 405, 34 L. ed. 385, 390; *St. Louis-San Francisco Ry. Co. v. McElvain*, 253 Fed. 122.

⁴⁷ *State ex rel. Gilbert Eliot & Co. v. Lake Torpedo Boat Co.* (Conn.), 98 Atl. 580.

⁴⁸ *Carnegie Steel Co. v. Colorado Fuel & Iron Co.*, 165 Fed. 195; *Fay v. Hill*, C. C. A., 249 Fed. 420.

⁴⁹ *Friedley-Voshardt Co. v. Reliance Metal Spinning Co.*, 238 Fed. 800.

§ 79a. Who seeks equity must do equity. The maxims enforced by other courts of equity are followed by the Federal courts.

The maxim that he who seeks equity must do equity is of very ancient origin.

He who seeks equity must do equity in the courts of the United States.¹ This rule is enforced either by requiring an offer to do equity to be made by the complainant in his bill,² or by the entry of a decree conditioned upon such conduct by him,³ or in some cases by requiring the performance of some act before suit is brought.⁴

The more usual instances are: the requirement that bills for relief against excessive taxation should aver payment of what is conceded to be due;⁵ suits to set aside a judicial sale⁶ and applications for the appointment of receivers.⁷

This maxim does not apply to a defendant unless he files a cross bill or counter claim.⁸

§ 79b. Requirement of clean hands. He who seeks equity must come with clean hands.¹ This doctrine is most frequently enforced in trademark cases where a party whose trademark contains a fraudulent representation is denied relief.² It has

§ 79a. ¹ State R. R. Tax Cases, 92 U. S. 575, Fosdick v. Schall, 99 U. S. 235; Cronen v. Moore, C. C. A., 210 Fed. 239; Broatch v. Boyesen, C. C. A., 236 Fed. 516; Rollman Mfg. Co. v. Universal Hardware Works, C. C. A., 238 Fed. 568; Alexander v. Fidelity Trust Co., 238 Fed. 938; Seaples v. Card, 246 Fed. 501; Louisiana Agricultural Corporation v. Pelican Oil Refining Co., Inc., C. C. A., 256 Fed. 822. See Niblett v. McFarland, 92 U. S. 101; Reed v. Tyler, 56 Ill. 288.

² Missouri K. & Tr. Co. v. Krumseig, 172 U. S. 351, 43 L. ed. 474, *infra*, § 153.

³ Walden v. Bodley, 14 Peters 156, 164, 165, 10 L. ed. 398, 401, 402; Fosdick v. Schall, 99 U. S. 235, 25 L. ed. 339, *infra*, § 153.

⁴ Fosdick v. Schall, 99 U. S. 235,

25 L. ed. 339, *infra*, § 153; State R. R. Tax Cases 92 U. S. 575 *infra*, § 153.

⁵ State R. R. Tax Cases, 92 U. S. 575, 617, 33 L. ed. 669, 674; *infra*, § 153.

⁶ Davis v. Gaines, 104 U. S. 386, 76 L. ed. 757, *infra*, § 153.

⁷ Fosdick v. Schall, 99 U. S. 235, 25 L. ed. 339, *infra*, § 153a.

⁸ Columbus v. Mercantile Tr. Co., 218 U. S. 645, 54 L. ed. 193; *infra*, § 400.

§ 79b. ¹ Primeau v. Granfield, C. C. A., 193 Fed. 911; Mathews v. Wayne Junction Tr. Co., 197 Fed. 237; Pickford v. Talbott, 225 U. S. 651, 56 L. ed. 1240; Dancigar v. Stone, 187 Fed. 853.

² Diamond Crystal Salt Co. v. Worcester Salt Co., C. C. A., 221 Fed. 66; Channell Chemical Co. v. E.

also been applied to a case where the complainant's trademark was an unfair imitation of one previously used by a stranger to the suit.³ The doctrine has not been extended so as to deny the right to sue for the infringement of a trademark or unfair competition, by imitation thereof, when the trademark is a label which contains a notice of a copyright that does not exist.⁴ The maxim has been applied to a suit to protect the name of a vaudeville sketch which the complainant had advertised as performed by the use of telepathy whereas the result was produced by use of a code of secret signals.⁵ To a suit to enjoin the refusal of a license for a moving picture which although morally unobjectionable had been advertised so as to suggest that it was an indecent exhibition.⁶ To a suit to enjoin the enforcement of a State "Blue Sky Law" regulating the sale of securities, when the system of the business transacted by the complainant showed on its face that it was intended to defraud purchasers.⁷ To a suit for the infringement of a copyright, where the complainant had committed in the publication of the book for which he sought protection piracies similar to those of which he complained.⁸ To a suit by an alien to prevent infringement of his American copyright when he had published in his own country a larger book there copyrighted with a notice that this included the matter copyrighted in the United States without indicating in the latter publication what matter was taken from the former.^{9a} To a suit to enjoin a baseball player from playing with another club when the complainants

W. Hayden Co., C. C. A., 222 Fed. 162; Koke Co. of America v. Coca-Cola Co., C. C. A., 255 Fed. 895; Leather Cloth Co. v. Am. Leather Cloth Co., 11 H. L. C. 523, affirming, Lord Chancellor Westbury in 10 Jurist N. S. 81; Werden v. Cal. Fig Syrup Co., 187 U. S. 516, 23 Sup. Ct. 161, 47 L. ed. 282. For recent cases where it was held that there was no fraud. See Allen v. Walker & Gibson, 235 Fed. 230, 246.

³ Ubeda v. Zialcita, 226 U. S. 452.

⁴ M. B. Fahey Tobacco Co. v. Senior, 247 Fed. 809.

⁵ In Howard v. Lovett, in the Supreme Court of Michigan (December, 1917, 165 N. W., 634).

⁶ Ivan Film Production v. Bell, N. Y. Sup. Ct. Sp. Tm. per Shearn, J.; N. Y. L. J., Dec. 5, 1916.

⁷ National Mercantile Co. v. Keating, 218 Fed. 477.

⁸ Edward Thompson Co. v. Am. Law Book Co., C. C. A., 122 Fed. 922, 925.

^{9a} Bentley v. Tibbals, C. C. A., 223 Fed. 247.

had persuaded him to contract for exclusive employment by them with knowledge of a former contract of the same nature which he had made with the other club upon a sufficient consideration which could not be enforced for want of mutuality.⁹ To suits where a prior wrong by the complainant was the cause of the act by the defendants sought to be enjoined.¹⁰ To a case where the plaintiff sought the same relief in separate actions upon such inconsistent averments of fact as to show a lack of candor.¹¹ It has been said, that it should be applied where the plaintiff sent a spy to seek employment by the defendant to obtain information for the use in his business;¹² but not where the spy was employed merely to obtain evidence of a violation of his rights.¹³ Improper conduct by the complainant's agents which does not appear to have been authorized by him does not make his hands unclean.¹⁴

It relates to the subject-matter of the suit only, and improper conduct by the complainant in matters not therewith connected will not bar equitable relief.¹⁵ Such are previous misconduct in similar transactions with strangers to the suits¹⁶ and in a suit to rescind a patent license because of misconduct by the licensee, previous breaches of the contract by the complainant which had been remedied before the suit was

⁹ *Weeghman v. Killifer*, C. C. A., 215 Fed. 289, affirming 215 Fed. 166.

¹⁰ *Barber v. Columbia Chemical Co.*, 228 Fed. 476; *Montrose Realty Co. v. Vernaerol Co.*, N. Y. L. J., Nov. 23, 1914.

¹¹ *Bentley v. Tibbals*, C. C. A., 223 Fed. 247; *Ogden v. Auer*, Mo., Mar., 1916, 184 S. W. 72.

¹² *Vulcan Detinning Co. v. Assmann*, 185 App. Div. 399.

¹³ *Ibid.*

¹⁴ *Internat'l News Serv. v. Asso. Press*, 248 U. S. 214, 243; *Todd Protectograph Co. v. Hedman Mfg. Co.*, 254 Fed. 829.

¹⁵ *Camors-McConnell v. McConnell*, 140 Fed. 412; holding that a bill to enforce, by injunction, a

contract for the sale of property and the good will therewith connected, should not be dismissed because the purchaser acquired the property for the purpose of obtaining a monopoly of the business and in pursuance of an illegal combination in restraint of trade. *Oscar Barnett Foundry Co. v. Crowe*, C. C. A., 219 Fed. 450; *Talbot v. Independent Order of Owls*, 220 Fed. 660; *American Sugar Refining Co. v. McFarland*, 229 Fed. 284; *Koke Co. of Am. v. Coca-Cola Co.*, C. C. A., 250 Fed. 895.

¹⁶ *Talbot v. Independent Order of Owls*, 220 Fed. 660; *American Sugar Refining Co. v. McFarland*, 229 Fed. 284.

brought.¹⁷ Except in an extraordinary case this doctrine will not defeat a suit to enjoin the infringement of a patent because the complainant denies the public the right to use the invention which it protects,¹⁸ nor of a patent¹⁹ or trademark²⁰ because complainant uses the same in such a manner as to restrain trade in interstate commerce. In the Second Circuit, because of infringement by the plaintiff of the copyright to a previous edition of the defendant's book, or of a later edition of which complaint is made, or an unlawful importation into the United States of another edition of the same book is no defense.²¹ It has been held: that it does not apply to a case where, subsequent to suit brought, the complainant has been guilty of reprehensible conduct, which does not affect the cause of action,²² and that plaintiff might recover at common law when he repudiated a contract to commit a fraud upon strangers and sued to recover the money he had paid thereunder, on the ground that he had been induced to enter into the same by fraud, since he was not *in pari delicto* with the defendant.²³ It is no defense to a contract which has been performed by the promisee, that the promisor knew that the performance of the agreement might aid the former to violate public policy, when the two parties did not conspire to accomplish that result, nor share in the benefits of such a violation.²⁴

The doctrine does not apply to a defendant who does not seek affirmative relief.²⁵ "A man by committing a fraud does not become an outlaw and *caput lupinum*."²⁶ "He may have no

¹⁷ Oscar Barnett Foundry Co. v. Crowe, C. C. A., 219 Fed. 450.

¹⁸ Continental Paper Bag Co. v. Eastern Paper Bag Co. (Paper Bag Patent Case), 210 U. S. 405, 430, 52 L. ed. 1122, 1133; Henry v. A. B. Dick Co., 224 U. S. 1, 56 L. ed. 645.

¹⁹ O. & W. Thum Co. v. Dickinson, C. C. A., 245 Fed. 609.

²⁰ S. E. Hendricks Co. v. Thomas Pub. Co., C. C. A., 242 Fed. 37, 40.

²¹ Bentley v. Tibbals, C. C. A., 223 Fed. 247, 253. But see T. B. Harms & Francis Day & Hunter v. Stern.

²² Chute v. Wisconsin Chemical Co., 185 Fed. 115.

²³ Stewart v. Wright, C. C. A., 147 Fed. 321.

²⁴ Mechanics' Ins. Co. v. Hoover Distilling Co., C. C. A., 31 L.R.A. (N.S.) 873; 182 Fed. 590.

²⁵ Armour & Co. v. Ranaker, 191 Fed. 48; Reid v. Shaffer, C. C. A., 249 Fed. 553; Barnett Foundry Co. v. Crowe, C. C. A., 219 Fed. 450.

²⁶ Stoffela v. Nugent, 217 U. S. 499, 501, 54 L. ed. 856, 858, per Holmes, J.

standing to rescind his transaction, but when it is rescinded by one who has the right to do so the courts will endeavor to do substantial justice so far as is consistent with adherence to law." ²⁷

§ 80. **The distinction between law and equity in the Federal courts.** The fact that those who framed the Constitution thought it necessary to mention law and equity separately, when blocking out the jurisdiction of the Federal courts, has caused some judges to think, and even to say in their opinions, that it was thereby intended that these branches of the law should always be kept apart.¹ The better opinion, however, seems to be that this distinction between law and equity is enforced by the Constitution only to the extent to which the Seventh Amendment forbids any infringement of the right of trial by jury, as fixed by the common law.² The Equity Rules of 1912 provide: "If at any time it appear that a suit commenced in equity should have been brought as an action on the law side of the court, it shall be forthwith transferred to the law side and be there proceeded with, with only such alteration in the pleadings as shall be essential."³ "If in a suit in equity a matter ordinarily determinable at law arises, such matter shall be determined in that suit according to the principles applicable without sending the case or question to the law side of the court."⁴

The Act of March 3, 1915, provides: "In case any of said courts," any Territorial District, or Circuit Court, or the Court of Claims of the Supreme Court of the United States, "shall find that a suit at law should have been brought in equity or a suit in equity should have been brought at law, the court shall order any amendments to the pleadings which may be necessary to conform them to the proper practice. Any party to the

²⁷ Ibid.

§ 80. ¹ *Parsons v. Bedford*, 3 Pet. 433, 7 L. ed. 732; *Bennett v. Butterworth*, 11 How. 669, 674, 13 L. ed. 859; 861; *Hipp v. Babin*, 19 How. 271, at p. 277, 15 L. ed. 633, 634; *Fenn v. Holme*, 21 How. 481, 486; *Costs in Civil Cases*, 1 Blatchf. C. C. 652, 654; *Butler v. Young*, 1 Flap. 276, 278; *Meade v. Beale*, Taney, 339, at p. 361; *Thompson*

v. Railroad Cos., 6 Wall. 134, 18 L. ed. 765; *Reubens v. Joel*, 13 N. Y. 488, p. 497. A similar remark is contained in the message of President Taft on Dec. 7th, 1909.

² Mr. Justice Matthews in *Root v. Railway Co.*, 105 U. S. 189, 206, 26 L. ed. 975, 981. Cf. *Ex parte Boyd*, 105 U. S. 647, 26 L. ed. 1200.

³ Eq. Rule 22.

⁴ Eq. Rule 23.

suit shall have the right, at any stage of the cause, to amend his pleadings so as to obviate the objection that his suit was not brought on the right side of the court. The cause shall proceed and be determined upon such amended pleadings. All testimony taken before such amendments, if preserved, shall stand as testimony in the cause with like effect as if the pleadings had been originally in the amended form.”⁵

“In all actions at law, equitable defenses may be interposed by answer, plea, or replication without the necessity of filing a bill on the equity side of the court. The defendant shall have the same rights in such case as if he had filed a bill embodying the defense of seeking the relief prayed for in such answer or plea. Equitable relief respecting the subject matter of the suit may thus be obtained by answer or plea. In case affirmative relief is prayed in such answer or plea, the plaintiff shall file a replication. Review of the judgment or decree entered in such case shall be regulated by rule of court. Whether such review be sought by writ of error or appeal the appellate court shall have full power to render such judgment upon the records as law and justice shall require.”⁶

Previously, it had been held that, where, in a suit for a partition, the defendant denied the title of complainant and pleaded sole seisin in himself, an issue was raised triable only at law, and that the suit in equity must be stayed to permit the plaintiff to bring an action at law for that purpose.⁷

§ 81. General rules affecting the jurisdiction in equity of the Federal courts. The jurisdiction in equity of the Federal courts is, subject to the limitations of the Constitution, substantially the same as that of the English Court of Chancery in 1787, when the Federal Constitution was adopted;¹ although, in the absence of special statutory authority, they do not have those extrajudicial powers which were exercised over the persons and

⁵ 38 St. at L. 956, Comp. St. at p. 484, 16 L. ed. 198, 199; Meade v. Beale, Taney, 339, at p. 361; Gordon v. Hobart, 2 Sumn. 401, at p. 405; Fletcher v. Morey, 2 Story, 555, at p. 567; Root v. Railway Co., 105 U. S. 189, at p. 207, 26 L. ed. 975, 981.

⁶ 38 St. at L. 956, Comp. St. § 1251a.

⁷ Gilbert v. Hopkins, 171 Fed. 70.

¹ Robinson v. Campbell, 3 Wheat, 212, at p. 221, 4 L. ed. 372, 375; Fenn v. Holme, 21 How. 481,

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estates of infants, idiots, lunatics, and charities by the Lord Chancellor, as the representative of the sovereign and by virtue of the latter's prerogative as *parens patriæ*.² "The rule being that this equity power must be construed according to equity jurisdiction in England as exercised at the time of the adoption of the Constitution and of the judiciary act, any jurisdiction exercised by that court in its earlier history, but subsequently abandoned, and any enlargement of its jurisdiction by statute subsequent to 1789 are to be excluded."³ The District courts of the United States, when sitting in equity, have the powers that were exercised in probate matters by the English Court of Chancery; provided that they do not interfere with the jurisdiction of the State courts in matters before them.⁴ The distinction between law and equity as recognized in the jurisprudence of England is to be observed in the courts of the United States, in administering the remedy for an existing right. But it does not follow that every right given by the English law, and which at the time the Constitution was adopted might have been enforced in the Court of Chancery, can also be enforced in a court of the United States. The right must be given by the law of the State or of the United States.⁵

The Judicial Code provides that: "Suits in equity shall not be sustained in either of the courts of the United States in any case

² *Fontain v. Ravenel*, 17 How. 369, at p. 391, 15 L. ed. 80, 89; *Loring v. Marsh*, 2 Clifford, 469, at p. 492; *In re Barry*, 42 Fed. 113; *In re Burrus*, Petitioner, 136 U. S. 586, 34 L. ed. 500; *N. Y. Foundling Hospital v. Gatti*, 203 U. S. 529, 439, 51 L. ed. 254, 259. See *Re Bishop's Estate*, C. C. A., 250 Fed. 145. As to their jurisdiction to inquire into the custody of the lunatic, see *King v. McLean Asylum*, C. C. A., 64 Fed. 325; *Hoadley v. Chase*, 126 Fed. 818. But see the *Late Corporation of The Church of Jesus Christ of Latter Day Saints v. U. S.*, 136 U. S. 1, 51, 56, 34 L. ed. 478, 493, 495; s. c., 140 U. S. 665, 35 L. ed. 592.

³ *Alger v. Anderson*, 92 Fed. 696; *Fontain v. Ravenel*, 17 How. 369, 394, 395, 15 L. ed. 80, 90, 91; per Taney, C. J. "The grant of power cannot be enlarged by resorting to a jurisdiction which the Court of Chancery in England, centuries ago, may have claimed as a part of its ordinary judicial power, but which had been abandoned and repudiated as untenable on that ground, by the court itself, long before the Constitution was adopted."

⁴ *Johnson v. Johnson*, 225 Fed. 413, *supra*, § 54.

⁵ Taney, C. J., in *Meade v. Beale*, 339, 361.

where a plain, adequate, and complete remedy may be had at law."⁶ The Supreme Court has construed a previous statute in the same words substantially as follows: The effect of this provision is that whenever a court of law is competent to take cognizance of a right, and has power to proceed to a judgment which affords a plain, adequate, and complete remedy, without the aid of a court of equity, the plaintiff must proceed at law, because the defendant has a constitutional right to a trial by jury.⁷ "It would be difficult, and perhaps impossible, to state any general rule which would determine in all cases, what should be deemed a suit in equity as distinguished from an action at law, for particular elements may enter into consideration which would take the matter from one court to the other; but this may be said, that, where an action is simply for the recovery and possession of specific real or personal property, or for the recovery of a money judgment, the action is one at law. An action for the recovery of real property, including damages for withholding it, has always been of that class."⁸ "Accordingly, a suit in equity to enforce a legal right can be brought only when the court can give more complete and effectual relief in kind or in degree on the equity side than on the common-law side; as, for instance, by compelling a specific performance, or the removal of a cloud on the title to real estate; or preventing an injury for which damages are not recoverable at law, as in *Watson v. Sutherland*, 5 Wall. 74; or where an agreement procured by fraud is of a continuing nature, and its rescission will prevent a multiplicity of suits."⁹ "By inadequacy of the remedy at

⁶ Jud. Code, § 267, 36 St. at L. 1087, re-enacting U. S. R. S., 723.

⁷ *Hipp v. Babin*, 19 How. 271, 15 L. ed. 633; *Insurance Co. v. Bailey*, 13 Wall. 616, 621, 20 L. ed. 501, 503; *Grand Chute v. Winegar*, 15 Wall. 373, 375, 21 L. ed. 174, 175; *Lewis v. Cocks*, 23 Wall. 466, 470, 23 L. ed. 70, 71; *Root v. Railway Co.*, 105 U. S. 189, 212, 26 L. ed. 975, 983; *Killian v. Ebbinghaus*, 110 U. S. 568, 573, 28 L. ed. 246; *N. Y. Guaranty Co. v. Memphis Water Co.*, 107 U. S. 205, 214, 27

L. ed. 484, 487, per Bradley, J.:

"This enactment certainly means something; and if only declaratory of what was always the law, it must, at least, have been intended to emphasize the rule, and to impress it upon the attention of the courts."

⁸ *Whitehead v. Shattuck*, 138 U. S. 146, 151, 34 L. ed. 873, 874, per Field, J.

⁹ *Buzard v. Houston*, 119 U. S. 347, 351, 352, 30 L. ed. 451, 452, 453, per Gray, J.

law is here meant, not that it fails to produce the money,—that is a very usual result in the use of all remedies,—but that in its nature or character it is not fitted or adapted to the end in view.”¹⁰ “When irreparable injury is spoken of, it is not meant that the injury is beyond the possibility of repair or beyond the possibility of compensation and damages; but it must be of such constant and frequent recurrence that no fair or reasonable redress can be had therefor in a court of law.”¹¹ “If the remedy at law is adequate in theory it deprives equity of jurisdiction, although practically it may be inadequate to secure the collection of the claim sued on.”¹² Equitable jurisdiction does not accrue to the Federal court because it is thought that the law as administered by it is more favorable to a party seeking its aid than the law as administered by the courts of a State in which he has been sued.¹³ “There may consequently be cases over which the English courts of chancery would have taken jurisdiction, which are not cognizable by the Federal courts when sitting at equity.”¹⁴

The facts stated, and the relief sought in the first pleading, and not its form or name, determine whether it invokes the jurisdiction and commences a suit at law or in equity.¹⁵ Where the complainant has a remedy at law by mandamus, the fact that a Federal court has no jurisdiction to grant the mandamus does not make the remedy at law inadequate.¹⁶ The fact that a judgment can only be enforced by application to a court of equity does not take the case from the common-law side of the court.¹⁷ “The adequate remedy at law which is the test of equitable juris-

¹⁰ *Thompson v. Allen Co.*, 115 U. S. 550, 554, 29 L. ed. 472, 473, per Miller, J.

¹¹ *Chicago General Ry. Co. v. C., B. & Q. R. R. Co.*, 181 Ill. 605, 611; quoted with approval in *Donovan v. Pennsylvania Co.*, 199 U. S. 279, 305, 50 L. ed. 192, 204.

¹² *Safe Deposit & T. Co. v. City of Anniston*, 96 Fed. 661, 663, per Shelby, J.

¹³ *Cable v. United States Life Insurance Co.*, 191 U. S. 288, 48 L. ed. 188.

¹⁴ *Buzard v. Houston*, 119 U. S. 347, 352, 30 L. ed. 451, 453.

¹⁵ *Armstrong Cork Co. v. Merchants' Refrigerating Co.*, C. C. A., 184 Fed. 199.

¹⁶ *Smith v. Bourbon Co.*, 127 U. S. 105, 32 L. ed. 73. *Contra*, *Provisional Municipality of Pensacola v. Lehman*, 57 Fed. 324, 331; *Stephens v. Ohio State Tel. Co.*, 240 Fed. 759, 767. As to the rule where the State courts give a remedy by *certiorari*, *Ewing v. City of St. Louis*, 5 Wall. 413, 18 L. ed. 657; *Taylor v. Louisville & N. R. Co.*, 88 Fed. 350, 359.

¹⁷ *Thompson v. Northern Pac. Ry. Co.*, 93 Fed. 384.

diction in these courts, is that which existed when the Judiciary Act of 1789 was adopted, unless subsequently changed by Congress."¹⁸ A State statute giving an adequate relief at law does not affect the equitable jurisdiction of a Federal court.¹⁹ Whether the equitable jurisdiction is lost when a statute of the United States gives the same or adequate relief at law,—as, for example, in the case of discovery,—has not yet been settled.²⁰

§ 81a. Equitable jurisdiction to enforce rights created by statutes of the United States. If a statute of the United States creates a new right, the remedy will be in equity if the relief thereby afforded is in analogy with a species of relief ordinarily given by equity alone.¹ Thus, it has been held that a suit to enforce the individual liability of stockholders or directors to creditors of a corporation,² or to determine the question of the

¹⁸ *McConihay v. Wright*, 121 U. S. 201, 206, 30 L. ed. 932, 933, per Matthews, J.

¹⁹ *Missouri, K. & T. Ry. Co. v. Elliott*, 56 Fed. 772; *Mississippi Mills v. Cohn*, 150 U. S. 202, 37 L. ed. 1052; *Sheffield Furnace Co. v. Witherow*, 149 U. S. 574, 37 L. ed. 853; *Smyth v. Ames*, 169 U. S. 466, 42 L. ed. 819; *Lindsay v. First Nat. Bank*, 156 U. S. 485, 39 L. ed. 505; *Travelers' Protective Ass'n v. Gilbert*, C. C. A., 55 L.R.A. 538, 111 Fed. 269. *Borden's Condensed Milk Co. v. Baker*, C. C. A., 177 Fed. 906, where the State statute gave relief in *certiorari*; *Union Pac. R. Co. v. Board of Com'rs of Weld County, Colo.*, C. C. A., 222 Fed. 651; *Nevada-California Power Co. v. Hamilton*, 235 Fed. 317; *Second Nat. Bank v. Georger*, 246 Fed. 517; *Western Union Tel. Co. v. Trapp*, C. C. A., 186 Fed. 114, a suit to enjoin the collection of taxes. *City Council of Augusta, Ga. v. Timmerman*, C. C. A., 233 Fed. 216; *McDougal v. Mudge*, C. C. A., 233 Fed. 235. *Contra*, as to suit to enjoin the collection of taxes. *City Council of*

Augusta v. Timmerman, 227 Fed. 171. See *infra*, § 82.

²⁰ Compare *Vaughan v. Central Pac. R. Co.*, 4 Sawy. 280; *Pratt v. Northam*, 5 Mason, 95; *Peters v. Prevost*, 1 Paine, 64; *Home Ins. Co. v. Stanchfield*, 1 Dill, 424; *Markey v. Mut. Ben. Life Ins. Co.*, 6 Ins. L. J. 537; *Heath v. Erie R. Co.*, 9 Blatchf. 316; *Drexel v. Berney*, 14 Fed. 268; *Post v. Toledo, C. etc. R. Co.*, 144 Mass. 341, 59 Am. Rep. 86, 4 New Eng. R. 221.

§ 81a. ¹ *Edgell v. Haywood*, 3 Atk. 354; *Hornor v. Henning*, 93 U. S. 228, 23 L. ed. 879; *Terry v. Little*, 101 U. S. 216, 25 L. ed. 864; *Manufacturing Co. v. Bradley*, 105 U. S. 175, 26 L. ed. 1034; *Doe v. Waterloo Min. Co.*, 43 Fed. 219.

² *Hornor v. Henning*, 93 U. S. 228, 23 L. ed. 879; *Terry v. Little*, 101 U. S. 216, 25 L. ed. 864; *Manufacturing Co. v. Bradley*, 105 U. S. 175, 26 L. ed. 1034; *Stone v. Chisolm*, 113 U. S. 302, 28 L. ed. 991; *Goss v. Carter*, C. C. A., 156 Fed. 746. But see as to the Maine statute, *Alderson v. Dole*, C. C. A., 74 Fed. 29. Under Kansas Gen. Stat.,

right of possession to land under section 2326 of the Revised Statutes when there are conflicting claims to patents before a land office,³ must be brought in equity. The statute authorizing a suit to quiet title by an adverse claimant to public lands in Alaska⁴ does not apply to contests between homestead settlers and locators of mining claims as to the mineral or non-mineral character of land;⁵ a complaint by the receiver of an insolvent bank against former directors to recover a dividend fraudulently and unlawfully declared and paid, and also to recover money illegally paid out of capital for the surrender of stock certificates was held to state a cause of action at common law.⁶ A suit under section 5239 of the Revised Statutes to recover of a director of a national bank the damages sustained in consequence of excessive loans must be brought on the common-law side of the court,⁷ although the bank holds stock as security for the loan.⁸ A suit by the receiver of a national banking association, to recover dividends paid to stockholders when the corporation was insolvent, may be brought in equity.⁹ But it was held: that the liability of directors under the Civil Code of California¹⁰ for incurring indebtedness beyond the amount of the subscription of the capital stock of a corporation must be enforced by a bill in equity.¹¹

It has been held: that suits by a trustee in bankruptcy, to recover money paid as a preference, should be brought in equity,¹² that a suit to foreclose a mechanic's lien must be

ch. 23, the creditor may proceed at law or in equity. *N. Y. Life Ins. Co. v. Beard*, 80 Fed. 66. As to proceedings under the Texas statute, see *Thomson-Houston El. Ry. Co. v. Dallas Con. Tr. Ry. Co.*, 54 Fed. 1001. See notes to *Rickerson Roller Mill Co. v. Farrell Foundry & M. Co.*, 75 Fed. 554, 23 C. C. A., 302; *Scott v. Latimer*, 33 C. C. A. 1.

³ *Doe v. Waterloo Min. Co.*, 43 Fed. 219.

⁴ 30 St. at L. 413.

⁵ *Lassley v. Brownall*, C. C. A., 199 Fed. 772.

⁶ *Jesson v. Noyes*, C. C. A., 245 Fed. 46.

⁷ *Stephens v. Overstolz*, 43 Fed. 771.

⁸ *Corsicana Nat. Bank v. Johnson*, C. C. A., 218 Fed. 822.

⁹ *Hayden v. Thompson*, 71 Fed. 60. It was held otherwise under the *Maine R. S. C. H.* 47, § 89; a suit by a stockholder, *John A. Roebling's Sons v. Kinicutt*, 248 Fed. 596, 599. ¹⁰ § 309.

¹¹ *Re La Jolla Lumber & Mill Co.*, 243 Fed. 1004.

¹² *Parker v. Black*, C. C. A., 151 Fed. 18. But see § 644, *infra*.

brought in equity.¹³ The proceeding under the act of Congress to prevent the unlawful occupancy of public lands¹⁴ is a summary proceeding in the nature of a suit in equity and may be tried without a jury.¹⁵ In the absence of express provisions to that effect, it was held that a statute directing the Attorney-General to take "proper proceedings to prevent any unlawful interference with the rights and equities of the United States under this act," and other acts of Congress, "and to have legally ascertained and firmly adjudicated all alleged rights" of persons claiming any control or interest in the property of a corporation and to have annulled all contracts beyond the corporate powers; did not authorize the joinder of applications for common-law and chancery writs in the same suit.¹⁶

§ 82. State laws creating new rights are enforced by Federal courts at law or equity. If, however, the customary¹ or statute² law of a State has created a new right, the Federal courts will enforce the same at law or equity, if it falls within the remedies authorized by either branch of their jurisdiction.

Such are statutes giving a mortgagor or his judgment creditors a certain time within which to redeem land after a foreclosure sale;³ authorizing a suit to set aside the probate of

¹³ *Armstrong Cork Co. v. Merchants' Refrigerating Co.*, C. C. A., 184 Fed. 199; *Pioneer Min. Co. v. Delamotte*, C. C. A., 185 Fed. 752. So held where there were conflicting liens to be adjusted, although the State statute gave a right of action at law. *Healey Ice Mach. Co. v. Green*, 181 Fed. 890.

¹⁴ 23 St. at L. 321.

¹⁵ *Cameron v. U. S.*, 148 U. S. 301, 304, 37 L. ed. 459, 460; *Duffield v. San Francisco Chemical Co.*, 198 Fed. 942.

¹⁶ *Union Pac. Ry. Co. v. U. S.* 59 Fed. 813.

§ 82. ¹ *Neves v. Scott*, 13 How. 268, 271, 14 L. ed. 140, 142; *Gaines v. Fuentes*, 92 U. S. 10, 20, 23 L. ed. 524, 528; *Ellis v. Davis*, 109 U. S. 485, 27 L. ed. 1006; *Lorman v.*

Clarke, 2 McLean, 568, 577; *Niehols v. Eaton*, 91 U. S. 716, 729, 23 L. ed. 254, 258; *Fisher v. Shropshire*, 147 U. S. 133, 37 L. ed. 109; *St. Louis & S. F. R. v. S. W. Tel. & T. Co.*, C. C. A., 121 F. 276.

² *Clark v. Smith*, 13 Pet. 195, 10 L. ed. 123; *Fitch v. Creighton*, 24 How. (U. S.) 159, 16 L. ed. 596; *Brine v. Insurance Co.*, 96 U. S. 627, 24 L. ed. 858; *Mills v. Scott*, 99 U. S. 25, 25 L. ed. 315; *Van Norden v. Morton*, 99 U. S. 378, 25 L. ed. 315; *Cummings v. National Bank*, 101 U. S. 153, 157, 25 L. ed. 903, 904; *Holland v. Challen*, 110 U. S. 15, 28 L. ed. 52; *Reynolds v. Crawfordsville First Nat. Bank*, 112 U. S. 405, 28 L. ed. 733.

³ *Brine v. Insurance Co.*, 96 U. S. 627, 24 L. ed. 858; *Orvis v. Powell*,

a will, or a will itself, for fraud,⁴ even though the statute provides that the suit shall be brought in a specified State court, and that an issue of fact therein shall be tried by a jury; since the Federal court of equity can empanel a jury for that purpose.⁵ But this cannot be done unless the proceeding is an action or suit *inter partes*, which relates to independent controversies, and not merely to those controversies which may arise upon an application for probate, or upon disputes concerning the setting aside of a probate of a will, when the remedy afforded by the court is a mere continuation of the probate proceeding, merely a method of procedure ancillary to the original probate allowed by the State court, for the purpose of giving to the probate its ultimate and final effect.⁶

A Federal court of equity will follow a State statute authorizing a person in possession of land and unmolested;⁷ or

98 U. S. 176, 178, 25 L. ed. 238, 239; Connecticut Mut. L. Ins. Co. v. Cushman, 108 U. S. 51, 27 L. ed. 648.

⁴ Broderick's Will, 21 Wall. 503, 519, 520, 22 L. ed. 599, 605, 606; Sawyer v. White, C. C. A., 122 Fed. 223 (Missouri Statute); Richardson v. Green, C. C. A., 61 Fed. 423; s. c., 159 U. S. 264, 40 L. ed. 142 (Oregon Statute); Williams v. Crabb, C. C. A., 59 L.R.A. 425, 117 Fed. 193, 204 (Illinois Statute); Wart v. Wart, 117 Fed. 766 (Iowa Statute); McDermott v. Hannon, 203 Fed. 1015 (N. Y. Statute). See § 54, *supra*.

⁵ Williams v. Crabb, C. C. A., 117 Fed. 193, 204, 59 L.R.A. 425; Wart v. Wart, 117 Fed. 766; McDermott v. Hannon, 203 Fed. 1015 (N. Y. Statute). See Chicago, B. & Q. R. Co. v. Oglesby, 198 Fed. 153. But in Sexton Mfg. Co. v. Singer Sewing Mach. Co., C. C. A., 194 Fed. 56; held that the section of the Mechanics' Lien Law of Illinois, which provided that the lien shall not be enforced to the prejudice of any other

creditor, encumbrancer or purchaser, unless the contractor within four months after completion "shall either bring suit to enforce his lien thereof or shall file with the clerk of the circuit court in the county in which the building," is situated, a claim of lien (Ill. L. 1903, p. 230; Ill. R. S. 1905, Hurd. p. 1319), was not complied with by bringing a suit in the Federal court within the prescribed time, when no notice was filed in the office of the clerk of the State Circuit Court.

⁶ Farrell v. O'Brien, 199 U. S. 89, 50 L. ed. 101. See § 54, *supra*. But see Preston v. Chicago, St. L. & N. O. R. Co., 175 Fed. 487.

⁷ Clark v. Smith, 13 Peters, 195, 10 L. ed. 123; U. S. Min. Co. v. Lawson, C. C. A., 134 Fed. 769; North Carolina Mining Co. v. Westfeldt, 151 Fed. 290; Kraus v. Congdon, C. C. A., 161 Fed. 18. *Contra*, Am. Ass'n v. Williams, C. C. A., 166 Fed. 17. See Woods v. Woods, 184 Fed. 159. A State statute giving a tenant under a lease for more than 10 years the right to maintain an

even one out of possession of vacant land,⁸ to maintain a bill to determine in equity the title to the same or to recover possession thereof; but not a State statute authorizing one out of the possession of land without a trial by jury to obtain possession of the same when occupied by an adverse claimant.⁹ It will follow a State statute making an assessment for opening streets a lien upon abutting lands, which can be foreclosed by the city or its assignee;¹⁰ authorizing the appointment of a receiver under certain conditions, which in the Federal courts must then also be performed;¹¹ authorizing any creditor or stockholder to sue to wind up the affairs of a corporation which has become insolvent or suspended its ordinary business for want of funds,¹² but not a State statute authorizing a court of equity to dissolve a corporation;¹³ authorizing a bill for a partition of an equitable claim to land the legal title to which is in the United States;¹⁴ authorizing an injunction to be granted

action in his own name to remove a cloud upon title will be given effect by a Federal court, and under such statute the lessor is not an indispensable party to a suit by a lessee for ninety-nine years, obligated by the terms of the lease to pay all taxes and assessments against the property, to set aside an assessment for local improvements on the ground of its invalidity. *New York, N. H. & H. R. Co. v. City of New York*, 145 Fed. 661.

⁸ *Holland v. Challen*, 110 U. S. 15, 28 L. ed. 52; *Southern Pac. R. Co. v. Stanley*, 49 Fed. 263; *Field v. Barber Asphalt Co.*, 117 Fed. 925; *Smith Oyster Co. v. Darbee & Immel Oyster & Land Co.*, 149 Fed. 555.

⁹ *Whitehead v. Shattuck*, 138 U. S. 146, 34 L. ed. 873; *Wehrman v. Conklin*, 155 U. S. 314, 325, 39 L. ed. 167, 173; *Giberson v. Cook*, 124 Fed. 986; *Union Pac. R. Co. v. Cunningham*, 173 Fed. 90; *Baum v. Longwell*, 200 Fed. 450. See *Klenk v. Byrne*, 143 Fed. 1008; *Contra Farr*

v. Hobe-Peters Land Co., C. C. A., 188 Fed. 10. It has been held that the bill is demurrable when it fails to allege affirmatively either that the plaintiff is in possession, or that both complainant and defendant are out of possession. *So. Pac. R. Co. v. Goodrich*, 57 Fed. 879.

¹⁰ *Fitch v. Creighton*, 24 How. (U. S.) 159, 16 L. ed. 596.

¹¹ *McGraw v. Mott, C. C. A.*, 179 Fed. 646. (§ 65 of N. J. Corp. Act, N. J. P. L. 1896, p. 298).

¹² *Flash v. Wilkerson*, 22 Fed. 689; *Fechheimer v. Baum*, 2 L.R.A. 153, 37 Fed. 167; *T. & W. M. Co. v. Shatto*, 34 Fed. 380; *Conklin v. U. S. Shipbuilding Ass'n*, 123 Fed. 913; s. c., C. C. A., 126 Fed. 132; *Land Title & Tr. Co. v. Asphalt Co., C. C. A.*, 127 Fed. 1. But see *Scott v. Neely*, 140 U. S. 106, 35 L. ed. 358.

¹³ *Conklin v. U. S. Shipbuilding Co.*, 140 Fed. 219. *Contra, Jacobs v. Mexican Sugar Co.*, 130 Fed. 589.

¹⁴ *Aspen Mining & Smelting Co. v. Rucker*, 28 Fed. 220

in a new class of cases,¹⁵ where there is no dispute as to the legal title of the complainant, as in a taxpayer's suit to restrain the waste of municipal property.¹⁶ But, it has been held, that a Federal court of equity cannot follow a State statute authorizing an injunction against the collection of a tax, in a case where equity, independently of statutory authority, would have no such jurisdiction.¹⁷

Federal courts of equity have followed statutes authorizing an action for the protection of a water right, in which all persons who have diverted water from the same stream or source are joined, and the court, in one judgment, settles the relative rights and priorities of all parties to the action;¹⁸ empowering a guardian, with the permission of the State court, to mortgage his ward's estate, but not clauses providing that such a mortgage can only be foreclosed in the court which authorized its execution;¹⁹ creating and providing for the enforcement of a mechanic's lien;²⁰ authorizing a bill by the debtor, to compel the return or cancellation of securities for a usurious loan, without payment or the offer of payment of the amount borrowed with the lawful interest²¹—but it has been held that a court of equity may allow interest upon an unliquidated claim, although, by the State practice, such interest is not allowed.²²

¹⁵ *Cummings v. National Bank*, 101 U. S. 153, 157, 25 L. ed. 903, 904; *Lanier v. Alison*, 31 Fed. 100; *Grether v. Wright*, C. C. A., 75 Fed. 742; *Weidenfeld v. Sugar Run R. Co.*, 48 Fed. 615, 619; *St. Louis & S. F. R. Co. v. S. W. Tel. & T. Co.*, C. C. A., 121 Fed. 276. See *Stone Breaker v. Hunter*, C. C. A., 215 Fed. 67, a right recognized by the common laws of the State. But see *Davidson v. Calkins*, 92 Fed. 230; *Lehigh Valley C. Co. v. Hamblen*, 23 Fed. 225.

¹⁶ *Seccomb v. Wurster*, 83 Fed. 856; *Larabee v. Dolley*, 175 Fed. 365.

¹⁷ *Illinois Life Ins. Co. v. Newman*, 141 Fed. 449. See, however, the authorities cited §§ 151g, 271b, *infra*.

¹⁸ *Ames Realty Co. v. Big Indian Mining Co.*, 146 Fed. 166.

¹⁹ *Davis v. James*, 2 Fed. 618.

²⁰ *Idaho & O. L. I. Co. v. Bradbury*, 132 U. S. 509, 33 L. ed. 433; *Sheffield Furnace Co. v. Witherow*, 149 U. S. 574, 579, 37 L. ed. 853, 856; *John W. Hood & Co. v. Board of School Directors of Tangipahoa Parish*, 210 Fed. 384. But see as to attorney's lien, *Sherry v. O. S. N. Co.*, 72 Fed. 565.

²¹ *Missouri, Kansas & Texas Tr. Co. v. Krumseig*, 172 U. S. 351, 43 L. ed. 474; *Olds v. Curlette*, 145 Fed. 661. But see *Matthews v. Warner*, 6 Fed. 461, 465; affirmed without passing on this point, 112 U. S. 600, 28 L. ed. 851.

²² *Pennsylvania Steel Co. v. N. Y.*

and although at common law the State rulings upon this point would be followed;²³ authorizing a State court of equity to enforce an order of the State railroad commissioners, when a bill was filed to restrain the enforcement of such order;²⁴ authorizing a court of equity after the destruction of the public records to enter a decree establishing and confirming the title of a landowner;²⁵ authorizing the assignee of an insolvent to apply for the dissolution of levies of attachments and executions against his property;²⁶ and the Federal courts of equity enforce a vendor's lien recognized by the State common law.²⁷ The United States Circuit Court for the District of Connecticut followed the State statute, providing that "Courts of equity may pass the title to real estate by decree without any act of the respondent, . . . and such decree when recorded shall be as effectual as the adverse deed of respondent."²⁸ It has been held that the Federal courts in Ohio should follow the State statute authorizing a decree of specific performance against a non-resident not served within the State, provided that jurisdiction is obtained under the Revised Statutes of the United States;²⁹ that the summary method of foreclosing a mortgage under the Louisiana Code belongs on the equity side of the court;³⁰ and that the Louisiana statute authorizing a summary proceeding to set aside an incorrect assessment for taxation will be enforced pursuant to the chancery practice on the equity side of the court, and not in accordance with the State practice by a petition upon the common-law side.³¹ The Massachusetts employers' liability act, which authorizes an action to recover damages for the death of an employee, "to be assessed with reference to the degree of culpability of the employer or of the person for whose negli-

City Ry. Co., C. C. A., 198 Fed. 775, 779.

²³ *Stephens v. Phoenix Bridge Co.*, C. C. A., 139 Fed. 248, 71 C. C. A. 374.

²⁴ *Platt v. Lecocq*, C. C. A., 15 L.R.A. (N.S.) 558, 158 Fed. 723.

²⁵ *Gormley v. Clark*, 134 U. S. 338, 33 L. ed. 909.

²⁶ *Brochon v. Wilson*, 91 Fed. 617.

²⁷ *Fisher v. Shropshire*, 147 U. S. 133, 37 L. ed. 109; *Chilton v. Brai-*

den's Adm'x, 2 Black, 458, 17 L. ed. 304; *Wilson v. Plutus Min. Co.*, C. C. A., 174 Fed. 317.

²⁸ *A. & W. Sprague Mfg. Co. v. Hoyt*, 29 Fed. 421. See *infra*, § 441.

²⁹ *Single v. Scott Paper Mfg. Co.*, 55 Fed. 553, 557.

³⁰ *Fleitas v. Richardson*, 147 U. S. 538, 37 L. ed. 272.

³¹ *Lindsay v. First Nat. Bank*, 156 U. S. 485, 39 L. ed. 505.

gence the employer is liable," is not a penal statute, in such a sense that an action based thereon may not be maintained in a Federal court at common law.³²

A State statute cannot give a Federal court jurisdiction in equity of a case in which there is an adequate remedy at common law.³³

The liability of shareholders for unpaid subscriptions to stock are several and independent. When they are unconditional and no issue with the corporation affecting such liabilities is common to the shareholders, the remedy of the corporation, or its trustee in bankruptcy, or receiver, is by action at common law against each shareholder separately.³⁴ The same rule applies to a suit by a creditor under the same circumstances.³⁵ It has been held that a State statute authorizing a suit in equity will not be followed.³⁶ A Federal court will not follow a State statute which authorizes a creditor's bill against an individual³⁷ or a corporation,³⁸ even against a stockholder where no accounting is required,³⁹ by a complainant who has not obtained a judgment establishing his claim; but State statutes were followed which gave such a remedy to the creditor of an insolvent decedent,⁴⁰

³² *Malloy v. American Hide & Leather Co.*, 148 Fed. 482.

³³ *Whitehead v. Shattuck*, 138 U. S. 146, 34 L. ed. 873; *Scott v. Neely*, 140 U. S. 106, 35 L. ed. 358.

³⁴ *Kelly v. Gill*, 245 U. S. 116, California Statute; but see *Brown v. Allebach*, 156 Fed. 697, N. J. Statute.

³⁵ *Clinton Min. & Mineral Co. v. Cochran*, C. C. A., 247 Fed. 449, South Dakota Statute; *John A. Roebling's Sons Co. v. Kinnicutt*, 248 Fed. 596, Maine Statute. *Contra*, 2nd Nat. Bank of Erie v. Georger, 246 Fed. 517, N. Y. Statute.

³⁶ *Alderson v. Dole*, C. C. A., 74 Fed. 29, Maine Statute; 2nd Nat. Bank v. Georger, 246 Fed. 517, 518; Minn. Statute. *John A. Roebling's Sons Co. v. Kinnicutt*, 248 Fed. 596, Maine Statute. See *Borland v. Haven*, 37 Fed. 394, 405.

³⁷ *Scott v. Neely*, 140 U. S. 106, 35 L. ed. 358; *Cates v. Allen*, 149 U. S. 451, 37 L. ed. 804; *Gillespie v. Riggs*, C. C. A., 253 Fed. 943, *infra*, § 151c.

³⁸ *Morrow Shoe Mfg. Co. v. New Eng. Shoe Co.*, 60 Fed. 341; *Atlantic & F. R. Co. v. Western Ry. Co.*, C. C. A., 50 Fed. 790.

³⁹ *Alderson v. Dole*, C. C. A., 74 Fed. 29.

⁴⁰ *Lillenthal v. Drucklieb*, C. C. A., 92 Fed. 753. In the District of Columbia such a bill may be maintained without statutory authority. *Kennedy v. Creswell*, 101 U. S. 641 (at p. 645), 25 L. ed. 1075, 1076; s. c., *Creswell v. Kennedy*, 3 MacArthur, 78. Other authorities in the District Court to the same effect are, *Dunn v. Murt*, 4 Mack, 289; *Richardson v. Penicks*, 1 App. D. C. 261, at p. 267; *Offutt*

and to an assignee for the benefit of creditors.⁴¹ The Federal court will follow a State statute which authorizes the involuntary appointment of the sheriff as administrator and a suit in his name without his consent by a party interested in the estate.⁴² It has been held: that the New Jersey statute authorizing the inspection, by a stockholder, of the books of his corporation, cannot be enforced by a suit in equity;⁴³ and that the Federal court will not enforce the Massachusetts statute authorizing the holder of a tontine policy to maintain a bill in equity against his insurance company for an accounting.⁴⁴ The Federal court in Virginia refused to follow a State statute which gave the complainant in a creditor's bill a priority over other creditors of the same class.⁴⁵ Whether a mortgagee must sue at law or in equity to recover from one who by a covenant with the mortgagor has assumed the mortgage depends upon the law of the forum, not on the law of the place where the deed and mortgage were made and the land is situated.⁴⁶ When a State statute creating a new liability provides an exclusive remedy, such liability can be enforced in the Federal courts in no other manner.⁴⁷ When a State statute creates a new liability and provides that it can only be enforced in a specified State tribunal, the Federal courts will enforce the liability, and reject the clause respecting the exclusive jurisdiction.⁴⁸ Where, however, the suit authorized is one against the State itself, and the statute shows that the legislature contemplated that the State court alone should entertain the same, the Federal courts have no jurisdiction.⁴⁹ Otherwise, the exceptions made by the State statute will be usually recog-

v. King, 1 MacArthur, 312. But see Thiel Detective Service Co. v. McClure, 130 Fed. 55.

⁴¹ Closser v. Strawn, 227 Fed. 139.

⁴² Sheffey v. Davis Colberg Co., C. C. A., 219 Fed. 465 (W. Virginia Statute).

⁴³ Maeder v. Buffalo Bill's Wild. West Co., 132 Fed. 280.

⁴⁴ Peters v. Equitable Life Assurance Society, 149 Fed. 290.

⁴⁵ Talley v. Curtain, C. C. A., 54 Fed. 43.

⁴⁶ Willard v. Wood, 135 U. S. 309, 34 L. ed. 210.

⁴⁷ Fourth Nat. Bank v. Franklyn, 120 U. S. 747, 30 L. ed. 825; Flour City Nat. Bank v. Wechselberg, 45 Fed. 547.

⁴⁸ Davis v. James, 2 Fed. 618. Cf. Bowker v. Hill, 115 Fed. 528; Hale v. Tyler, 115 Fed. 833.

⁴⁹ Chandler v. Dix, 194 U. S. 590, 48 L. ed. 1129. *Infra*, § 105.

nized by the Federal court.⁵⁰ It has been held: that a suit to collect the double liability imposed by the Constitution and statutes of Kansas, upon the stockholders of certain corporations, is contractual in its nature and runs to the creditors individually, not to the corporations; and that it can only be enforced in an action at common law, even when the petition charges that the defendant and other stockholders have made a colorable and fraudulent transfer of their stock to another corporation for the purpose of escaping such liability.⁵¹

§ 83. State statutes cannot impair the jurisdiction nor regulate the practice of Federal courts of equity. No State statute giving one of its courts—for example, a court of probate—exclusive jurisdiction of a certain class of litigation can impair the jurisdiction of the Federal courts.¹ No State statute enlarging the powers of courts of common law can impair the jurisdiction of a Federal court of equity.² No State statute diminishing or destroying an equitable remedy, or in any way regulating the practice in courts of equity, can have any effect upon the jurisdiction or practice of the Federal courts.³

Such are statutes requiring a mortgagor to tender the debt secured by his mortgage before filing a bill to redeem the mortgaged premises;⁴ requiring a bill to foreclose a mortgage given

⁵⁰ *Harrison v. Remington Paper Co.*, C. C. A., 3 L.R.A. (N.S.) 954, 140 Fed. 385.

⁵¹ *Anglo-Am. Land M. & A. Co. v. Lombard*, 132 Fed. 721.

§ 83. ¹ *Suydam v. Broadnax*, 14 Pet. 67, 10 L. ed. 357; *Hull v. Dills*, 19 Fed. 657; *Semmes v. Whitney*, 50 Fed. 666; *Hershberger v. Blewett*, 55 Fed. 170; *Heaton v. Thatcher*, 59 Fed. 731.

² *McConihay v. Wright*, 121 U. S. 201, 206, 30 L. ed. 932, 933; and cases cited. *Borden's Condensed Milk Co. v. Baker*, C. C. A., 177 Fed. 906, where the State statute gave relief in *certiorari*; *Western Union Tel. Co. v. Trapp*, C. C. A., 186 Fed. 114, a suit to enjoin the collection of taxes.

³ *Boyle v. Zacharie*, 6 Pet. 648, 8 L. ed. 532; *Bein v. Heath*, 12 How. (U. S.) 168, 179, 13 L. ed. 939, 944; *Noonan v. Lee*, 2 Black, 499, 509, 17 L. ed. 278, 281; *Thompson v. Railroad Co.*, 6 Wall. 134, 18 L. ed. 765; *Cowles v. Mercer County*, 7 Wall. 118, 19 L. ed. 86; *Payne v. Hook*, 7 Wall. 425, 19 L. ed. 260; *Railway Co. v. Whitton's Adm'r*, 13 Wall. 270, 285, 20 L. ed. 571, 576; *Smith v. Railroad Co.*, 99 U. S. 398, 25 L. ed. 437. But see *Massachusetts B. L. Ass'n v. Lohmiller*, C. C. A., 74 Fed. 23.

⁴ *Gordon v. Hobart*, 2 Sumn. 401. See *Klenk v. Byrne*, 143 Fed. 1008.

to secure a judgment to show that execution has been issued under the judgment and returned unsatisfied;⁵ requiring leave to be obtained from a State court before a suit can be brought to enforce a judgment therein entered;⁶ or the presentment of a claim to the comptroller⁷ or city council⁸ or a county board⁹ or the termination of an appeal to a specified State court from the decision of the municipal authorities upon such an appeal,¹⁰ before a suit against the city; or at least when the United States are the claimants, the presentment of a claim to an executor before a suit thereupon can be revived against the estate of a decedent;¹¹ forbidding an injunction against the collection of illegal taxes;¹² but a State statute forbidding an injunction against the improper operation of a benefit society except at the suit of the Attorney General was followed;¹³ requiring that a bond be given before an injunction can be granted; or regulating the form of the security then required or the proceedings to enforce the same;¹⁴ regulating the fees in receiverships;¹⁵ determining what shall constitute notice of a pending suit;¹⁶ authorizing persons to agree upon a statement of facts, and to stipulate that the court take jurisdiction to try a cause and render a decree without pleadings;¹⁷ authorizing an appearance by his general guardian, to bind an infant not personally served with process;¹⁸ in the absence of a Federal statute, authorizing the

⁵ *Dow v. Chamberlin*, 5 McLean, 281.

⁶ *Phelps v. O'Brien County*, 2 Dill, 518.

⁷ *Gamewell F. A. Tel. Co. v. Mayor, etc.*, 31 Fed. 312.

⁸ *Barber Asphalt Pav. Co. v. Morris, C. C. A.*, 132 Fed. 945, 66 C. A. 55, 67 L.R.A. 761.

⁹ *Covington County v. Stevens, C. C. A.*, 256 Fed. 328.

¹⁰ *Barber Asphalt Pav. Co. v. Morris, C. C. A.*, 132 Fed. 945.

¹¹ *Pond v. U. S., C. C. A.*, 111 Fed. 989.

¹² *In re Tyler*, 149 U. S. 164, 189, 37 L. ed. 689, 697; *Western Union Tel. Co. v. Trapp, C. C. A.*, 186 Fed. 114; *City Council of Augusta v. Timmerman*, 227 Fed. 171; *Speidel*

v. N. Barstow Co., 243 Fed. 621.

¹³ *Cummings v. Supreme Council of Royal Arcanum*, 247 Fed. 992.

¹⁴ *Bein v. Heath*, 12 How. (U. S.) 168, 13 L. ed. 939; *Russell v. Farley*, 105 U. S. 437; 26 L. ed. 1061; *Meyers v. Block*, 120 U. S. 206, 211, 30 L. ed. 642, 643.

¹⁵ *Guaranty Tr. Co. v. Galveston City R. Co.*, 107 Fed. 311. But see 25 St. at L. 436.

¹⁶ *McClaskey v. Barr*, 48 Fed. 130, 132. *Contra*, *Jones v. Smith*, 40 Fed. 314; *Gamble v. Rural Independent School Dist.*, 76 C. C. A., 539, 146 Fed. 113.

¹⁷ *Nickerson v. Atchison, T. & S. F. R. Co.*, 1 McCrary, 383.

¹⁸ *N. Y. Life Ins. Co. v. Bangs*, 103 U. S. 780, 26 L. ed. 609.

examination of a party' before trial; ¹⁹ or, regulating the manner of taking depositions; ²⁰ providing that a county can be sued only in a specified State court; ²¹ forbidding a foreign corporation to sue until it has complied with a statutory condition. ²² It has been said that proceedings for the foreclosure of a mortgage in a Federal court should proceed upon the ordinary lines of such proceedings in the State courts. ²³ But it has been held that equitable relief may be given on the submission, upon an agreed statement of facts, of an action of *assumpsit* brought on the common-law side of the court, and a stipulation that judgment should be rendered in accordance with the opinion of the court thereupon. ²⁴ A State statute providing that if by mistake a suit was brought in equity which should have been at common law there should be no abatement, but that the cause be transferred to the common-law docket, was followed in the Federal court. ²⁵ The New York statute providing that, upon the consolidation of two corporations, suits pending by or against either shall not abate, will be followed by the Federal courts at equity, "not because the State statute is operative to regulate the practice and procedure of Federal courts in equity suits, but because, so far as the litigated life of the artificial person (properly a party to the suit when brought) is concerned, there has been no change, the only power which could destroy it having scrupulously refrained from doing so." ²⁶

¹⁹ *Ex parte Fisk*, 113 U. S. 713, 28 L. ed. 1117; *Dravo v. Fabel*, 132 U. S. 487, 33 L. ed. 421; *Harks Dental Ass'n v. International T. C. Co.*, 194 U. S. 303, 48 L. ed. 989. See *infra*, § 359.

²⁰ *Ex parte Fisk*, 113 U. S. 713, 28 L. ed. 1117; *Dravo v. Fabel*, 132 U. S. 487, 33 L. ed. 421; *Hanks v. Dental Ass'n v. International T. C. Co.*, 194 U. S. 303, 306, 48 L. ed. 989, 990; *U. S. v. 50 Boxes and Packages of Lace*, 92 Fed. 601; *Tabor v. Indianapolis Journal Newspaper Co.*, 66 Fed. 423. See *infra*, §§ 359, 372.

²¹ *Cowles v. Mercer County*, 7 Wall. 118, 19 L. ed. 86; *Lincoln County v. Luning*, 133 U. S. 529,

33 L. ed. 766. See *Chicot County v. Sherwood*, 148 U. S. 529, 37 L. ed. 546.

²² *Bank of N. A. v. Barling*, 44 Fed. 641; affirmed, as *Barling v. Bank of N. A., C. C. A.*, 50 Fed. 260; *Vitagraph Co. v. Twentieth Century Optiscope Co.*, 157 Fed. 699.

²³ *Deck v. Whitman*, 96 Fed. 873; *Knickerbocker Tr. Co. v. Penacook Mfg. Co.*, 100 Fed. 814. See, however, *Nalle v. Young*, 160 U. S. 624, 40 L. ed. 560.

²⁴ *Knight v. Fisher*, 58 Fed. 991.

²⁵ *U. S. Bank v. Lyon County*, 48 Fed. 632.

²⁶ *Edison Electric Light Co. v. U.*

§ 84. Sources of Federal equity practice. The Revised Statutes provide: "The Supreme Court shall have power to prescribe, from time to time, and in any manner not inconsistent with any law of the United States, the forms of writs and other process, the modes of framing and filing proceedings and pleadings, of taking and obtaining evidence, of obtaining discovery, of proceeding to obtain relief, of drawing up, entering, and enrolling decrees, and of proceeding before trustees appointed by the court, and generally to regulate the whole practice to be used in suits in equity or admiralty, by the Circuit and District Courts."¹ The several "District Courts may, from time to time, and in any manner not inconsistent with any law of the United States, or with any rule prescribed by the Supreme Court under the preceding section, make rules and orders directing the returning of writs and processes, the filing of pleadings, the taking of rules, the entering and making up of judgments by default, and other matters, in vacation, and otherwise regulate their own practice as may be necessary or convenient for the advancement of justice and the prevention of delays in proceedings."² These statutes are constitutional³ and the rules thus promulgated, when not in conflict with the Federal Constitution or a statute of the United States, have the force and effect of law.⁴

S. El. Light Co., 52 Fed. 300, 313; s. c., 3 C. C. A. 83, per Lacombe, J. See Marion Phosphate Co. v. Perry, 74 Fed. 425.

§ 84. 1 U. S. R. S., § 917.

2 U. S. R. S., § 918. This must be construed in connection with U. S. R. S., § 914, requiring the practice in actions at common law to conform as near as may be to the practice in the State courts of record; any rule of the court to the contrary notwithstanding. Importers' & Traders' Nat. Bank v. Lyons, 134 Fed. 510.

3 Wayman v. Southard, 10 Wheat. 1, 6 L. ed. 253; Beers v. Houghton, 9 Peters, 338, 359, 9 L. ed. 149;

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White v. Toledo, St. L. & K. C. R. Co., 79 Fed. 133.

4 Bank of U. S. v. White, 8 Peters, 262, 269, 8 L. ed. 938, 941; Seymour v. Philips & Colby Const. Co., 7 Biss. 460, Fed. Cas. No. 12689; Northwestern Mut. Life Ins. Co. v. Keith, C. C. A., 77 Fed. 374; Am. Graphophone Co. v. Nat. Phonograph Co., 127 Fed. 349; U. S. v. Barber Lumber Co., 169 Fed. 184. It was held that a Circuit Court of Appeals had no authority to promulgate a rule permitting the prosecution of appellate proceedings in *forma pauperis*. Bradford v. Southern Ry. Co., 195 U. S. 243, 25 Sup. Ct. 55, 49 L. ed. 178; *Re* Bradford's Petition, C. C. A., 139 Fed. 518, 71

They bind the United States as well as individuals.⁵ Under these provisions prior to the year 1912 the Supreme Court had from time to time promulgated ninety four rules of equity practice⁶ and most of the inferior courts have also adopted rules of their own.

The ninetieth equity rule of the Supreme Court, which was promulgated in March, 1842, provided that, "in all cases where the rules prescribed by this court or by the Circuit Court do not apply, the practice of the Circuit Court shall be regulated by the present practice of the High Court of Chancery in England, so far as the same may reasonably be applied consistently with the local circumstances and local conveniences of the district where the court is held, not as positive rules, but as furnishing just analogies to regulate the practice." The previous rule promulgated at the October term, 1822, was: "In all cases where these rules prescribed by this Court or the Circuit Courts, do not apply, the practice of the Circuit Courts shall be regulated by the practice of the High Court of Chancery in England."⁷ Judge Sawyer said: "The rule quoted simply regulates the practice in exercising the jurisdiction of the court in those respects wherein the rules adopted do not apply; but the practice of the High Court of Chancery is to applied, not as controlling, but simply as furnishing just analogies to regulate the practice."⁸

By reference to these sources and the decisions of the courts resulting from them, the practice at equity in the courts of the United States was formerly determined.

C. C. A., 334; overruling *Reed v. Pennsylvania Co.*, C. C. A., 111 Fed. 714, 49 C. C. A. 572. See *infra*, 413.

⁵ *U. S. v. Barber Lumber Co.*, 169 Fed. 184. The Equity Rules of 1822 are published in 7 Wheaton xvii., 5 L. ed. 375. The Equity Rules of 1842, in 1 Howard, xli. The amendments thereto are to be found in the volumes of the reports, published about the time of their promulgation. For a criticism of the practice under these rules, see *Monarch Vacuum Cleaner Co. v. Vacuum Cleaner Co.*, 194 Fed.

172. In minor particulars, many of the courts disregarded them. In C. C., W. D. Tenn, no entry was made in the order-book for more than seven years. *Electrolibration Co. v. Jackson*, 52 Fed. 773, 774. In E. D. Mo., for a long time no order-book was kept. *Hopkins' Rules*, 10.

⁶ See *Kelley v. T. L. Smith Co.*, C. C. A., 196 Fed. 466.

⁷ Rule xxxiii, 7 Wheaton, xiii.

⁸ *Lewis v. Shainwald*, 7 Saw. 403, 405.

In the District of New Jersey, where the Federal statutes and equity rules were silent, the State chancery rules were followed.⁹

At the October term of 1912, the Supreme Court promulgated eighty-one new rules of equity practice, which, although they retain many of the rules of 1842, omitted the ninetieth rule, which has just been quoted.^{9a} What practice should be followed in cases where the present rules and statutes and the former decisions of the Federal courts are silent has not yet been decided. The prudent practitioner will in such case follow the chancery practice in England as it existed in 1842 or previously.¹⁰ The established practice approved by the Supreme Court is still in force except as changed by the new equity rules or the rules of the District Courts.¹¹ It has been said, however, that "It would seem to be the spirit of these new equity rules that they were drawn by the Supreme Court with the intent of leaving the judge free to adjust matters in the interests of substantial justice, as he sees it, unhampered by precedent and by technical definitions and distinctions."¹² Since the alterations in the new rules are based to a large extent upon provisions in the English Rules of 1883, which in their turn were suggested by the New York Code of Procedure, written by David Dudley Field, where the construction of the equity rules of 1912 is doubtful, the decisions of the English courts since 1883 and of the courts of New York since 1848 should be consulted.¹³

⁹ The first American edition of Daniell's Chancery Practice and the second American edition of Smith's Practice, both of which were published in 1837, are the authoritative works which best explain the English chancery practice in 1841. Note by Mr. Justice Bradley in *Thomson v. Wooster*, 114 U. S. 104, 29 L. ed. 105, 107.

^{9a} 226 U. S. 629.

¹⁰ *Maeder v. Buffalo Bill's Wild West Co.*, 132 Fed. 280.

¹¹ *Individual Drinking Cup Co. v. Union News Co.*, C. C. A., 250 Fed. 625.

¹² *Sheeler v. Alexander*, 211 Fed. 544. *Alien Enemy Act*, 40 St. at L. 411. *Comp. St.* § 3115½a-3115½j.

¹³ It is the duty of the courts as

far as possible to mould procedure so as to meet the exigencies of the case. *Davies v. André*, 24 Q. B. D. 598, 607. They must not give to the rules a pleader's construction, but a construction consistent with common sense. *Edwards v. Lowther*, 24 W. R. 434. "Practical rules ought not to be construed according to mere grammar, if that which is an absurdity from a business point of view is thereby produced." *Hannay v. Smurthwaite* (1893), 2 Q. B. 412, 420, per Esher, M. R. Where one rule is general and another specific, the latter should prevail. *Cavendish v. Strutt* (1904), 1 Ch. 524, 526, 527, 531; *Locke v. White*, 33 Ch. D. 308.

CHAPTER III.

PERSONS WHO MAY BE PLAINTIFFS OR DEFENDANTS IN A SUIT IN EQUITY.

§ 85. General rule as to persons capable of being plaintiffs.

All persons may file a bill in equity in their own right, except alien enemies, infants, idiots, lunatics, married women, foreign corporations who have been deprived of the right by statute,¹ and possibly those who by the laws of a State have been declared civilly dead.

§ 86. States as plaintiffs. A State may sue as plaintiff in any court of the United States which has jurisdiction of the case.¹ A State cannot sue in the Supreme Court of the United States to collect a judgment for a penalty recovered in the court of such State against a corporation chartered by another State.²

§ 87. Alien enemies as plaintiffs. In the absence of a statute upon the subject, subjects of a country at war with the United States cannot sue in the State or Federal courts before the conclusion of peace, unless they are residents of this country or within the jurisdiction of four allies.¹ The Act of October 6, 1917,

§ 85. ¹ *Infra*, § 88. It has been held that a company which has not been organized as a corporation in compliance with the statute regulating the subject cannot bring a suit in equity because of the infringement of a patent although it might as a *de facto* corporation enforce in the courts contracts with parties who had recognized it as having corporate privileges. *Am. Ball Bearing Co. v. Adams*, 222 Fed. 967, reversed *Cardo Co. v. Adams*, C. C. A., 231 Fed. 950. Such a defect, however, will not prevent the corporation from protecting its right to property of which it is in pos-

session until the judgment of quo warranto has been obtained against it. *Utah Light and Traction Co. v. U. S.*, C. C. A., 230 Fed. 343.

§ 86. ¹ *Ames v. Kansas*, 111 U. S. 49, 28 L. ed. 482; *U. S. v. Louisiana*, 123 U. S. 32, 31 L. ed. 69; *supra*, § 13. For the jurisdiction of suits brought in the name of a State *ex relatione*, see *supra*, 42.

² *Wisconsin v. Pelican Ins. Co.*, 127 U. S. 265, 32 L. ed. 239.

§ 87. ¹ *Wilcox v. Henry*, 1 Dall. 69, 1 L. ed. 41; *Crawford v. The William Penn*, 1 Pet. C. C. 106; *Mumford v. Mumford*, 1 Gall. 366;

against Trading with the Enemy provides: "Nothing in this Act shall be deemed to authorize the prosecution of any suit or action at law or in equity in any court within the United States by an enemy or ally of enemy prior to the end of the war, except as provided in section ten hereof: Provided, however, that an enemy or alien enemy licensed to do business under this Act may prosecute and maintain any such suit or action so far as the same arises solely out of the business transacted with the United States under such license and so long as such license remains in full force and effect: *And provided further*, That an enemy or ally of enemy may defend by counsel any suit in equity or action at law which may be brought against him.

"Receipt of notice from the President to the effect that he has reasonable ground to believe that any person is an enemy or ally of enemy shall be *prima facie* defense to any one receiving the same, in any suit or action at law or in equity brought or maintained, or to any right or set-off or recoupment asserted by, such person and based on failure to complete or perform since the beginning of the war any contract or other obligation."²

A resident of the United States,³ at least if he has declared his intention of becoming a citizen thereof, does not lose his right to sue in the courts of the United States because he is still a subject or a citizen of the enemy.⁴ If a complainant become an alien enemy after a suit has been begun, the defense may be interposed by answer.⁵ The effect of such a defense is then, however.

Ex parte Graber, 247 Fed. 882; *Clarke v. Morey*, 10 Johns. (N. Y.) 69; 2 Kent's Com. 63. Where practically all the stock of a New Jersey corporation was owned by citizens of Germany; but a majority of the directors were residents of the United States; the Supreme Court of New York held that it had right to sue there, pending the war. *Fritz Schultz, Jr., Co. v. Fraines & Co.*, App. Tm. 164 N. Y. Sup. 454, affirming *McAvoy, J.* As to the right of alien residents to sue, see *Speidel v. N. Barstow Co.*, 243 Fed. 621; *Arndt-Ober v. Met. Opera Co.*, — App. Div. N. Y. —; 169 N. Y.

Sup. 944, affirming 169 N. Y. Sup. 304; *Kranchanake v. Acme Mfg. Co.*, N. C. 95 S. E. Rep. 851.

On the general subject see a series of articles on The War and the Law by John Meriman in The Docket 1919, 1920.

² 40 St. at L. 416, ch. 106, § 7, subd. (b). Comp. St. § 3115½d.

³ *The Oropa*, 255 Fed. 132; *Plettenberg, Holthaus & Co. v. I. J. Kalmon & Co.*, 241 Fed. 605; *Stumpf v. A. Schreiber Brewing Co.*, 242 Fed. 80.

⁴ *The Oropa*, 255 Fed. 132.

⁵ *Bell v. Chapman*, 10 Johns. (N.

merely to suspend the cause of action and suit, not to dismiss the bill.⁶ If the defendant is an alien enemy; after the commencement of the suit,⁷ in the absence of a statute upon the subject, the proper practice ordinarily is for the court to entertain jurisdiction and then to suspend proceedings or otherwise maintain the *status quo* until, through the restoration of peace or otherwise, adequate presentation of his defense becomes possible.⁸ The subject is regulated to a certain extent by the Trading with the Enemy Act.⁹

The Act against Trading with the Enemy further provides: "Any enemy, or ally of enemy, may institute and prosecute suits in equity against any person other than a licensee under this Act to enjoin infringement of letters patent, trademark, print, label, and copyrights in the United States owned or controlled by said enemy or ally of enemy, in the same manner and to the extent that he would be entitled so to do if the United States was not at war: *Provided*, That no final judgment or decree shall be entered in favor of such enemy or ally of enemy by any court except after thirty days' notice to the alien property custodian. Such notice shall be in writing and shall be served in the same manner as civil process of Federal courts." ¹⁰

§ 88. Foreign corporations. The State statutes cannot deprive a foreign corporation from suing in its courts upon a contract connected with interstate commerce.¹ To what extent a State statute can deny a corporation of another State, not so en-

Y.), 183; *Watts, Watts & Co. v. Unione Austriaca*, 248 U. S. 9.

⁶ *Hutchinson v. Brock*, 11 Mass. 119; *Parkinson v. Wentworth*, 11 Mass. 26; *Levine v. Taylor*, 12 Mass. 8; *Hamersley v. Lambert*, 2 Johns. C. (N. Y.) 508; *Ex parte Bousmaker*, 13 Ves. 71; *Wilcox v. Henry*, 1 Dall. 69, 1 L. ed. 41; *Story's Eq. Pl.*, § 54. But see *Mumford v. Mumford*, 1 Gall. 366.

⁷ *Samuel M. Kintner and Harry M. Barrett v. Hoch-Frequenz-Maschinen Aktien-Gesellschaft Fur Drahtloss Telegraphie*, N. Y. L. J., Jan. 1918.

⁸ *Watts Watts & Co. v. Unione Austriaca*, 248 U. S. 9.

⁹ 40 St. at L. 420, § 10, Comp. St. § 3115½ee. See *infra*, § 96k.

¹⁰ Act of October 6, 1917, as to Trading with the Enemy, ch. 106 § 10, 40 St. at L. 420; Comp. St. 3115½ee (f) and (g). See *infra*, § 96k.

§ 88. ¹ *International Textbook Co. v. Pigg* (217 U. S. 91, 112, 54 L. ed. 678, 687; *Buck Stove Co. v. Vickers*, 226 U. S. 205, 214, 57 L. ed. —).

gaged, equality of treatment with individual citizens, in respect to the right to sue and defend in its courts, is a doubtful question.² It may forbid a corporation of another State from making a contract within its borders which is not connected with interstate commerce, until it has complied with certain reasonable statutory provisions, such as the filing of a copy of its charter and the payment of an annual license fee; and may further direct that every contract made within the State before such conditions have been complied with shall be void;³ but no State statute can deprive such a corporation of the right to sue in a court of the United States held within such State.⁴ And where the State statute provided, "No foreign stock corporation doing business in this state shall maintain any action in this state upon any contract made by it in this state, unless prior to the making of such contract it shall have procured such certificate";⁵ this did not prevent the recovery upon such contract in the Federal court there held.⁶

§ 89. Married women as plaintiffs. A married woman originally could only sue when joined with her husband, unless he had deserted her, and was without the realm or civilly dead, when she could sue alone;¹ or unless the suit concerned her separate property, when she was obliged to sue by her next friend.² The next friend, however, was chosen by herself;³ and the husband was then usually made a party defendant, that he might have an opportunity to assert any claim he might have

² *International Textbook Co. v. Pigg*, 217 U. S. 91, 112, 54 L. ed. 678, 687.

³ *Diamond Glue Co. v. U. S. Glue Co.*, 187 U. S. 611, 47 L. ed. 328; *Loomis v. People's Const. Co.*, C. C. A., 211 Fed. 453.

⁴ *David Lupton's Sons Co. v. Automobile Club of America*, 225 U. S. 489, 56 L. ed. 1177. In *Boston Towboat Co. v. John H. Seamen Co.*, 199 Fed. 445, it was held that when a suit was brought by such a corporation, which had no statutory right to sue, the court might adjudicate upon a counter-claim inter-

posed by the defendant and allow it as a set-off against the plaintiff's demand, although it could not render an affirmative judgment in favor of the plaintiff for any excess.

⁵ N. Y. Consol. Laws, Ch. 23, § 15.

⁶ *David Lupton's Sons Co. v. Automobile Club of America*, 225 U. S. 489, 56 L. ed. 1177.

§ 89. 1 Story's Eq. Pl., § 61; *Countess of Portland v. Prodgers*, 2 Vern. 104.

² *Wake v. Parker*, 2 Keen. 70; Story's Eq. Pl., § 63.

³ Story's Eq. Pl., § 61; *Gamber v. Atlee*, 2 DeG. & Sm. 745.

to the subject-matter of the suit.⁴ In the courts of the United States, however, the rule was early laid down as follows: "Where the wife complains of the husband and asks relief against him she must use the name of some other person in prosecuting the suit; but where the acts of the husband are not complained of, he would seem to be the most suitable person to unite with her in the suit. This is a matter of practice within the discretion of the court."⁵ In the District Courts held in the State of New York, where a married woman has substantially all the powers of a spinster, she may sue in equity, as if she were single, at least if she be a citizen of that State.⁶ In the District Courts in the districts of California the rule is otherwise.⁷ When a suit has been begun by a married woman alone who should have sued by her next friend, leave to amend by adding to the title the name of a next friend will always be granted.⁸

§ 90. Suits on behalf of infants. The Equity Rules provide: "All infants and other persons so incapable may sue by their guardians, if any, or by their *prochein ami*; subject, however, to such orders as the court or judge may direct for the protection of infants and other persons."¹ A guardian, as such, cannot maintain an action in a State other than in which he was appointed, in the absence of a statute of the forum permitting him to sue.²

The suit should be brought in the name of the infant by his guardian *ad litem* and not in the name of the guardian *ad litem* for the infant³ but this objection unless specifically raised by demurrer or motion cannot be availed of upon writ of error.⁴

⁴ *Sigel v. Phelps*, 7 Sim. 239; *Wake v. Parker*, 2 Keen. 70; *Story's Eq. Pl.*, § 63.

⁵ *Mr. Justice McLean in Bein v. Heath*, 6 How. 228, 240, 12 L. ed. 416, 421. See *Douglas v. Butler*, 6 Fed. 228.

⁶ *Lorillard v. Standard Oil Co.*, 2 Fed. 902. But see *Taylor v. Holmes*, 14 Fed. 499, 514; *U. S. v. Pratt Coal & Coke Co.*, 18 Fed. 708; *O'Hara v. MacConnell*, 93 U. S. 150, 23 L. ed. 840.

⁷ *Wills v. Pauly*, 51 Fed. 257.

⁸ *Douglas v. Butler*, 6 Fed. 228; *Taylor v. Holmes*, 14 Fed. 499.

§ 90. ¹ *Eq. Rule 70*; copied in substance from *Eq. Rule 37*, of 1842.

² *Lawrence v. Nelson*, 143 U. S. 215, 222, 12 Sup. Ct. 440, 36 L. ed. 130; *Ex Kingsley*, 160 Fed. 275; *Pulver v. Leonard*, 176 Fed. 586.

³ *Sandeen v. Tschider*, C. C. A., 205 Fed. 252.

⁴ *Ibid.*

By the old Chancery practice, an infant could only sue by his next friend,⁵ who might be any person that would undertake the suit in his behalf, subject, however, to the costs and the censure of the court, if it were improperly brought.⁶ The next friend, at any time, may be removed by the court either summarily or after a reference, if it seemed for the best interest of the infant to appoint another.⁷ This is usually done if he is interested in the suit.⁸ It was doubtful whether insolvency and consequent inability to respond for costs was, in itself, a ground for the next friend's removal.⁹ That might, however, be a reason for an order directing him to give security for costs.¹⁰ The court might, at any time, order a reference to a master, to determine the propriety of a suit; and, if it appeared to have been brought against the infant's interest, would stay proceedings in it or dismiss the bill, with costs to be paid by the next friend.¹¹ This could be done even without a reference.¹² No such reference would, it seems, be ordered at the request of the next friend himself,¹³ unless there were another cause pending by reason of which the infant's property was subject to the control of the court, when such a reference might be ordered at the instigation of a next friend, and he be paid his costs out of the estate even if the bill were finally dismissed.¹⁴ An application to dismiss a bill as improperly filed on behalf of an infant might be made by a person "as next friend for the purpose of this application,"¹⁵ or by a defendant to the bill.¹⁶ It seems that any motion clearly for the interest of an infant complainant could be made by a next friend for the

⁵ Rule 87; Story's Eq. Pl., § 57; Dudgeon v. Watson, 23 Fed. 161; Bradwell v. Weeks, 1 J. Ch. (N. Y.) 325.

⁶ Campbell v. Campbell, 2 M. & C. 25, 30; Sale v. Sale, 1 Beav. 586; Starten v. Bartholomew, 6 Beav. 143.

⁷ Nalder v. Hawkins, 2 M. & K. 243; Russell v. Sharpe, 1 Jac. & W. 482; Jarvis v. Crozier, 98 Fed. 753, 755.

⁸ Jarvis v. Crozier, 98 Fed. 753, 755. See in re Corsellis, 50 Law T. N. S. 703.

⁹ Anon., 1 Ves. Jr. 409.

¹⁰ Fulton v. Roosevelt, 1 Paige (N. Y.), 178, 180, 19 Am. Dec. 409.

¹¹ Da Costa v. Da Costa, 3 P. Wms. 140; Nalder v. Hawkins, 2 M. & K. 243; Sale v. Sale, 1 Beav. 586. See King v. McLean Asylum of Massachusetts General Hospital, 64 Fed. 325.

¹² Sale v. Sale 1 Beav. 586.

¹³ Jones v. Powell, 2 Mer. 141.

¹⁴ Taner v. Ivie, 2 Ves. Sen. 466.

¹⁵ Guy v. Guy, 2 Beav. 466.

¹⁶ Fox v. Suwerkrop, 1 Beav. 583.

purpose of the application, when the next friend who filed the bill refused to move.¹⁷ If two suits were instituted on behalf of the same infant for the same purpose by two next friends, the court would direct a master to inquire which is most for the infant's benefit.¹⁸ A bill might be filed by a next friend on behalf of a child still in its mother's womb.¹⁹

If an infant were made co-plaintiff with others, and it appeared that it would be more for his advantage that he should be made a defendant, an order to strike out his name as plaintiff, and to make him a defendant, might be obtained.²⁰ The next friend has the power to select the court in which the case shall be tried.²¹ He may waive the right to remand the case to a State court after removal.²² The court usually will not approve a compromise or enter a decree by consent when an infant is interested without a reference to a master to report whether it is advisable²³; it may approve a compromise without such a reference.²⁴ And a consent decree without such a reference binds the infant unless obtained by fraud.²⁵

An attorney who is representing interests antagonistic to infant clients cannot give binding consent to a decree against the infants, and a decree based on such consent is invalid.²⁶

Where, in a proceeding to which infants were parties, the court, after reference to a master, rendered a decree; it was upheld, as binding upon the infants, although there was a stipulation that such decree might be entered by consent at chambers, for the decree was based on the action of the court, and not the consent, which was not binding on the infants, being signed by their attorney, who was representing interests an-

¹⁷ *Furtado v. Furtado*, 6 Jur. 227; *Cox v. Wright*, 9 Jur. (N.S.) 981; *Guy v. Guy*, 2 Beav. 460.

¹⁸ *Calvert on Parties* (2d ed.), 418.

¹⁹ *Luterel's Case*, cited Prec. Ch. 50; *Musgrave v. Parry*, 2 Vern. 710.

²⁰ *Tappen v. Norman*, 11 Ves. 563; *Jarvis v. Crozier*, 98 Fed. 753.

²¹ *Re Moore*, 209 U. S. 490, 52 L. ed. 904.

²² *Ibid.*

²³ *Thompson v. Maxwell Land*

Grant Co. 168 U. S. 451, 462, 42 L. ed. 539.

²⁴ *Lippiat v. Holley*, 1 Beav. 423; *Brooke v. Mostyn*, 33 Beav. 457, s. c., 2 DeG. J. & S. 373; *Wall v. Bushby*, 1 Bro. Ch. 484; *Thompson v. Maxwell Land Grant Co.*, 168 U. S. 451, 462, 42 L. ed. 539; *Re Moore*, 209 U. S. 490, 498, 52 L. ed. 904.

²⁵ *Ibid.*

²⁶ *Glover v. Bradley*, C. C. A., 4th Ct. 233 Fed. 721, 10.

tagonistic to them.²⁷ When a bill was filed on behalf of an infant, his coming of age did not abate the suit; but he might then elect whether he would proceed with it or not.²⁸ If he chose to go on with the case, all further proceedings could be carried on without any amendment or the filing of a supplemental bill.²⁹ He was then liable for all costs of the suit, as if he had filed the bill after he came of age.³⁰ Otherwise, he was not personally chargeable with costs;³¹ unless he made a motion to dismiss the bill; which it seems could only be done upon the payment of costs by himself,³² if he could not establish that the bill was improperly filed by his next friend.³³ If the next friend died during the infant's minority, and the latter took no step in the case after he had come of age, the defendant might have the bill dismissed, but without costs, since there would then be no one living who was liable to pay them.³⁴ The suit is brought in the name of the infant, not in that of the next friend,³⁵ and the infant's citizenship is the test of the jurisdiction.³⁶ Where the bill shows that the suit was brought by a guardian in a representative capacity, but by the title it appears that he sues individually, the title, if necessary, may be amended.³⁷ A guardian ad litem for an infant, although appointed in a State court before the removal of the cause, cannot without the approval of the court, bind the infant by a contract concerning the amount of the attorney's fees.³⁸

§ 91. Suits on behalf of idiots, lunatics, and persons of weak mind. Idiots and lunatics sue by their committees or guardians, if they have any, otherwise by next friends.¹ It is the usual practice to join them as plaintiffs with their representatives, though it might be held unnecessary to do so when one

²⁷ Ibid.

²⁸ Guy v. Guy, 2 Beav. 460.

²⁹ Hoffman's Ch. Pr. 60; Daniell's Ch. Pr. (2d Am. ed.) 102.

³⁰ Daniell's Ch. Pr. (2d Am. ed.) 102.

³¹ Waring v. Crane, 2 Paige (N. Y.), 79, 21 Am. Dec. 70.

³² Waring v. Crane, 2 Paige (N. Y.), 79, 21 Am. Dec. 70.

³³ Turner v. Turner, 2 Stra. 708.

³⁴ Morgan v. Potter, 157 U. S. 195, 39 L. ed. 670.

³⁵ Woolridge v. McKenna, 8 Fed. 650; *supra*, § 44.

³⁶ Ibid.

³⁷ Pulver v. Leonard, 176 Fed. 586.

³⁸ Ryan v. Philadelphia & Reading Coal & Iron Co., 189 Fed. 253.

§ 91: 1 Rule 87; Hoffman's Ch. Pr. 61.

has a committee authorized by statute to sue in his name.² If the interest of the committee be adverse to that of his ward, the latter should sue by a next friend.³ Although the practice is unsettled, it would be advisable to have the next friend appointed by the court.⁴ Where a volunteer applied for the writ of *habeas corpus* on behalf of a person whom he alleged to be wrongfully confined as a lunatic, the court appointed another guardian *ad litem* with the direction that he examine the facts and use his own discretion in determining whether to continue the proceeding.⁵ If a plaintiff become a lunatic after the institution of a suit, a supplemental bill may be filed in the joint names of the lunatic and of the committee of his estate, which will answer the same purpose as a bill of revivor in procuring the benefit of former proceedings.⁶ If a committee die and a new committee is appointed after a suit has been instituted by the former for the benefit of his idiot or lunatic, the proper way of continuing the suit is by a supplemental bill filed by the idiot or lunatic and the new committee.⁷ In England, a committee usually before the institution of a suit prayed the sanction of the Lord Chancellor by a petition, which was often referred to a master.⁸ Where a bill had been filed in the name of an alleged lunatic under an order of the court, and thereafter the plaintiff appeared by an attorney and moved to dismiss the bill, upon the ground that she was mentally competent; it was held, that the court was not ousted of its jurisdiction, but might inquire into the mental competency of the plaintiff.⁹ It has been said: that in such a case, the issue concerning the mental competency should be determined by a jury; but that it may be decided by

² See *Ortley v. Messere*, 7 Johns. Ch. (N. Y.) 139; *Harrison v. Rowan*, 4 Wash. C. C. 202; *Palmer, Attorney-General, v. Parkhurst*, 1 Chan. Cas. 112; *Gorham v. Gorham*, 3 Barb. Ch. (N. Y.) 24; *Hoffman's Ch. Pr.* 61; *Story's, Eq. Pl.*, § 65, and notes.

³ Compare *Attorney-General v. Tiler*, 1 Dick. 378; *Hoffman's Ch. Pr.* 61.

⁴ Compare *Attorney-General v. Tiler*, 1 Dick. 378; *Hoffman's Ch.*

Pr. 61; *Story's Eq. Pl.*, § 64, and notes.

⁵ *King v. McLean Asylum*, 26 L.R.A. 784, 64 Fed. 331.

⁶ See *Brown v. Clark*, 3 Woodeson's Lect. 378; *Daniell's Ch. Pr.* 108.

⁷ *In re Reynolds*, Shelf on Lun. 417; *Daniell's Ch. Pr.* 108.

⁸ *In re Webb*, Shelf on Lun. 417; *Daniell's Ch. Pr.* 108.

⁹ *Isle v. Cranby*, 199 Ill. 39, 64 L.R.A. 513, 64 N. E. 1065.

the court.¹⁰ If a person of full age is neither an idiot nor a lunatic, and is yet incapable of managing his affairs, the court may appoint a next friend to sue for him.¹¹ If a bill has been filed in the name of a plaintiff, who, at the time of filing it, is in a state of mental incapacity, it may, on motion, be taken off the file,¹² but it has been held that a bill cannot be dismissed upon the motion of the defendant because the complainant was in filing the same dominated by another person, to such an extent that she was not free to exercise her will, when the complainant does not unite in the motion.¹³ If, however, after a suit has been properly instituted, a plaintiff becomes imbecile, the bill cannot for that reason be taken off the file.¹⁴

§ 92. Capacity of foreign executors and administrators to sue. Foreign executors and administrators, under which term are included those appointed in other States than that where the court is held, cannot sue until they have taken out ancillary letters of administration,¹ unless the State statute authorizes such suit; in which case the Federal court will follow the State practice.² This rule forbids an action by a foreign administrator without ancillary letters to recover damages for the death of his intestate within the State where the suit was

¹⁰ Howard v. Skinner, 87 Md. 556, 40 L.R.A. 753; Pyott v. Pyott, 191 Ill. 280.

¹¹ Wartnaby v. Wartnaby, Jac. 377; Owing's Case, 1 Bland (Md.), 370, 373, 17 Am. Dec. 311; Story's Eq. Pl. § 66.

¹² Wartnaby v. Wartnaby, Jac. 377; Story's Eq. Pl., § 66.

¹³ Speckart v. Schmidt, C. C. A., 190 Fed. 499.

¹⁴ Wartnaby v. Wartnaby, Jac. 377.

§ 92. 1 Fenwick v. Sears, 1 Cranch, 259, 2 L. ed. 101; Dixon v. Ramsay, 3 Cranch, 319, 2 L. ed. 453; Doe v. McFarland, 9 Cranch 151, 3 L. ed. 687; Kerr v. Moon, 9 Wheat, 565, 6 L. ed. 161; Mason v. Hartford, Providence & Fishkill R. Co., 19 Fed. 53; Duchesse d'Auby

v. Porter, 41 Fed. 68; Johnson v. Powers, 139 U. S. 156, 158, 35 L. ed. 112, 113; Re Kingsley, 160 Fed. 275; J. B. & J. M. Cornell Co. v. Ward, C. C. A., 168 Fed. 51; Dodge v. Town of North Hudson, 177 Fed. 986; Watkins v. Eaton, C. C. A., 183 Fed. 384; Klug v. Martinsburg Power Co., 229 Fed. 861; St. Bernard v. Shane, 201 Fed. 453; Old Dominion Trust Co. v. First Nat. Bank, 252 Fed. 613' (a curator).

² Hayes v. Pratt, 147 U. S. 557, 37 L. ed. 279; Beaumont v. Beaumont, 144 Fed. 128, under New Jersey Statute; Provident Life & Trust Co. v. Fletcher, 237 Fed. 104 (New York Statute); Public Service Electric Co. v. Post, C. C. A., 257 Fed. 933 (New Jersey Statute).

brought,³ under the Federal Employers Liability Act.⁴ The action may be brought by an ancillary administrator appointed in a State where the employee was not domiciled.⁵ The omission is cured by the issue of ancillary letters at any time before the hearing.⁶ An act of Congress authorizes them to sue without ancillary letters in the District of Columbia.⁷ It has been held: that a foreign administrator, without ancillary letters, may sue to recover damages for the death of his intestate, which took place within the State of his appointment, when the cause of action arises under a statute of such State;⁸ but that a foreign administrator, appointed in the State of his decedent's domicile, cannot sue to recover damages for the death; under a statute of a State where the decedent died, which is different from those where the appointment was made and the suit is brought.⁹ A foreign executor may sue without ancillary letters when the title is vested in him as trustee by devise.¹⁰ A foreign executor or administrator, without ancillary letters, may sue to recover the proceeds of the decedent's estate, which is in the hands of an agent of such personal representative.¹¹

§ 93. Capacity of foreign receivers to sue. Ordinarily a receiver appointed by a foreign court cannot sue to collect a cause of action that belongs to the corporation;¹ even when he brings

³ *J. B. & J. M. Cornell Co. v. Ward*, C. C. A., 168 Fed. 51; *Dodge v. Town of North Hudson*, 177 Fed. 986.

⁴ *Anderson v. Louisville & N. R. Co.*, C. C. A., 210 Fed. 689.

⁵ *St. Bernard v. Shane*, 201 Fed. 453.

⁶ *Hodges v. Kimball* C. C. A., 91 Fed. 845.

⁷ 24 St. at L. 431; *Overby v. Gordon*, 177 U. S. 214, 44 L. ed. 741; *Brownson v. Wallace*, Fed. Cas. No. 2,042, 4 Blatchf. 465.

⁸ *McCarty v. N. Y., L. E. & W. R. Co.*, 62 Fed. 437.

⁹ *Maysville Street R R. & Transfer Co. v. Marvin*, C. C. A., 59 Fed. 91; *Brooks v. Southern Pac. Co.*, 148 Fed. 986.

¹⁰ *De Forest v. Thompson*, 40 Fed. 375.

¹¹ *Moore v. Petty*, C. C. A., 135 Fed. 668.

§ 93. ¹ *Booth v. Clark*, 17 How. 322, 15 L. ed. 164; *Hale v. Allinson*, 188 U. S. 56, 47 L. ed. 380; *Great Western Mining & Mfg. Co. v. Harris*, 198 U. S. 561, 49 L. ed. 1163; *Sterrett v. Ind. Nat. Bank*, 248 U. S. 73; *Burr v. Smith*, 113 Fed. 858; *Hilliker v. Hale*, C. C. A., 117 Fed. 220; *certiorari* denied 188 U. S. 739, 47 L. ed. 677; *Edwards v. National Window Glass Jobbers Ass'n*, 139 Fed. 795; *Covell v. Fowler*, 144 Fed. 535. It has been held: that this rule applies to a receiver appointed by a United States court of bankruptcy. In re

a suit in the name of the corporation itself.² A receiver can never sue in a foreign court, to enforce a cause of action, upon which he could not sue in the courts of the State where he was appointed.³ It has been said: that a defendant to the suit, in which the foreign receiver was appointed, cannot, if he has been duly served with process, dispute the authority of the receiver to sue in a foreign court, at least where the judgment appointing the receiver expressly authorized him to sue in such foreign court.⁴ The fact that the court, which appointed the receiver, gave him leave to sue in another district, does not authorize him there to sue without an ancillary appointment.⁵ It has been held that a foreign receiver cannot obviate this objection by bringing a suit in the name of the corporation,⁶ nor by obtaining *ex parte* an order from the court in which the suit is brought and obtaining a ratification of the appointment by such court.⁷ It has been said: that when the foreign receiver is the statutory successor of a corporation, he can sue in a foreign court without an ancillary appointment.⁸

He can also do so when he has received a voluntary assignment

National Mercantile Agency, 128 Fed. 639.

² Great Western Mining & Mfg. Co. v. Harris, 198 U. S. 561, 49 L. ed. 1163. See, however, Great Western Telegraph Co. v. Purdy, 162 U. S. 329, 40 L. ed. 986.

³ Hale v. Allinson, 188 U. S. 56, 47 L. ed. 380.

⁴ Burr v. Smith, 113 Fed. 858.

⁵ Fowler v. Osgood, 4 L.R.A. (N.S.) 824, 141 Fed. 20.

⁶ Great Western Min. & Mfg. Co. v. Harris, 198 U. S. 561, 25 Sup. Ct. 770, 49 L. ed. 1163; Fairview Fluor Spar & Lead Co. v. Ulrich, C. C. A., 192 Fed. 894; Strout v. United Shoe Machinery Co., 195 Fed. 313; Fairview Fluor Spar & Lead Co. v. Ulrich, C. C. A., 192 Fed. 894; 35 St. at L. 65. See *infra*, §§ 304, 311.

⁷ Fairview Fluor Spar & Lead Co. v. Ulrich, C. C. A., 192 Fed. 894.

⁸ Belfe v. Rundle, 103 U. S. 222,

26 L. ed. 337 (where the statute upon the dissolution of an insurance company vested its assets in the superintendent of the insurance department and the latter was allowed to sue in a foreign jurisdiction); Bernheimer v. Converse, 206 U. S. 516; Avery v. Boston Safe Deposit & Trust Co., 72 Fed. 700; Rogers v. Riley, 80 Fed. 759; Hale v. Hardon, 89 Fed. 283, 287; Hale v. Coffin, 114 Fed. 567; Anderson v. Louisville & N. R. Co., C. C. A., 210 Fed. 689. Irvine v. Baker, 225 Fed. 834; Hopkins v. Lancaster, 254 Fed. 190, holding that the Federal Court is bound by the decision of the courts of the State which appointed the receiver as to the interpretation of the statute. Sterrett v. Second Nat. Bank, 248 U. S. 73. But see Hale v. Allinson, 188 U. S. 56, 69, 47 L. ed. 380, 389.

of the assets of the insolvent;⁹ and where the statute vests in him the right to sue for and collect an assessment upon the stockholders, he is a *quasi* assignee and can maintain such suit in another jurisdiction.¹⁰ Where he has recovered a judgment in the State of his appointment he may maintain an action thereupon in another jurisdiction as a judgment creditor and his description of himself in his pleading as receiver may be disregarded as surplusage;¹¹ but it has been held that in such a case, he cannot sue to recover equitable assets until he has obtained a judgment in the State where they are situated,¹² even though he shows that the debtor has no other property.

A receiver, appointed by a Federal court, can sue in the courts of the State where the Federal district is located.¹³ It seems that a receiver, appointed by a State court, can sue in the Federal court in the same district.¹⁴

§ 94. Who may be defendants. All persons may be made defendants, except the United States, without their consent,¹ or a Territory thereof;² foreign States and sovereigns for acts done in a political capacity;³ "one of the United States by citizens of another State, or by citizens or subjects of any foreign State;⁴" receivers appointed by State courts without the leave of such courts;⁵ and foreign executors and administrators,⁶ unless they have assets within the jurisdiction of the court where

⁹ *Hawkins v. Glenn*, 131 U. S. 319, 33 L. ed. 184; *Lewis v. Clark*, C. C. A., 129 Fed. 570; (where the assignment was made by a foreign receiver to a receiver appointed in another State, who was allowed to sue in a third State).

¹⁰ *Converse v. Hamilton*, 224 U. S. 243, 56 L. ed. 749; *Irvine v. Putnam*, 190 Fed. 321.

¹¹ *McBride v. Oriental Bank*, 200 Fed. 895.

¹² *Trotter v. Lisman*, 199 N. Y. 497.

¹³ *Grant v. Buckner*, 172 U. S. 232, 238, 43 L. ed. 430.

¹⁴ *Porter v. Sabin*, 149 U. S. 473, 37 L. ed. 815.

§ 94. 1 *Carr v. U. S.*, 98 U. S.

433, 25 L. ed. 209; *Kansas v. U. S.*, 204 U. S. 331, 51 L. ed. 510, *infra*, §§ 95-97.

² *Kawananakoa v. Polyblank*, 205 U. S. 349, 51 L. ed. 834.

³ *Duke of Brunswick v. King of Hanover*, 6 Beav. 1; *Hullett v. King of Spain*, 2 Bligh N. R. 31.

⁴ Eleventh Amendment to Constitution.

⁵ *Barton v. Barbour*, 104 U. S. 126, 26 L. ed. 672; *Thompson v. Scott*, 4 Dill, 508; *Express Co. v. Railroad Co.*, 99 U. S. 191, 25 L. ed. 319. See § 314, *infra*.

⁶ *Vaughn v. Northrup*, 15 Pet. 1, 10 L. ed. 639; *Courtney v. Pradt*, 196 U. S. 89, 49 L. ed. 398; s. c., 135 Fed. 818; *Lewis v. Parrish*, C.

the bill is filed,⁷ in which case they are liable, as trustees, to account for the same, to those entitled thereto.⁸ Whether a suit can be brought against the President of the United States is undecided.⁹

§ 95. The United States as a defendant. In general. The United States cannot be sued in any court without their consent.¹ A Territory of the United States, such as the Territory of Hawaii,² or Porto Rico,³ has the same immunity. The District of Columbia has not.⁴ Neither has the city of Manila in the Philippines.⁵ Even if there is no remedy adequate to the

C. A., 115 Fed. 285; *Skiff v. White*, 127 Fed. 175; *Story's Eq. Pl.*, § 179, *infra*, § 109.

⁷*Sandilands v. Inness*, 3 Sim. 363; *McNamara v. Dwyer*, 7 Paige (N. Y.) 239, 32 Am. Dec. 627; *Campbell v. Tousey*, 7 Cow. (N. Y.) 64, *infra*, § 109.

⁸*Lewis v. Parrish*, C. C. A., 115 Fed. 285, *infra*, § 109.

⁹See *Mississippi v. Johnson*, 4 Wall. 475, 18 L. ed. 437; *People ex rel. Broderick v. White*, 156 N. Y. 136, 4 L.R.A. 231, 66 Am. St. Rep. 547, and cases cited.

§ 95. ¹*Carr v. U. S.*, 98 U. S. 433, 25 L. ed. 209; *Kansas v. U. S.*, 204 U. S. 331, 51 L. ed. 510.

²*Kawananakoa v. Polyblank*, 205 U. S. 349, 353, 51 L. ed. 834, 836; per *Holmes, J.*: "Some doubts have been expressed as to the source of the immunity of a sovereign power from suit without its own permission, but the answer has been public property since before the days of Hobbes. (*Leviathan*, c. 26, 2.) A sovereign is exempt from suit, not because of any formal conception or obsolete theory, but on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends. '*Car on peut bien recevoir loy*

d'autrui, mais il est impossible par nature de se donner loy.' *Bodin*, *Republique*, 1, c. 8. Ed. 1629, p. 132. *Sir John Eliot, De Jure Maiestatis*, c. 3. *Nemo suo statuto ligatur necessitate. Baldus, De Leg. et Const., Digna Vox* (2d ed., 1496, fol. 51b. Ed. 1539, fol. 61). As the ground is thus logical and practical, the doctrine is not confined to powers that are sovereign in the full sense of judicial theory, but naturally is extended to those that in actual administration originate and change at their will the law of contract and property, from which persons within the jurisdiction derive their rights. A suit presupposes that the defendants are subject to the law invoked. Of course it cannot be maintained unless they are so."

³*Porto Rico v. Rosaly*, 227 U. S. 270; *Porto Rico v. Ramos*, 232 U. S. 627; *Porto Rico v. Emmanuel*, 235 U. S. 251; *Veitia v. Fortuna Estates*, C. C. A., 240 Fed. 256; *Soler v. Scoville*, C. C. A., 253 Fed. 932.

⁴*Metropolitan R. R. Co. v. District of Columbia*, 132 U. S. 1, 33 L. ed. 231.

⁵*Vilas v. City of Manila*, 220 U. S. 345, 55 L. ed. 491.

collection of a claim against a municipality when reduced to judgment, a plaintiff having a valid claim is entitled to maintain an action thereupon and to reduce the same to judgment against it.⁶

The United States may waive their exemption from suit by statute,⁷ but not by the act of any of their officers.⁸ A Territory waives exemption by the appearance of the Territorial Attorney General⁹ or by failing to object to the jurisdiction.¹⁰ When the United States institute a suit, they waive their exemption so far as to allow a presentation by the defendant of any set-off, legal and equitable, to the extent of the demand made or property claimed.¹¹ No affirmative judgment then can be entered by the defendant, upon his set off or counterclaim.¹²

The Revised Statutes provide: "In suits brought by the United States against individuals, no claim for a credit shall be admitted, upon trial, except such as appear to have been presented to the accounting officers of the Treasury, for their examination, and to have been by them disallowed, in whole or in part, unless it is proved to the satisfaction of the court that the defendant is, at the time of the trial, in possession of vouchers not before in his power to procure, and that he was prevented from exhibiting

⁶ *Mount Pleasant v. Beckwith*, 100 U. S. 514, 530, 25 L. ed. 699, 703; *Vilas v. City of Manila*, 220 U. S. 345, 352, 55 L. ed. 491, 494. It has been held that the National Home for Disabled Volunteer Soldiers, in Tennessee, a charitable institution engaged as an agency of the Federal Government in the discharge of a governmental function, is not subject to an action sounding in tort to recover damages for the negligence of its officers in diverting and polluting the waters of plaintiff's spring; since the power "to sue and to be sued at law and in equity," conferred on the corporation by its charter (U. S. R. S., § 4825, Comp. St. 1901, p. 3337), is limited to matters within the scope of the other corporate powers with which it is vested. *Lyle v.*

National Home for Disabled Volunteer Soldiers, 170 Fed. 842.

⁷ *U. S. v. Clarke*, 8 Pet. 436, 8 L. ed. 1001; *The Siren*, 7 Wall. 152, 19 L. ed. 129.

⁸ *Carr v. U. S.*, 98 U. S. 433, 25 L. ed. 209.

⁹ *Porto Rico v. Ramos*, 232 U. S. 627; *Veitia v. Fortuna Estates*, C. C. A., 240 Fed. 256.

¹⁰ *Kawananakoa v. Polyblank*, 205 U. S. 349, 353, 51 L. ed. 834, 836; *Porto Rico v. Emmanuel*, 235 U. S. 251; *Richardson v. Fajardo Sugar Co.*, 241 U. S. 44.

¹¹ *Reeside v. Walker*, 11 How. 272, 13 L. ed. 693; *U. S. v. Kerr*, 196 Fed. 503.

¹² *Reeside v. Walker*, 11 How. 272, 13 L. ed. 693; *New York v. Dennison*, 84 N. Y. 272.

a claim for such credit at the Treasury by absence from the United States or by some unavoidable accident." ¹³ It has been held that this applies to all counterclaims against the United States. ¹⁴

When the United States proceed *in rem*, they open to consideration all claims and equities in regard to the property libeled. ¹⁵ Where property of the United States is involved in a litigation to which they are not technically parties, the attorney for the district where the suit is brought may intervene by way of suggestion; and in such a case the court will either stay the suit or adjust its judgment according to the rights disclosed on the part of the government; ¹⁶ but no judgment can then be entered against the United States for costs or divest them of their title to property. ¹⁷

A suit against the United States Shipping Board or the United States Emergency Fleet Corporation ¹⁸ or against a railroad company ¹⁹ or telegraph company ²⁰ while under Federal control is not a suit against the United States, provided that no property of the defendant is seized by writ or other process. ²¹

By the Transportation Act of February 28, 1920, "Actions

¹³ U. S. R. S., § 951.

¹⁴ U. S. v. Kerr, 196 Fed. 503.

¹⁵ Mr. Justice Field in *The Siren*, 7 Wall. 152, 154; *Walker v. U. S.*, 139 Fed. 409. A more liberal rule against the government is suggested in *Fifth Nat. Bank v. Long*, 7 Biss. 502; *Elliot v. Van Voorst*, 3 Wall. Jr. 299; *Briggs v. The Light Boats*, 11 Allen (Mass.), 157; *Stanley v. Schwalby*, 162 U. S. 255, 272. In *U. S. v. Ansonia Brass & Copper Co.*, 218 U. S. 452, it was held that certain stipulations made by a District Attorney of the United States, in order to obtain possession of vessels seized by judicial proceedings while in the course of construction, should not be construed as depriving the Government of any rights asserted under the contracts for such construction.

¹⁶ *Stanley v. Schwalby*, 147 U. S. 508, 513; *The Exchange*, 7 Oranch, 116, 147. But see *Stanley v. Schwalby*, 162 U. S. 255.

¹⁷ *Stanley v. Schwalby*, 162 U. S. 255, 272. *Infra*, § 105.

¹⁸ *Gould Coupler Co. v. U. S. Shipping Board Emergency Fleet Corporation* (S. D. N. Y.), 261 Fed. 716. But see *Commonwealth Furnace Corp'n v. Landis* (E. D. Pa.) 261 Fed. 440.

¹⁹ *Muir v. Louisville & N. R. Co.* 247 Fed. 888; *Cocker v. N. Y. & O. Ry. Co.*, 253 Fed. 676; *Harnick v. Pennsylvania R. Co.*, 254 Fed. 748; *infra*, § 96i.

²⁰ *Witherspoon & Sons v. Postal Telegraph & Cable Co.*, 267 Fed. 758. See *infra*, § 96j.

²¹ *Commonwealth Furnace Corp'n v. Landis* (E. D. Pa.), 261 Fed. 440.

at law, suits in equity and proceedings in admiralty, based on causes of action arising out of the possession, use, or operation by the President of the railroad or system of transportation of any carrier (under the provisions of the Federal Control Act, or the Act of August 29, 1916) of such character as prior to Federal control could have been brought against such carrier may, after the termination of Federal control, be brought against an agent designated by the President for such purpose, which agent shall be designated by the President within thirty days after the passage of this act. Such actions, suits, or proceedings may, within the periods of limitation now prescribed by State or Federal statutes but not later than two years from the date of the passage of this act, be brought in any court which but for Federal control would have had jurisdiction of the cause of action had it arisen against such carrier.

"Process may be served upon any agent or officer of the carrier operating such railroad or system of transportation, if such agent or officer is authorized by law to be served with process in proceedings brought against such carrier and if a contract has been made with such carrier by or through the President for the conduct of litigation arising out of operation during Federal control. If no such contract has been made process may be served upon such agents or officers as may be designated by or through the President. The agent designated by the President under subdivision (a) shall cause to be filed, upon the termination of Federal control, in the office of the Clerk of each District Court of the United States, a statement naming all carriers with whom he has contracted for the conduct of litigation arising out of operation during Federal control, and a like statement designating the agents or officers upon whom process may be served in actions, suits, and proceedings arising in respect to railroads or systems of transportation with the owner of which no such contract has been made; and such statements shall be supplemented from time to time, if additional contracts are made or other agents or officers appointed.

"Complaints praying for reparation on account of damage claimed to have been caused by reason of the collection or enforcement by or through the President during the period of Federal control of rates, fares, charges, classifications, regulations, or practices (including those applicable to interstate, for-

eign, or intrastate traffic) which were unjust, unreasonable, unjustly discriminatory, or unduly or unreasonably prejudicial, or otherwise in violation of the Interstate Commerce Act, may be filed with the Commission, within one year after the termination of Federal control, against the agent designated by the President under subdivision (a), naming in the petition the railroad or system of transportation against which such complaint would have been brought if such railroad or system had not been under Federal control at the time the matter complained of took place. The Commission is hereby given jurisdiction to hear and decide such complaints in the manner provided in the Interstate Commerce Act, and all notices and orders in such proceedings shall be served upon the agent designated by the President under subdivision (a).

"Actions, suits, proceedings, and reparation claims, of the character above described pending at the termination of Federal control shall not abate by reason of such termination, but may be prosecuted to final judgment, substituting the agent designated by the President under subdivision (a).

"Final judgments, decrees, and awards in actions, suits, proceedings, or reparation claims, of the character above described, rendered against the agent designated by the President under subdivision (a), shall be promptly paid out of the revolving fund created by section 210.

"The period of Federal control shall not be computed as a part of the periods of limitation in actions against carriers or in claims for reparation to the Commission for causes of action arising prior to Federal control.

"No execution or process, other than on a judgment recovered by the United States against a carrier, shall be levied upon the property of any carrier where the cause of action on account of which the judgment was obtained grew out of the possession, use, control, or operation of any railroad or system of transportation by the President under Federal control."

The Act of March 9, 1920, authorizes libels and cross-libels *in personam* to be filed against vessels owned by the United States or by corporations, a majority of the stock in which is owned by the United States. This statute will be quoted in the Chapter on Admiralty.

Whether the United States is a legal effective party is de-

terminated not by the record but by the effect of the decree which is sought.²³

§ 96. Liability of the United States to suits for the recovery of money upon contract. The Judicial Code provides: District Courts of the United States shall have jurisdiction, "Concurrent with the Court of Claims, of all claims not exceeding ten thousand dollars founded upon the Constitution of the United States or any law of Congress, or upon any regulation of an Executive Department, or upon any contract, express or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect to which claims the party would be entitled to redress against the United States, either in a court of law, equity, or admiralty, if the United States were suable, and of all set-offs, counterclaims, claims for damages, whether liquidated or unliquidated, or other demands whatsoever on the part of the Government of the United States against any claimant against the Government in said court: *Provided, however,* That nothing in this paragraph shall be construed as giving to either the district courts or the Court of Claims jurisdiction to hear and determine claims growing out of the late Civil War, and commonly known as 'war claims,' or to hear and determine other claims which had been rejected or reported on adversely prior to the third day of March, eighteen hundred and eighty-seven, by any court, department, or commission authorized to hear and determine the same, or to hear and determine claims for pensions; or as giving to the district courts jurisdiction of cases brought to recover fees, salary, or compensation for official services of officers of the United States or brought for such purpose by persons claiming as such officers or as assignees or legal representatives thereof; but no suit pending on the twenty-seventh day of June, eighteen hundred and ninety-eight, shall abate or be affected by this provision: *And provided further,* That no suit against the Government of the United States shall be allowed under this paragraph unless the same shall have been brought within six years after the right accrued for which the claim is made: *Provided,* That the claims of married women, first accrued during marriage, of persons

²³ *Louisiana v. McAdoo*, 234 U. S. 129, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

under the age of twenty-one years, first accrued during minority, and of idiots, lunatics, insane persons, and persons beyond the seas at the time the claim accrued, entitled to the claim, shall not be barred if the suit be brought within three years after the disability has ceased; but no other disability than those enumerated shall prevent any claim from being barred, nor shall any of the said disabilities operate cumulatively. All suits brought and tried under the provisions of this paragraph shall be tried by the court without a jury."¹ This withholds from the District Courts jurisdiction over all claims against the United States which exceed ten thousand dollars and all cases brought to recover fees, salary or compensation for the services of officers. In such cases, suit must be brought in the Court of Claims;² but it has been held that the District Courts have jurisdiction of suits to recover disbursements made by marshals in payment of the services of court bailiffs,³ and the expense allowances of Circuit Judges.⁴

Actions for similar causes may be brought in the District Court of the United States for Porto Rico.⁵

It is doubtful whether an alien corporation can maintain such a suit in any court.⁶ It has been doubted whether an alien corporation can bring such a suit in a District Court.⁷ But the Circuit Court of Appeals for the Second Circuit has held that it may do so.⁸

"The words 'hear and determine' are used four times,—once as applied to the Court of Claims, twice as applied to that court and to the Circuit and District Courts, and again as applied to any court, department, or commission. These words must be taken to be used in each instance in the same sense, and as imply-

§ 96. 136 St. at L. 1087, § 24, subd. twentieth. This is practically a re-enactment of the Tucker act, passed in 1887, as subsequently amended 24 St. at L. 505, 30 St. at L. 494.

² *Infra*, Chapter XXXV on Court of Claims.

³ U. S. v. Swift, C. C. A., 139 Fed. 225.

⁴ Archbald v. United States, 217 Fed. 165.

⁵ Hijo v. U. S., 194 U. S. 315, 48 L. ed. 994.

⁶ Hijo v. U. S., 194 U. S. 315, 48 L. ed. 994.

⁷ *Ibid*.

⁸ U. S. v. N. Y. & O. S. S. Co., C. C. A., 216 Fed. 61, 69. *Contra*, Reid Wrecking Co. v. U. S., 202 Fed. 314. See *infra*, §§ 671, 672.

ing an adjudication conclusive as between the parties, in the nature of a judgment or award. The proviso that nothing in this section shall be construed as giving to either of the courts named in the act jurisdiction to hear and determine claims 'which have heretofore been rejected or reported on adversely by any court, department, or commission authorized to hear and determine the same,' must be limited to a rejection of a claim, or an adverse report thereon, by a court, department, or commission which determines the rights of the parties, such as the approval by the Secretary of the Treasury of an account of expenses under the captured and abandoned property act,⁹ or the decisions of an international commission. Moreover, the Court of Claims, even before the passage of the Act of 1887, had jurisdiction of Claims under an act of Congress or under a contract, and could therefore hear and determine claims for legal salaries or fees.¹⁰ We cannot believe that the Act of 1887, entitled 'An act to provide for the bringing of suits against the government of the United States,' the manifest scope and purpose of which are to extend the liability of the government to be sued, was intended to take away a jurisdiction already existing, and to give to the decisions of accounting officers an authority and effect which they never had before."¹¹ Consequently, the rejection of a claim by the First Comptroller of the Treasury, which is only conclusive within the Department of the Treasury, is not a bar to such a suit.¹²

§ 96a. Suits against the United States for torts and upon implied contracts when a tort is waived. It has been said: that the words "in cases not sounding in tort" limit only the last part of the clause, and do not affect claims founded upon the Constitution of the United States or a law of Congress.¹ With the exception of claims for the proceeds of captured or abandoned prop-

⁹ U. S. v. Johnson, 124 U. S. 236, 31 L. ed. 389, 8 Sup. Ct. R. 446.

¹⁰ Meade v. U. S., 9 Wall. 691, 19 L. ed. 687.

¹¹ Meade v. U. S., 18 Ct. Cl. 281; s. c., 109 U. S. 146; Adams v. U. S., 20 Ct. Cl. 115; U. S. v. McDonald, 128 U. S. 471, 32 L. ed. 506; U. S. v. Jones, 131 U. S. 1, 13.

¹² U. S. v. Harmon, 147 U. S. 268; s. c. as Harrison v. U. S. 41 Fed. 560; U. S. v. Rand, C. C. A., 53 Fed. 348; U. S. v. Jones, 131 U. S. 1, 13, 33 L. ed. 90.

§ 96a. 1 Dooley v. U. S., 182 U. S. 222, 45 L. ed. 1074; U. S. v. Lynah, 188 U. S. 445, 475, 47 L. ed. 539, 550.

erty and others arising under special statutes, the courts have no jurisdiction of claims upon torts committed by the United States,² except where the claimant can waive the tort and sue upon an implied contract,³ or where the case arises under the Constitution or a law of the United States.⁴ The United States is not liable for damages caused by the negligence of a government contractor.⁵ The United States are not liable for injury

² "There can be no reasonable doubt that this limitation to cases of contract, express or implied, was established in reference to the distinction between actions arising out of contracts, as distinguished from those founded on torts, which is inherent in the essential nature of judicial remedies under all systems, and especially under the system of the common law. The reason of this restriction is very obvious on a moment's reflection. While Congress might be willing to subject the Government to the judicial enforcement of valid contracts, which could only be valid as against the United States when made by some officer of the Government acting under lawful authority, with power vested in him to make such contracts, or to do acts which implied them, the very essence of a tort is that it is an unlawful act done in violation of the legal rights of some one. For such acts, however high the position of the officer or agent of the Government who did or commanded them, Congress did not intend to subject the Government to the results of a suit in that court. This policy is founded in wisdom, and is clearly expressed in the act defining the jurisdiction of the court; and it would ill become us to fritter away the distinction between actions *ex delicto* and actions *ex contractu*, as well understood in our system of jurisprudence, and

thereby subject the Government to payment of damages for all the wrongs committed by its officers or agents, under a mistaken zeal, or actuated by less worthy motives." Miller, J., in *Langford v. U. S.*, 101 U. S. 341, 25 L. ed. 1010.

Where a statute which authorized a suit against the United States for a continuous tort was repealed pending such suit, it was held that the damages sustained up to the time of the repeal only could be recovered. *Paine L. Co. v. U. S.*, 55 Fed. 854.

³ *Ingram v. U. S.*, 32 Ct. Cl. 147, 162, per Nott, C. J.: "The common law reduces all civil actions between individuals to two simple classes, *ex contractu* and *ex delicto*. There are many subdivisions of the former; but generally it may be said that what is not *ex delicto* is *ex contractu*. It is the opinion of this court that Congress used the language 'upon any contract, expressed or implied,' with reference to this general classification of the common law. The meaning is that the court shall have jurisdiction of all actions *ex contractu* whether the contract be express or implied, but shall not have jurisdiction of actions *ex delicto*."

⁴ *Dooley v. U. S.*, 182 U. S. 222, 45 L. ed. 1074; *Lincoln v. U. S.*, 197 U. S. 419, 49 L. ed. 816.

⁵ *U. S. v. Riffe Co.*, 247 Fed. 374.

resulting from the negligence of their officers to those who are not in a contractual or a *quasi-contractual* relation with them.⁶ A person injured by the negligence of a government employee operating an elevator cannot waive the tort and sue the United States upon an implied contract to carry him with care.⁷ Where the Register of the Treasury canceled registered bonds without authority of law, a party who bought them on the faith of such cancellation and subsequently was obliged to repay their value to the original owner, was not allowed to recover from the United States the amount for which he was thus mulcted.⁸ An action for the unlawful seizure of private property for the use of the army sounds in tort and the courts have no jurisdiction of the same.⁹ Where a suit was brought by an army officer against the United States for indemnity because of his payment of a judgment recovered against him on account of his seizure and use of a boat for the benefit of the government under the orders of his superior officer; it was held that, if the liability of the United States was in tort, no action would lie, and that if the liability was upon an implied contract, it arose when the seizure was made, not when the judgment was recovered.¹⁰ Damages have been awarded against the government for the use of a vessel impressed during the Spanish War.¹¹ The liability of the United States and of officers thereof for damages to real estate,¹² for infringement of patents¹³ and for taxes illegally collected,¹⁴ is subsequently considered.

§ 96b. Suits against the United States for damages for use of, and injury to, real property. A suit may be brought against the United States to recover damage to property leased by the Government and injured by want of reasonable care while in its

⁶ *German Bank of Memphis v. U. S.*, 148 U. S. 573, 37 L. ed. 564; *Occidental Const. Co. v. U. S.*, C. C. A., 245 Fed. 817.

⁷ *Bigby v. U. S.*, 188 U. S. 400, 47 L. ed. 519.

⁸ *German Bank of Memphis v. U. S.*, 148 U. S. 573, 37 L. ed. 564.

⁹ *Herrera v. U. S.*, 222 U. S. 558, 55 L. ed. 316.

¹⁰ *Carpenter v. U. S.*, 42 Fed. 264.

¹¹ *Neal's Case*, 36 Ct. Cl. 49. See *U. S. v. Russell*, 13 Wall. 623, 20 L. ed. 474.

¹² *Infra*, § 96b.

¹³ *Infra*, § 100 and Chapter XXXV on the Court of Claims.

¹⁴ *Infra*, § 96f.

possession,¹ but not, it has been held, when the Federal agent who made the lease was acting without authority.²

When the Government of the United States, by such formal proceedings as are necessary to bind it, takes for public use land to which it asserts no claim or title, but admits the ownership to be private or individual, there arises an implied obligation to pay the owner its true value,³ unless Congress has provided for the payment of the same, in which case no more can be recovered, although the owner has protested.⁴ It has been held: that an action will lie to recover damages to land, to which the Government claims no title, if the same is permanently flooded⁵ or permanently subjected to periodical floods⁶ by a work, such as a dam built on adjoining land, under the direction of an Act of Congress; but that it is not liable for damages caused by temporary floods to land which was previously subject to overflow in time of freshets, although increased by a Government dam on adjacent land,⁷ or by revetments erected by the Government along the banks of a river to prevent erosion from natural causes,⁸ and that where the Government has agreed to furnish a coffer dam to a contractor for the construction of a public work, it is liable for damage caused by negligence in the construction of the dam, although there was no stipulation in the contract to the effect.⁹ Not for damages by dredging to land artificially submerged when the Government had acted

§ 96b. ¹ *Bryan v. U. S.*, 6 Ct. Cl. 128; *McGowan v. U. S.*, 20 Ct. Cl. 147.

² *Occidental Const. Co. v. U. S.*, C. C. A., 245 Fed. 817.

³ *Langford v. U. S.*, 101 U. S. 341, 25 L. ed. 1010. See *Hill v. U. S.*, 149 U. S. 593, 37 L. ed. 862; *Great Falls Mfg. Co. v. Att'y Gen.*, 124 U. S. 581, 31 L. ed. 527; *U. S. v. Russell*, 13 Wall. 623, 20 L. ed. 474; *Grant v. U. S.*, 1 Ct. Cl. 41; *Hollister v. Benedict & B. Mfg. Co.*, 113 U. S. 59, 67, 28 L. ed. 901, 903; *Mills v. U. S.*, 19 Ct. Cl. 79; *Kettler v. U. S.*, 21 Ct. Cl. 175; *Alexander's Case*, 39 Ct. Cl. 383 (land used for a camp); *Philippine Sugar Estates Development Co. v. U. S.*, 40 Ct. Cl. 33.

⁴ *Hoe v. U. S.*, 218 U. S., 322, 54 L. ed. 1055.

⁵ *U. S. v. Lynah*, 188 U. S. 445, 47 L. ed. 539; *U. S. v. Welch*, 217 U. S. 333; *U. S. v. Grizzard*, 219 U. S. 180, 55 L. ed. 165, 31 L.R.A. (N.S.) 1135.

⁶ *U. S. v. Cress*, 243 U. S. 316.

⁷ *Coleman v. U. S.*, 181 Fed. 599.

⁸ *Bedford v. U. S.*, 192 U. S. 217, 48 L. ed. 414. See *Manigault v. Springs*, 199 U. S. 473, 485, 50 L. ed. 274, 280; *Mills v. U. S.* 46 Fed. 738.

⁹ *Collins & Farwell v. U. S.*, 34 Ct. Cl. 294.

under the belief that it was part of a navigable river.¹⁰ When damages for the flooding of land are allowed they include the value of a private right of way to other land of plaintiffs, which is thus destroyed,¹¹ and the loss of an easement of access from other land of the plaintiff to a public road.¹² When the navigable channel of a river was widened by an Act of Congress damages were allowed against the United States for the consequent partial destruction of piers.¹³ The location of a battery is not an appropriation of property over which the guns are fired in artillery practice during peace or war.¹⁴ Whenever there has been an actual physical taking of part of a distinct tract of land, the compensation to be awarded includes not only the market value of so much as is actually appropriated, but also the damage to the remainder which therefrom results, including injury due to the probable use to which the part appropriated is to be devoted by the Government;¹⁵ but damage resulting to adjacent but distinct parcels of land has been denied.¹⁶ In a proceeding to condemn the locks and dams of a corporation, the value of the franchise to take tolls for their use must be included in the compensation.¹⁷ Before the Tucker act, it was held: that, when the United States takes possession of property, asserting a title hostile to that of the true owner, such owner cannot recover, in a suit in any court, the reasonable value of its use, or the reasonable value of the fee of the same.¹⁸ Whether the Tucker act¹⁹ has changed this rule has not yet been authoritatively decided.²⁰

¹⁰ *Tempel v. U. S.*, 248 U. S. 121.

¹¹ *U. S. v. Welch*, 217 U. S. 333, 54 L. ed. 787, 28 L.R.A. (N.S.) 385, 19 Ann Cas. 680.

¹² *U. S. v. Grizzard*, 219 U. S. 180, 55 L. ed. 165, 31 L.R.A. (N.S.) 1135.

¹³ *Greenleaf Johnson Lumber Co. v. U. S.*, 204 Fed. 489.

¹⁴ *Peabody v. U. S.*, 231 U. S. 530; *Portsmouth Harbor Land & Hotel Co. v. U. S.*, 250 U. S. 1.

¹⁵ *U. S. v. Grizzard*, 219 U. S. 180, 55 L. ed. 165, 31 L.R.A. (N.S.) 341.

¹⁶ *Sharp v. U. S.*, 191 U. S. 341, 353, 48 L. ed. 211, 215.

¹⁷ *Monongahela Navigation Co. v.*

U. S., 148 U. S. 312, 315, 37 L. ed. 463, 464.

¹⁸ *Langford v. U. S.*, 101 U. S. 341, 25 L. ed. 1010.

¹⁹ 24 St. at L. 505; 30 St. at L. 494, Jud. Code, § 24, quoted *supra*, § 96.

²⁰ *U. S. v. Lynah*, 188 U. S. 445, 474, 47 L. ed. 539, 550; where Brown, J., with the concurrence of Shiras and Peckham, JJ., expressed the opinion: that a case of trespass upon real estate by the government, was a taking of property within the meaning of the Fifth Amendment to the Constitution of the United States, and was the subject of an

When the claim is not based upon the Constitution, or a law of the United States, or a department regulation, it must "be founded on a convention between the parties, a coming together of minds."²¹ It has been said that to constitute an implied contract upon which a suit can be brought, "there must have been some consideration moving to the United States, or they must have received the money charged with a duty to pay it over; or the claimant must have had a lawful right to it when it was received, as in the case of money paid by mistake."²²

§ 96c. Suits against the United States for damages for use of, and injury to, personal property. A similar rule is applied to the action of the Government in regard to personal property. Where Congress has given the authority necessary for certain work and property for use in such work is left with the officer in charge by the owner whose title is not disputed, upon the representation that payment will be recommended for such use; an implied contract arises on the part of the Government to pay its value.¹ But the Government is not liable to pay for damages caused by the negligence of an agent of the United States to mules hired by him without authority.² Suits may be brought against the United States, by a contractor for extra work done by him under the direction of a government agent authorized to order the same, and for damages for an improper interference by such agent with the fulfillment of the contract,³ to recover the value of property delivered in pursuance of an express

action under the Tucker act. See *Dooley v. U. S.*, 182 U. S. 222, 45 L. ed. 1074; *Hoe v. U. S.*, 218 U. S. 322, 54 L. ed. 1055. But see *U. S. v. Lynah*, 188 U. S. 445, 47 L. ed. 539; *U. S. v. Welch*, 217 U. S. 333, 54 L. ed. 787, 28 L.R.A. (N.S.) 385, 19 Ann. Cas. 680; *U. S. v. Grizzard*, 219 U. S. 180, 55 L. ed. 165, 31 L.R.A. (N. S.) 1135.

²¹ *Harley v. U. S.*, 198 U. S. 229, 234, 49 L. ed. 1029, 1030. The retention without express rejection of a proposal, although the proposal purports to be an assignment, does not amount to an acceptance of the same, when it expressly states that

it shall not bind the proposer unless accepted by the officer before a specified date, and it was in answer to an advertisement stating that the proposals were for investigation and estimate and that the advertising officer had no authority to contract for the expenditure of money. *Beach v. U. S.*, 226 U. S. 243, 57 L. ed. —.

²² *Knote v. U. S.*, 95 U. S. 149, 157, 24 L. ed. 442, 444.

¹ *96c. 1 U. S. v. Buffalo Pitts Co.*, 234 U. S. 228.

² *Occidental Const. Co. v. U. S.*, C. C. A., 245 Fed. 817.

³ *Bowe v. U. S.*, 42 Fed. 761.

contract which is void;⁴ but not, it has been held, for negligence to property hired by an agent of the Government without authority;⁵ to recover for salvage services,⁶ including maritime services in saving property, upon which duties had been paid that the government might otherwise have been obliged to refund,⁷ and for the share of general average reasonably due.⁸

§ 96d. Suits against the United States for money had and received through mistake. Suits may be brought to recover money paid to a public officer under a mutual mistake of fact,¹ but not money paid under a mutual mistake of law;² to recover the purchase price paid upon void entries of public land;³ to recover money paid a land officer as part payment for a certificate of entry which he refuses to deliver, the consideration for the payment thus failing⁴ to recover money of the claimant received by the United States for other purposes, and appropriated by them for the payment of an illegal tax;⁵ to recover money of the claimant obtained and paid into the Treasury by a fraud perpetrated by an officer of the United States.⁶

§ 96e. Suits against the United States to recover money paid under duress. Suits may be brought against the United States to recover money paid under a void judgment of a military commission¹ or a fine illegally imposed by a provisional court² or taxes which have been illegally collected by compulsion;³ provided that in the last class of cases a contemporary protest or notice was given by the tax-payer.⁴

⁴ U. S. v. Bostwick, 94 U. S. 53, 24 L. ed. 65.

⁵ Occidental Constr. Co. v. U. S., C. C. A., 245 Fed. 817.

⁶ U. S. v. Cornell Steamboat Co., 202 U. S. 184, 50 L. ed. 987; affirming, C. C. A., 137 Fed. 455.

⁷ Brown v. U. S., 15 Ct. Cl. 392.

⁸ Bowe v. U. S., 42 Fed. 761.

¹ § 96d. 1 U. S. v. Edmonston, 181 U. S. 500, 45 L. ed. 971; U. S. v. Wilson, 168 U. S. 273, 42 L. ed. 464; U. S. v. Lawson, 101 U. S. 164, 25 L. ed. 860.

² Emmons v. U. S., 42 Fed. 26.

³ Slocum v. U. S., 35 Ct. Cl. 485;

Anthracite Mesa Coal Min. Co. v. U. S., 38 Ct. Cl. 56, 63.

⁴ Johnston v. U. S., 17 Ct. Cl. 157.

⁵ U. S. v. State Bank, 96 U. S. 30, 24 L. ed. 647.

⁶ Heathfield v. U. S., 8 Ct. Cl. 213.

¹ § 96e. 1 Basso's Case, 40 Ct. Cl. 202.

² U. S. v. Shipley, C. C. A., 197 Fed. 265.

³ Swift Co. v. U. S., 111 U. S. 22, 28 L. ed. 341.

⁴ Swift Co. v. U. S., 111 U. S. 22, 28 L. ed. 341; Christie Street Com-

Duress exists when taxes of either internal revenue taxes or duties upon imports have been illegally exacted and paid under protest and the payment was necessary to avoid stopping the business in which the plaintiff was engaged.⁵ Or where drastic penalties are imposed for their non-payment and due protest upon their payment was made.⁶ Suits cannot be brought against the United States to recover taxes paid voluntarily without any contemporary protest or notice of objection,⁷ nor money paid for the purchase of revenue stamps under similar circumstances.⁸ Neither a statute imposing a tax, nor execution thereunder, nor a mere demand for payment, constitutes duress; but where the statute contains self-operating provisions, by which non-payment of the tax results in heavy penalties and a forfeiture of the right to do business, payment by one within the class affected is not voluntary but compulsory.⁹ In such a case, payment by one not included in such a class is not made under duress.¹⁰ The refusal, by a recorder, to accept a deed without the revenue stamps,¹¹ and the refusal of the collector to give to a ship a clearance without such stamps;¹² do not constitute such duress as will authorize a suit to recover the taxes, when there was no contemporary protest or notice, although the statute made the omission of the stamps a misdemeanor.¹³ Where one protest has been duly made, subsequent protests against similar exactions are not necessary.¹⁴ A subsequent application to the internal revenue commissioner for a return of the money paid for the stamps is not equivalent to a contemporary protest or notice.¹⁵ The payment of an inherit-

mission Co. v. U. S., C. C. A., 136 Fed. 326, reversing 129 Fed. 506; Devlin v. U. S., 12 Ct. Cl. 266; Simons v. U. S., 19 Ct. Cl. 601.

⁵ Ewers v. Weaver, 182 Fed. 713; Emery, Bird, Thayer Realty Co. v. U. S., 198 Fed. 242; Swift Co. v. U. S., 111 U. S. 22, 28 L. ed. 341; Christie Street Commission Co. v. U. S., C. C. A., 136 Fed. 326; reversing 129 Fed. 506. See N. Y. Consol. Card Co. v. U. S., 20 Ct. Cl. 174.

⁶ International Paper Co. v. Burrill, 260 Fed. 664.

⁷ Chesebrough v. U. S., 192 U. S. 253, 48 L. ed. 432; U. S. v. New

York & Cuba Mail S. S. Co., 200 U. S. 488, 50 L. ed. 569.

⁸ Ibid.

⁹ Gaar, Scott & Co. v. Shannon, 223 U. S. 468, 56 L. ed. 510.

¹⁰ Ibid.

¹¹ Chesebrough v. U. S., 192 U. S. 253, 48 L. ed. 432.

¹² U. S. v. N. Y. & Cuba Mail S. S. Co., 200 U. S. 488, 50 L. ed. 569.

¹³ Chesebrough v. U. S., 192 U. S. 253, 48 L. ed. 432.

¹⁴ Johnson v. Herold, 161 Fed. 593.

¹⁵ Herold v. Kahn, C. C. A., 159 Fed. 608.

ance tax under protest, after a threat by the collector that, unless promptly paid, it would be collected with a penalty and interest of one per cent a month, was held to be involuntary and to justify a suit against the internal revenue collector to recover the same.¹⁶ It seems that a suit will lie against the United States to recover excess postage paid under protest¹⁷ and that one might lie against the Postmaster under the same circumstances.¹⁸

§ 96f. Suits against the United States to recover taxes unlawfully collected. Suits may be brought against the United States to recover taxes which a statute has directed the Secretary of Treasury to refund,¹ provided that the conditions imposed by the statute are fulfilled; but not otherwise.² Such suits arise under the Constitution and laws of the United States.³ The value of the matter in dispute is immaterial to the jurisdiction of the District Court.⁴

A party who has paid illegal taxes to an officer of the United States under protest may waive the tort and sue to recover the money under an implied contract.⁵ It has been held: that an action will lie against the United States for the recovery of duties illegally exacted upon merchandise, which is alleged not to have been imported from a foreign country, when the construction of the Constitution of the United States⁶ or of an act of Congress,⁷ was involved; to recover revenue taxes illegally exacted and paid under protest, when the payment was necessary to avoid stopping the business in which the plaintiff was engaged,⁸ and fines

¹⁶ *Simons v. U. S.*, 19 Ct. Cl. 601.

¹⁷ *Lewis Pub. Co. v. Wyman*, C. C. A., 182 Fed. 13, 17, 18.

¹⁸ *Ibid.*

§ 96f. ¹ *U. S. v. Hvoslef*, 237 U. S. 1; *Nelson v. U. S.*, 35 Ct. Cl. 427; *Ingram v. U. S.*, 32 Ct. Cl. 147.

² *Coleman v. U. S.*, 250 U. S. 30.

³ *Dooley v. U. S.*, 182 U. S. 222; *Lincoln v. U. S.*, 197 U. S. 419; *U. S. v. Hvoslef*, 237 U. S. 1.

⁴ *Ames v. Hager*, 86 Fed. 129; see *Foster's Income Tax*, 2nd ed. §§ 123, 128.

⁵ *Swift Co. v. U. S.*, 111 U. S. 22, 28 L. ed. 341; *U. S. v. Emery, Bird, Thayer Realty Co.*, 237 U. S. 28

(taxes paid under the corporation tax law). *Christie Street Commission Co. v. U. S.*, C. C. A., 136 Fed. 326; *Foster's Income Tax*, 2nd ed. § 128.

⁶ *Dooley v. U. S.*, 182 U. S. 222, 45 L. ed. 1074.

⁷ *Lincoln v. U. S.*, 197 U. S. 419, 49 L. ed. 816; *U. S. v. Hvoslef*, 237 U. S. 1.

⁸ *Swift Co. v. U. S.*, 111 U. S. 22, 28 L. ed. 341; *Christie Street Commission Co. v. U. S.*, C. C. A., 136 Fed. 326; reversing 129 Fed. 506. See *N. Y. Consol. Card Co. v. U. S.*, 20 Ct. Cl. 174; *U. S. v. Hvoslef*, 237

illegally imposed, the non-payment of which would have prevented the clearance of vessels carrying the mails.⁹

Suits cannot be brought against the United States to recover taxes paid voluntarily without any contemporary protest or notice of objection,¹⁰ nor money paid for the purchase of revenue stamps under similar circumstances,¹¹ except where the statute under which the suit was brought shows an intent on the part of the Government not to require such a protest.¹² Where one protest has been duly made, subsequent protests against similar exactions are not necessary.¹³ Neither a statute imposing a tax, nor execution thereunder, nor a mere demand for payment, constitutes duress; but where the statute contains self-operating provisions, by which non-payment of the tax results in heavy penalties and a forfeiture of the right to do business, payment by one within the class affected is not voluntary, but compulsory.¹⁴ In such a case, payment by one not included in such class is not made under duress.¹⁵ The refusal, by a recorder, to accept a deed without the revenue stamps,¹⁶ and the refusal of the collector to give to a ship a clearance without such stamps;¹⁷ do not constitute such duress as will authorize a suit to recover the taxes, when there was no contemporary protest or notice, although the statute made the omission of the stamps a misdemeanor.¹⁸ The question whether stamps were bought and affixed under duress is usually one of fact.¹⁹ A subsequent application to the internal revenue commissioner for a return of the money paid for stamps is not equivalent to a contemporary protest or notice.²⁰ The payment of an inheritance tax under

U. S. 1.; *Klock Produce Co. v. Hartson*, 212 Fed. 758.

⁹ *Oceanic Steam Navigation Co. v. Stranahan*, 214 U. S. 320, 329, 53 L. ed. 1013, 1018; *Klock Produce Co. v. Hartson*, 212 Fed. 758.

¹⁰ *Chesebrough v. U. S.*, 192 U. S. 253, 48 L. ed. 432; *U. S. v. New York & Cuba Mail S. S. Co.*, 200 U. S. 488, 50 L. ed. 569.

¹¹ *Ibid.*

¹² *U. S. v. Jones*, 236 U. S. 106; *U. S. v. Hvoslef*, 237 U. S. 1.

¹³ *Johnson v. Herold*, 161 Fed. 593.

¹⁴ *Gaar, Scott & Co. v. Shannon*, 223 U. S. 468, 56 L. ed. 510.

¹⁵ *Ibid.*

¹⁶ *Chesebrough v. U. S.*, 192 U. S. 253, 48 L. ed. 432.

¹⁷ *U. S. v. N. Y. Cuba Mail S. S. Co.*, 200 U. S. 488, 50 L. ed. 569.

¹⁸ *Chesebrough v. U. S.*, 192 U. S. 253, 48 L. ed. 432.

¹⁹ *Rutan v. Johnson*, C. C. A., 231 Fed. 369.

²⁰ *Herold v. Kahn*, C. C. A., 159 Fed. 608.

protest, after a threat by the collector that, unless promptly paid, it would be collected with a penalty and interest of one per cent a month, was held to be involuntary and to justify a suit against the internal revenue collector to recover the same.²¹ Such has been held to be the payment of an illegal tax upon land for the purpose of obtaining possession of the same land.²²

§ 96g. **Suits against the Commissioner and Collectors of Internal Revenue to recover taxes paid under duress.** Where Internal Revenue taxes have been illegally exacted and paid under protest and the payment was necessary to avoid stopping the business in which the plaintiff was engaged, the Commissioner of Internal Revenue or collector of Internal Revenue, or other officer who has compelled the unlawful payment may be sued personally for their recovery.¹ Where drastic penalties are imposed for non-payment of taxes, such duress exists.²

This can be done in the case of stamp taxes.³ Before suit can be brought compliance must be made with the statutory requirements subsequently quoted.⁴ What constitutes duress has been previously discussed.⁵ It has been held that an appeal to the Commissioner of Internal Revenue is not a prerequisite to an action against the Collector of Internal Revenue.⁶ A successor of the collector who has made the unlawful collection, is not subject to such a suit.⁷

Such a suit cannot be maintained by the recovery of an internal revenue tax unless a claim for the return of the tax is presented to the Commissioner of Internal Revenue within two years after its payment.⁸ The judgment is not *res adjudicata* in a subsequent suit against the United States.⁹

The Revised Statutes provide: "No suit or proceeding for the recovery of any internal tax alleged to have been errone-

²¹ *Simons v. U. S.*, 19 Ct. Cl. 601.

²² *Devlin v. U. S.*, 12 Ct. Cl. 266.

But see *Carver v. U. S.*, 111 U. S. 609, 28 L. ed. 540.

§ 96g. ¹ *Ewers v. Weaver*, 182 Fed. 713; *Emery, Bird, Thayer Realty Co. v. U. S.*, 198 Fed. 242.

² *International Paper Co. v. Burrill*, 260 Fed. 664.

³ *Swift Co. v. U. S.*, 111 U. S. 22, 28 L. ed. 341.

⁴ U. S. R. S., § 3225-3228.

⁵ *Supra*, § 96f.

⁶ *Ewers v. Weaver*, 182 Fed. 713.

⁷ *Roberts v. Lowe*, 326 U. S. 604.

⁸ *New York Mail & Newspaper Transp. Co. v. Anderson*, 234 Fed. 590.

⁹ *Sage v. U. S.*, 260 U. S. 33.

ously or illegally assessed or collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, shall be maintained in any court, unless the same is brought within two years next after the cause of action accrued: *Provided*, That actions for such claims which accrued prior to June six, eighteen hundred and seventy-two, may be brought within one year from said date; and that where any such claim was pending before the Commissioner, as provided in the preceding section, an action thereon may be brought within one year, after such decision and not after. But no right of action which was already barred by any statute on the said date shall be revived by this section.”¹⁰

“All claims for the refunding of any internal tax alleged to have been erroneously or illegally assessed or collected, or of any penalty alleged to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, must be presented to the Commissioner of Internal Revenue within two years next after the cause of action accrued: *Provided*, That claims which accrued prior to June six, eighteen hundred and seventy-two, may be presented to the Commissioner at any time, within one year from said date. But nothing in this section shall be construed to revive any right of action which was already barred by any statute on that date.”¹¹

“The Commissioner of Internal Revenue, with the advice and consent of the Secretary of the Treasury, may compromise any civil or criminal case arising under the internal-revenue laws instead of commencing suit thereon; and, with the advice and consent of the said Secretary and the recommendation of the Attorney-General, he may compromise any such case after a suit thereon has been commenced. Whenever a compromise is made in any case there shall be placed on file in the office of the Commissioner the opinion of the Solicitor of Internal Revenue, or of the officer acting as such, with his reasons therefor, with a statement of the amount of tax assessed, the amount of additional tax or penalty imposed by law in the consequence of the neglect or delinquency of the person against whom the tax

¹⁰ U. S. R. S., § 3227, Comp. St. § 5950.

¹¹ U. S. R. S., § 3228, Comp. St. § 5951.

is assessed, and the amount actually paid in accordance with the terms of the compromise." ¹²

"No discontinuance or nolle prosequi of any prosecution under section three thousand two hundred and fifty-seven shall be allowed without the permission in writing of the Secretary of the Treasury and the Attorney-General." ¹³

"It shall be lawful for any court in which any suit or criminal proceeding arising under the internal-revenue laws may be pending, to continue the same at any stage thereof, for good cause shown on motion by the district attorney." ¹⁴

"When a second assessment is made in case of any list, statement, or return, which in the opinion of the collector or deputy collector was false or fraudulent, or contained any understatement or undervaluation, no tax collected under such assessment shall be recovered by any suit unless it is proved that the said list, statement, or return was not false nor fraudulent and did not contain any understatement or undervaluation; but this section shall not apply to statements or returns made or to be made in good faith under the laws of the United States regarding annual depreciation of oil or gas wells and mines." ¹⁵

Those sections of the Revised Statutes apply to proceedings under the Income Tax of 1913. ¹⁶

Since the internal revenue laws contain no requirement that the protest shall be in writing, it has been said that an oral protest is sufficient. ¹⁷ Where, however, the taxes were paid by a check marked on its face 'Paid under protest,' it was held that it did not appear that the fact of the protest came sufficiently to the knowledge of the commissioner, and that consequently it was insufficient. ¹⁸ A payment not under duress

¹² U. S. R. S., § 3229, Comp. St. § 5952.

¹³ U. S. R. S., § 3230, Comp. St. § 5953.

¹⁴ U. S. R. S., § 3231, Comp. St. § 5954.

¹⁵ U. S. R. S., as amended, 39 St. at L. 773, Comp. St. § 5948.

¹⁶ 38 St. at L. 166, 181, ch. 16, § 11, Par. L.; Dodge v. Osborn, 240 U. S. 118; Chesebrough v. U. S., 192 U. S. 253, 48 L. ed. 432,

24 Sup. Ct. Rep. 262; U. S. v. N. Y. & Cuba Mail S. S. Co., 200 U. S. 488, 50 L. ed. 569, 26 Sup. Ct. Rep. 327.

¹⁷ Wright v. Blakeslee, 101 U. S. 174, 179, 25 L. ed. 1048, 1049. See Stewart v. Barnes, 153 U. S. 456, 459, 38 L. ed. 781, 783, 14 Sup. Ct. Rep. 849; Abrast Realty Co. v. Maxwell (E. D. N. Y.), 206 Fed. 333, 334-336.

¹⁸ Kings County Savings Institu-

would seem to be past recovery, although made under protest. The payment of an inheritance tax under protest, after a threat by the collector that unless promptly paid it would be collected with a penalty and interest of one per cent a month, was held to be involuntary and to justify a suit against the internal revenue collector to recover the amount of the same.¹⁹

Where the protest had been sent by the collector to the commissioner who ruled adversely to it, it was held that no formal appeal to the commissioner was required.²⁰

The Revised Statutes further provide: "When a recovery is had in any suit or proceeding against a collector or other officer of the revenue for any act done by him, or for the recovery of any money exacted by or paid to him, and by him paid into the Treasury, into the performance of his official duty, and the court certifies that there was probable cause for the act done by the collector or other officer, or that he acted under the directions of the Secretary of the Treasury or other proper officer of the government, no execution shall issue against such collector or other officer, but the amount so recovered shall upon final judgment be provided for and paid out by the proper appropriation from the treasury."²¹

"This statute is constitutional."²² After such a certificate has been given, the statute practically converts the suit against the officer in one against the United States.²³

The certificate may be granted by a judge who did not try the case.²⁴ If, however, the trial judge has denied the application, another judge will rarely, if ever, grant it.²⁵ The certificate cannot be granted before a trial.²⁶ When the Government has had no notice, actual or constructive, of the suit, and no opportunity to defend, it is not concluded by the certificate

tion v. Blair, 116 U. S. 200, 29 L. ed. 657, 6 Sup. Ct. Rep. 353.

¹⁹ Simons v. U. S., 19 St. Cl. 601. See Hubbard v. Kelley, 8 W. Va. 46.

²⁰ Dodge v. Brady, 240 U. S. 122.

²¹ U. S. Rev. Stat. § 989, U. S. Comp. Stat. 1901, p. 708.

²² Carey v. Curtis, 3 How. 236, 245, 246, 11 L. ed. 576, 581, 582.

²³ United States v. Sherman, 98 U. S. 565, 25 L. ed. 235; Flanders v. Seelye, 105 U. S. 718, 724, 26 L. ed. 1217, 1219.

²⁴ Cox v. Barney, 14 Blatchf. 289, Fed. Cas. No. 3,300.

²⁵ Frerichs v. Coster, 23 Blatchf. 74, 22 Fed. 637.

²⁶ Cox v. Barney, 14 Blatchf. 28, Fed. Cas. No. 3,300.

of probable cause.²⁷ In case a writ of error is sued out no money will be paid by the Treasury upon the judgment until an affirmance and entry of the judgment upon the mandate of the court of review.²⁸ It has been held that after judgment neither the Government nor the collector is liable for interest;²⁹ but upon affirmance the court of review will allow interest which will be included in the judgment of affirmance entered upon the mandate in the court below.³⁰ The commissioner may after judgment against the collector allow a repayment of the tax to the plaintiff even though no certificate of probable cause was granted.³¹

"No suit shall be maintained in any court for the recovery of any internal tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, until appeal shall have been duly made to the Commissioner of Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof, and a decision of the Commissioner has been had therein: *Provided*, That if such a decision is delayed more than six months from the date of such appeal, then the said suit may be brought without first having a decision of the Commissioner at any time within the period limited in the next section."³²

It seems that these statutes apply to suits against the United States although when originally framed they were intended to regulate actions against Collectors of Internal Revenue.³³

The rejection of the claim by the Commissioner of Internal Revenue does not prevent a suit against the United States for its recovery.³⁴

²⁷ *Dunnegan v. U. S.*, 17 Ct. Cl. 247.

²⁸ *Cochran v. Schell*, 107 U. S. 625, 27 L. ed. 543, 2 Sup. Ct. Rep. 827.

²⁹ *White v. Arthur*, 20 Blatchf. 232, 10 Fed. 80.

³⁰ *Cochran v. Schell*, 107 U. S. 625, 27 L. ed. 543, 2 Sup. Ct. Rep. 827.

³¹ *United States v. Frerichs*, 124 U. S. 315, 31 L. ed. 471, 8 Sup. Ct. Rep. 514.

³² U. S. R. S. § 3226, as amended 19 St. at L. 248, Comp. St. § 5949.

³³ *U. S. v. Hvoslef*, 237 U. S. 1, 10; *Coleman v. U. S.*, 250 U. S. 30; *Sage v. U. S.*, 250 U. S. 33.

³⁴ *U. S. v. Hvoslef*, 237 U. S. 1, 8.

§ 96h. Suits against Collectors of the Ports to recover duties paid under duress. Duties illegally collected under the tariff prior to that of August 5, 1909, could be recovered against the Collectors of the Port where the duty had been paid under circumstances similar to those under which Internal Revenue Taxes could be recovered by the taxpayer¹ except that no appeal to the Commissioner of Internal Revenue was required.² When such a suit was brought in a State court it could be removed.³

That statute provided that thenceforth "no collector or other officer of the customs shall be in any way liable to any owner, importer, consignee, or agent of any merchandise, or any person, for or on account of any rulings or decisions as to the classification of said merchandise or the duties charged thereon, or the collection of any dues, charges, or duties on or on account of said merchandise, or any other matter or thing as to which said owner, importer, consignee, or agent of such merchandise might, under this Act, be entitled to appeal from the decision of said collector or other officer, or from any board of appraisers provided for in this Act."⁴ The same statute directs the Secretary of the Treasury to refund and pay, out of any money in the treasury not otherwise appropriated, all moneys that are shown to his satisfaction to have been paid to or deposited with a collector of customs in any case of unascertained or estimated duties.⁵

Claims for the return of duties upon imports must be duly brought before the Board of General Appraisers and should then decide against the claimant before the Court of Customs Appeals. The practice is previously explained.⁶

§ 96i. Suits against Director General of Railroads and Railroads under Government control. The Army Appropriation Act of August 29th, 1916, provides:

"The President, in time of war, is empowered, through the Secretary of War, to take possession and assume control of any system or systems of transportation, or any part thereof, and to utilize the same, to the exclusion as far as may be necessary

¹ § 96h. 1 De Lima v. Bidwell, 182 U. S. 1, 45 L. ed. 1041.

² See Ewers v. Weaver, 182 Fed. 713.

³ *Infra*, § 551.

⁴ 36 St. at L. 11, § 24.

⁵ *Ibid.*, § 23.

⁶ *Supra*, §§ 76, 77, 37 St. at L. 240 (Legacy Tax).

of all other traffic thereon, for the transfer or transportation of troops, war material and equipment, or for such other purposes connected with the emergency as may be needful or desirable."¹

President Wilson on December 26, 1917, issued a Proclamation taking possession and assuming control through the Secretary of War "at 12 o'clock noon on the twenty-eighth day of December, 1917, of each of every system of transportation and the appurtenances thereof located wholly or in part within the boundaries of the continental United States and consisting of railroads, and owned or controlled systems of coastwise and inland transportation, engaged in general transportation, whether operated by steam or by electric power, including also terminals, terminal companies and terminal associations, sleeping and parlor cars, private cars and private car lines, elevators, warehouses, telegraph and telephone lines and all other equipment and appurtenances commonly used upon or operated as a part of such rail or combined rail and water systems of transportation;—to the end that such systems of transportation be utilized for the transportation of troops, war material and equipment, to the exclusion so far as may be necessary of all other traffic thereon; and that so far as such exclusive use be not necessary or desirable, such systems of transportation be operated and utilized in the performance of such other services as the national interest may require and of the usual and ordinary business and duties of common carriers.

"It is hereby directed that the possession, control, operation and utilization of such transportation systems hereby by me, undertaken shall be exercised by and through William G. McAdoo, who is hereby appointed and designated Director General of Railroads. Said Director may perform the duties imposed upon him, so long and to such extent as he shall determine, through the Boards of Directors, Receivers, officers, and employees of said systems of transportation. Until and except so far as said Director shall from time to time by general or special orders otherwise provide, the Board of Directors, Receivers, officers and employees of the various transportation systems shall continue

§ 96i. 139 St. at L. 645, ch. 418,
§ 1; Comp. Stat. § 197a.

the operation thereof in the usual and ordinary course of the business of common carriers in the names of their respective companies.

"Until and except so far as said Director shall from time to time otherwise by general or special orders determine, such systems of transportation shall remain subject to all existing statutes and orders of the Interstate Commerce Commission, and to all statutes and orders of regulating commissions of the various states in which said systems or any part thereof may be situated. But any orders general or special, hereafter made by said Director, shall have paramount authority and be obeyed as such."*

The proclamation further provides:

"But nothing herein contained, expressed or implied, or hereafter done or suffered hereunder, shall be deemed in any way to impair the rights of the stockholders, bondholders, creditors and other persons having interests in said systems and transportation or in the profits thereof, to receive just and adequate compensation for the use and control and operation of their property hereby assumed.

"Regular dividends hitherto declared, and maturing interest upon bonds, debentures and other obligations, may be paid in due course; and such regular dividends and interest may continue to be paid until and unless the said Director shall from time to time otherwise by general or special orders determine; and, subject to the approval of the Director, the various carriers may agree upon and arrange for the renewal and extension of maturing obligations.

"Except with the prior written assent of said Director, no attachment by means process or an execution shall be levied on or against any of the property used by any of said transportation systems in the conduct of their business as common carriers; but suits may be brought by and against said carriers and judgments rendered as hitherto until and except so far as said Director may, by general or special orders, otherwise determine.

"From and after twelve o'clock on said twenty-eighth day of December, 1917, all transportation systems included in this order and proclamation shall conclusively be deemed within the possession and control of said Director without further act or notice.

*Ibid. Note.

But for the purposes of accounting said possession and control shall date from twelve o'clock midnight on December 31, 1917."³

The Act of March 21, 1918, regulating the Federal control of railroads during the war with Germany provides:

"The provisions of the Act entitled 'An Act making appropriations for the support of the Army for the fiscal year ending June thirtieth, nineteen hundred and seventeen, and for other purposes,' approved August twenty-ninth, nineteen hundred and sixteen, shall remain in force and effect except as expressly modified and restricted by this Act; and the President, in addition to the powers conferred by this Act, shall have and is hereby given such other and further powers necessary or appropriate to give effect to the powers herein and heretofore conferred. The provisions of this Act shall also apply to any carriers to which Federal control may be hereafter extended."⁴

"Carriers while under Federal control shall be subject to all laws and liabilities as common carriers, whether arising under State or Federal laws or at common law, except in so far as may be inconsistent with the provisions of this Act or any other Act applicable to such Federal control or with any order of the President. Actions at law or suits in equity may be brought by and against such carriers and judgments rendered as now provided by law; and in any action at law or suit in equity against the carrier, no defense shall be made thereto, upon the ground that the carrier is an instrumentality or agency of the Federal Government. Nor shall any such carrier be entitled to have transferred to a Federal court any action heretofore or hereafter instituted by or against it, which action was not so transferable prior to the Federal control of such carrier, and any action which has heretofore been so transferred because of such Federal control or of any Act of Congress or official order or proclamation relating thereto shall upon motion of either party be retransferred to the court in which it was originally instituted. But no process, mesne or final, shall be levied against any property under such Federal control.

"During the period of Federal control, whenever in his opinion the public interest requires, the President may initiate

³ Ibid. Note.

⁴ 40 St. at L. 000 ch. 25, § 10;
Comp. St. § 1115½i.

rates, fares, charges, classifications, regulations, and practices by filing the same with the Interstate Commerce Commission which said rates, fares, charges, classifications, regulations, and practices shall not be suspended by the commission pending final determination.

"Said rates, fares, charges, classifications, regulations, and practices shall be reasonable and just and shall take effect at such time and upon such notice as he may direct, but the Interstate Commerce Commission shall, upon complaint, enter upon a hearing concerning the justness and reasonableness of so much of any order of the President as establishes or changes any rate, fare, charge, classification, regulation, or practice of any carrier under Federal control, and may consider all the facts and circumstances existing at the time of the making of the same. In determining any question concerning any such rates, fares, charges, classifications, regulations, or practices or changes therein, the Interstate Commerce Commission shall give due consideration to the fact that the transportation systems are being operated under a unified and coordinated national control and not in competition.

"After full hearing the commission may make such findings and orders as are authorized by the Act to regulate commerce as amended, and said findings and orders shall be enforced as provided in said Act: *Provided, however,* That when the President shall find and certify to the Interstate Commerce Commission that in order to defray the expenses of Federal control and operation fairly chargeable to railway operating expenses, and also to pay railway tax accruals other than war taxes, net rents for joint facilities and equipment, and compensation to the carriers, operating as a unit, it is necessary to increase the railway operating revenues, the Interstate Commerce Commission in determining the justness and reasonableness of any rate, fare, charge, classification, regulation, or practice shall take into consideration said finding and certificate by the President, together with such recommendations as he may make." ⁵

"All pending cases in the courts of the United States affecting railroads or other transportation systems brought under the

⁵ 40 St. at L. 000 ch. 25, § 10;
Comp. St. § 3115½j.

Act to regulate commerce, approved February fourth, eighteen hundred and eighty-seven, as amended and supplemented, including the commodities clause, so called, or under the Act to protect trade and commerce against unlawful restraints and monopolies, approved July second, eighteen hundred and ninety, and amendments thereto, shall proceed to final determination as soon as may be, as if the United States had not assumed control of transportation systems; but in any such case the court having jurisdiction may, upon the application of the United States, stay execution of final judgment or decree until such time as it shall deem proper."⁶

This Act is constitutional as an exercise by Congress of the War Power.⁷ It divests all State boards and commissions of power to interfere with the management of the railroads.⁸

An order by the Director General made April 9, 1919, as amended on April 18, 1919, reads as follows:

"Whereas, the act of Congress approved March 21, 1918, entitled 'An Act to provide for the operation of transportation systems while under federal control,' provides (section 10) 'that carriers while under federal control shall be subject to all laws and liabilities as common carriers, whether arising under state or federal laws or at common law, except in so far as may be inconsistent with the provisions of this act or with any order of the President. . . . But no process, mesne, or final, shall be levied against any property under such federal control;' and

"Whereas, it appears that suits against the carriers for personal injuries, freight and damage claims, are being brought in states and jurisdictions far remote from the place where plaintiffs reside or where the cause of action arose, the effect thereof being that men operating the trains engaged in hauling war material, troops, munitions, or supplies are required to leave their trains and attend court as witnesses and travel sometimes for hundreds of miles from their work, necessitating absence from

⁶ 40 St. at L. 000 ch. 25, § 10; Comp. St. § 3115½m.

⁷ Northern Pac. Ry. Co. v. North Dakota, 251 U. S. 000, 39 Sup. Ct. 502; 63 L. ed.; Wainwright v. Pennsylvania R. Co., 253 Fed. 459,

holding that the order of the Director General was valid.

⁸ Northern Pac. Ry. Co. v. North Dakota, 151 U. S. 000; 39 Sup. Ct. 502, 63 L. ed.

their trains for days and sometimes for a week or more, which practice is highly prejudicial to the just interests of the government and seriously interferes with the physical operation of the railroads, and the practice of suing in remote jurisdictions is not necessary for the protection of the rights or the just interests of plaintiffs: ⁹

"It is therefore ordered that all suits against carriers while under federal control must be brought in the county or district where the plaintiff resided at the time of the accrual of the cause of action or in the county or district where the cause of action arose." ¹⁰

"Whereas, the act of Congress approved March 21, 1918, entitled 'An act to provide for the operation of transportation systems while under federal control,' provides (section 10) 'that carriers while under federal control shall be subject to all laws and liabilities as common carriers, whether arising under state or federal laws or at common law, except in so far as may be inconsistent with the provisions of this act . . . or with any order of the President. . . . But no process, mesne or final, shall be levied against any property under such federal control,' and authorizes the President to exercise any of the powers by said act or therefore granted him with relation to federal control through such agencies as he might determine; and

"Whereas, by a proclamation dated March 29, 1918, the President, acting under the Federal Control Act and all other powers him thereto enabling, authorized the Director General, either personally or through such divisions, agencies, or persons, or in the name of the President, to issue any and all orders which may in any way be found necessary and expedient in connection with the federal control of systems of transportation, railroads, and inland waterways as fully in all respects as the President is authorized to do, and generally to do and perform all and singular acts and things and to exercise all and singular the powers and duties which in and by the said act, or any other act in relation to the subject hereof, the President is authorized to do and perform; and

"Whereas, it appears that there are now pending against car-

⁹ Cocker v. N. Y. C. & Western Ry. Co., 253 Fed. 676, 677. ¹⁰ Ibid.

riers under federal control a great many suits for personal injury, freight and damage claims, and that the same are being pressed for trial by the plaintiffs in states and jurisdictions far removed from the place where the persons alleged to have been injured or damaged resided at the time of such injury or damage, or far remote from the place where the causes of action arose, the effect of such trials being that men operating the trains engaged in hauling war materials, troops, munitions, or supplies are required to leave their trains and attend court as witnesses, and travel sometimes for hundreds of miles from their work, necessitating absence from their trains for days and sometimes for a week or more, which practice is highly prejudicial to the just interests of the government and seriously interferes with the physical operation of railroads, and the practice of trying such cases during federal control in remote jurisdictions is not necessary for the protection of the rights or the just interests of plaintiffs:

"It is therefore ordered that upon a showing by the defendant carrier that the just interests of the government would be prejudiced by a present trial of any suit against any carrier under federal control, which suit is not covered by General Order No. 18, and which is now pending in any county or district other than where the cause of action arose or other than in which the person alleged to have been injured or damaged at that time resided, the suit shall not be tried during the period of federal control: Provided, if no suit on the same cause of action is now pending in the county or district where the cause of action arose, or where the person injured or damaged at that time resided, a new suit may, upon proper service, be instituted therein; and if such suit is now barred by the statute of limitations, or will be barred before October 1, 1918, then the stay directed by this order shall not apply unless the defendant carrier shall stipulate in open court to waive the defense of the statute of limitations in any such suit which may be brought before October 1, 1918.

"This order is declared to be necessary in the present war emergency. In the event of unnecessary hardship in any case, either party may apply to the Director General for relief, and he will make such order therein as the circumstances may require consistent with the public interest.

"This order is not intended in any way to impair or affect

General Order No. 18, as amended by General Order No. 18a."¹¹
By General Order No. 50, October 28, 1918:

"Actions to be brought against the Director General of Railroads instead of against the carrier corporations themselves, where the cause of action arose after December 31, 1917.

"Whereas by the proclamations dated December 26, 1917, and April 11, 1918, the President took possession and assumed control of systems of transportation and the appurtenances thereof, and appointed the undersigned, William G. McAdoo, Director General of Railroads, and provided in and by said proclamations that 'until and except so far as said director shall from time to time otherwise by general or special orders determine, such systems of transportation shall remain subject to all existing statutes and orders of the Interstate Commerce Commission and to all statutes, . . . but any orders, general or special, hereafter made by said director shall have paramount authority and be obeyed as such;' and

"Whereas the Act of Congress, called the Federal Control Act, approved March 21, 1918, provided that 'carriers while under federal control shall be subject to all laws and liabilities as common carriers, whether arising under state or federal laws or at common law, except in so far as may be inconsistent with the provisions of this act or any other act applicable to such federal control, or with any order of the President;' and

"Whereas since the director general assumed control of said systems of transportation, suits are being brought and judgments and decrees rendered against carrier corporations on matters based on causes of action arising during federal control, for which the said carrier corporations are not responsible, and it is right and proper that the actions, suits and proceedings hereinafter referred to, based on causes of action arising during or out of federal control should be brought directly against the said Director General of Railroads and not against said corporations; it is therefore

"Ordered, that actions at law, suits in equity and proceedings in admiralty hereafter brought in any court based on contract, binding upon the Director General of Railroads, claims for death

¹¹ *Rutherford v. Union Pac. Ry.*
Co., 264 Fed. 880.

or injury to person, or for loss and damage to property, arising since December 31, 1917, and growing out of the possession, use, control or operation of any railroad or system of transportation by the Director General of Railroads, which action, suit or proceeding but for federal control might have been brought against the carrier company, shall be brought against William G. McAdoo, Director General of Railroads, and not otherwise, provided, however, that this order shall not apply to actions, suits, or proceedings for the recovery of fines, penalties and forfeitures.

"Subject to the provisions of general orders numbered 18, 18-a and 26, heretofore issued by the Director General of Railroads, service of process in any such action, suit or proceeding may be made upon operating officials operating for the Director General of Railroads, the railroad or other carrier in respect of which the cause of action arises in the same way as service was heretofore made upon like operating officials for such railroad or other carrier company.

"The pleadings in all such actions at law, suits in equity or proceedings in admiralty now pending against any carrier company for a cause of action arising since December 31, 1917, based upon a cause of action arising from or out of the operation of any railroad or other carrier, may, on application, be amended by substituting the Director General of Railroads for the carrier company as party defendant and dismissing the company therefrom.

"The undersigned Director General of Railroads is acting herein by authority of the President for and on behalf of the United States of America; therefore no supersedeas bond or other security shall be required of the Director General of Railroads in any court for the taking of or in connection with an appeal, writ of error, supersedeas or other process in law, equity, or in admiralty, as a condition precedent to the prosecution of any such appeal, writ of error, supersedeas or other process, or otherwise in respect of any such cause of action or proceeding." ¹²

¹² N. Y. L. J. Oct. 28, 1918. It has been held, that this is a consent by the United States to an action against the Director General. *Dahn v. McAdoo*, 256 Fed. 549. That as regards actions pending when the order was made the provision for substitution was permissive only for the benefit of the plaintiff and defendant could not obtain such relief

This order is valid.¹³ It has been held that the railroad company has an absolute right to the substitution.¹⁴

It has been said: "Under these acts of Congress and the proclamation of the President the Director General is a carrier. He conducts the business of receiving and transporting goods and passengers for hire. A receiver of a railway company is a carrier as to the goods and the passenger transported," giving citations,¹⁵ "and the office of the Director General is analogous to that of a receiver of the railway companies."¹⁶

An obiter dictum of a Federal District Judge concerning the Act of August 29, 1916, reads thus:

"The statute authorizes the President (a) in time of war, (b) through the Secretary of War, (c) to take, possess, and assume control, (d) of any system of transportation, to the exclusion, if necessary, of any other transportation thereon, (e) for the transfer or transportation of troops, war material, and equipment, and for such other purposes connected, (f) with the emergency as may be needful or desirable. Under no established rule of interpretation can it be doubted that it was the intention of the legislative body to authorize, in time of war, the War Department and no other to take over the railroads for war purposes, such as transportation of troops and war material, and for such other purposes as might be desirable in the emergencies of war. Besides being an appropriate function of the War Department, it was the plain meaning of the statute which Congress enacted that the War Department should have authority over it, and even if

without the plaintiff's consent. *Jensen v. Lehigh Valley R. Co.*, 255 Fed. 795. By State courts that the order so far as it applies to a pending action is invalid. *Vaughan v. State (Ala.)*, 81 So. Rep. 417; *Scarborough v. Louisiana Ry. & Nav. Co.*, La. 82 So. Rep. 286; *McGregor v. Great Northern Ry. Co. (N. D.)*, 172 N. W. 841. That the order does not prevent subsequent suits against railroad companies. *Lavalle v. Northern Pac. Ry. Co. (Minn.)*, 172 N. W. 918. *Gowan v. McAdoo (Minn.)*, 173 N. W. 440. See *Johnson v. McAdoo*, 257 Fed. 757.

¹³ *Rutherford v. Union Pac. R. Co.*, 254 Fed. 880.

¹⁴ *Rutherford v. Union Pac. R. Co.*, D. Nebraska 254 Fed. 880; *Contra, Jensen v. Lehigh Valley R. Co.*, S. D. N. Y., 255 Fed. 795.

¹⁵ *United States v. Nixon*, 235 U. S. 231, 234, 35 Sup. Ct. 49, 59 L. ed. 207; *United States v. Ramsey*, 197 Fed. 144, 146, 116 C. C. A. 568, 42 L. R. A. (N. S.) 1031.

¹⁶ *Rutherford v. Union Pac. R. Co.*, 254 Fed. 880.

we assume (which is inconceivable) that the Secretary of War declined for that department to take up the war work indicated, we find nothing in the statute which authorizes it to be taken up by the Treasury Department, nor by a Director General of Railroads; Congress not having intrusted the work to either. And the situation, if strict rules were to operate, might involve consideration of the question whether the rule stated by the Supreme Court in *Smith v. Black*, 115 U. S. at page 319, 6 Sup. Ct. 56, 29 L. Ed. 398, to the effect that, 'Where there is a statute requiring a thing to be done by a known and responsible public officer, it may well be held that he must do it in person,' would not apply."¹⁷

The same judge stated in the same case: "On its face the act of August 29, 1916, does not give authority to the President to make or promulgate a proclamation of any character. No one, however, could or would contend that he had not abundant authority to issue such documents whenever he thought it proper to give notice or information to the public. But such papers cannot have any effect as laws, in the absence of express constitutional or congressional authorization. We cannot say that the President had any view to the contrary of this when he issued the proclamation in question."¹⁸ And again: "The statute is silent upon the subject of litigation of any character, and does not attempt to close either the State or Federal courts to any person who might already have an existing cause of action against any railroad company upon the mere ground that the property of the company had been taken over for a temporary though most important use. The proclamation designates Mr. McAdoo as Director General of Railroads. This position being unknown to the law, its powers are not fixed; but we suppose it was the intention to make him, not only a member, but the head of the board of directors of each railroad company, the property of which was taken into possession—thus giving him, instead of the Secretary of War, the control of all operations under the statute. Many rules for him to enforce appear to be prescribed in the proclamation, but we pass over all of them as having no bearing upon the cases before us, except that one of them which is in this language:

¹⁷ *Muir v. Louisville & N. R. Co.*,
247 Fed. 888, 894, per Evans, D. J.

¹⁸ *Ibid.* *Muir v. Louisville & N. R. Co.*, 247 Fed. 888, at p. 895.

" 'Except with the prior written assent of said Director, no attachment by mesne process or on execution shall be levied on or against any of the property used by any of said transportation systems in the conduct of their business as common carriers; but suits may be brought by and against said carriers and judgments rendered as hitherto until and except so far as said Director may, by general or special orders, otherwise determine.'

"We find no statutory warrant for this provision in the proclamation, and especially none for the exception mentioned in the last clause of it. We may, however, ignore that exception, because nothing appears to show any attempt to carry it into effect; but, even if we suppose that the other limited interruption of the rights of litigants while the war goes on should be patriotically accepted by all good citizens, litigant and otherwise, it by no means follows that the law authorizes any interference with the course of judicial procedure between litigants before the time arrives when there might be attempts to seize, under execution issued upon final judgments, property in the temporary possession of the United States under the proclamation. Nor can we see how even a right to prevent interruption of such temporary possession after final judgment has been rendered can, per se and independently of the nature of the cause of action, support the theory of the Railroad Company that the suits in which judgments may be rendered arise under the Constitution or laws of the United States."¹⁹

This judge held that actions in the State courts against railroad companies, each sued in personam prior to the second statute after the first proclamation for injuries caused immediately before the first proclamation subsequent to the first statute, could not be removed to the Federal court where there was no diversity of citizenship, and that their prosecution in the State courts should not be enjoined.²⁰

This decision could be sustained without giving sanction to the expressions of the judge's opinion hereinbefore quoted. The writer has found no approval of these dicta in any other case. These orders of the Director-General have since been followed by the courts.²¹

¹⁹ Ibid. *Muir v. Louisville & N. R. Co.*, 247 Fed. 888, 896, 897. Fed. 888. To the same effect is *Longhnen v. Hines*, 261 Fed. 218.

²⁰ *Muir v. Louisville Ry. Co.*, 247 ²¹ *Wainwright v. Pennsylvania R.*

Suits brought subsequent to April 18, 1918, against carriers elsewhere than in the county or district where the cause of action arose or where the plaintiff resided at the time of the accrual thereof, it was said, should have been dismissed,²² provided of course that this objection was duly and specifically made.²³ In other cases against railroad companies the stay of proceedings was held to be in the discretion of the Court.²⁴ In order to obtain a stay, it was said that there should be a showing as to the number of witnesses, the inconveniences to which the defendant may be put by bringing its witnesses to a trial in the district, the nature or quality of the work in which the witnesses were then engaged, whether they could be conveniently replaced during a temporary absence, and a general showing of the number of men in the defendant's employ.²⁵ A removal from the State

Co., 253 Fed. 459; *Cocker v. N. Y. & O. Ry. Co.*, 253 Fed. 676; *Harnick v. Pennsylvania R. Co.*, 254 Fed. 748. *Contra*, *Friesen v. Chicago R. I. Ry. Co.*, 254 Fed. 870.

²² *Wainwright v. Pennsylvania R. Co.*, 253 Fed. 459; *Cocker v. N. Y. & O. Ry. Co.*, 253 Fed. 676, 677. *Contra*, *Friesen v. Chicago, R. I. & P. Ry. Co.*, 254 Fed. 875. See *Seaver v. Hines*, 261 Fed. 239; *supra* § 61.

²³ *Harnick v. Pennsylvania R. Co.*, 254 Fed. 748.

²⁴ *Harnick v. Pennsylvania R. Co.*, 254 Fed. 748, per Manton, Ct. J.; *Cocker v. N. Y. & O. Ry. Co.*, 253 Fed. 676, 679, 680, per Mayer, D. J.

²⁵ *Harnick v. Pennsylvania R. Co.*, 254 Fed. 748. The following facts were held to justify a stay: "Coming now to the case at bar, it appears that the plaintiff is an infant about 14 years of age, now suing by his guardian for an injury which occurred at Scranton, Pa., on August 9, 1916. Plaintiff and his guardian then resided and now reside in Scranton, Pa. Four witnesses of the railroad are actively employed by it in its freight service, and are

at present engaged in moving coal, freight, munitions, and other war materials at and in the vicinity of Mayfield Yard, in Pennsylvania. The most important branch of the defendant railroad at this time is the one running from Cardoxia, N. Y., to Scranton, Pa., over which are hauled many carloads of coal from the mines in Pennsylvania, and in which freight service the railroad witnesses are engaged. The showing is well made that the absence of these employes at this time would be serious, because defendant is shorthanded, owing to the large number of employes who have gone into the military service, or who have left to obtain positions at shipyards and other industries performing war service, for which larger compensation is paid. The engineer, the fireman, the conductor, and one of the trainmen are all necessary and material witnesses concerning the accident.

Defendant further submits the affidavit of a physician to the effect that although the infant plaintiff's left leg has been amputated above

to the Federal court was a waiver of the objection.²⁶ In a proper case, when the plaintiff's injuries are serious and his financial condition desperate, a preference upon the trial calendar may be allowed.²⁷ Such a case may be removed from the State court to the Federal court in the same district when a necessary diversity of citizenship exists and the jurisdictional amount is involved,²⁸ unless it arises under the employers' liability law.²⁹ Such a removal waives any objection by the defendant that the suit was not brought in the proper district.³⁰

Actions growing out of the possession, use or operation of the lines under Federal control should now be brought against the agent designated by the President for that purpose as previously described.³¹ Federal control of carriers has terminated under the Federal Transportation Act of February 28, 1920.

§ 96j. Suits against telegraph and telephone companies when under Federal control. The Act of August 29, 1916, provides:

"The President, in time of war, is empowered, through the Secretary of War, to take possession and assume control of any system or systems of transportation, or any part thereof, and to utilize the same, to the exclusion as far as may be necessary of all other traffic thereon, for the transfer or transportation of troops, war material and equipment, or for such other purposes connected with the emergency as may be needful or desirable."¹ On July

the knee, he is strong and robust, and his heart and lungs, and abdomen are normal. Defendant also submits an affidavit from one O'Boyle, presumably an investigator, that he has seen the infant plaintiff; and called upon him with the physician, and that the boy is regularly attending school.

In this case it is manifest that no one is dependent for support upon the plaintiff, and he does not need any medical attendance. On the other hand, the showing made by the railroad indicates beyond question that the just interests of the government would be prejudiced by a present trial of the action in this jurisdiction. An action can

be promptly brought in Scranton, where plaintiff resides, and where the witnesses of defendant will be available at a minimum of inconvenience." *Cocker v. N. Y. & O. Ry. Co.*, 253 Fed. 680, 681, per Mayer, J.

²⁶ *Ibid.*

²⁷ *Harnick v. Penn. R. Co.*, 354 Fed. 748.

²⁸ *Ibid.*

²⁹ St. at L. 278. Comp. St. 1010; *supra*, § 61, *infra*, §§ 537-538.

³⁰ *Harnick v. Pennsylvania R. Co.*, 354 Fed. 748, 749.

³¹ Act of Feb. 28, 1920, § 206 quoted *supra*, § 95.

§ 96j. 139 St. at L. 645, Comp. St. § 1074a.

22, 1918, the President by proclamation took possession of the telegraph and telephone lines and systems in the United States through the Postmaster General.² There has been no subsequent legislation upon the subject.

This statute is constitutional.³ Pending such government control, no State commission can regulate or interfere with prices charged for telegraph or telephone service in interstate or international commerce.⁴ It was held that an action might be brought against a telegraph and cable company for delay in delivering the cable while the company was under federal control.⁵

§ 96k. Suits against alien property custodian. The act to prevent trading with the enemy provides: "Any person, not an enemy, or ally of enemy, claiming any interest, right, or title in any money or other property which may have been conveyed, transferred, assigned, delivered, or paid to the alien property custodian hereunder, and held by him or by the Treasurer of the United States, or to whom any debt may be owing from an enemy, or ally of enemy, whose property or any part thereof shall have been conveyed, transferred, assigned, delivered, or paid to the alien property custodian hereunder, and held by him or by the Treasurer of the United States, may file with the said custodian a notice of his claim under oath and in such form and containing such particulars as the said custodian shall require; and the President, if application is made therefor by the claimant, may, with the assent of the owner of said property and of all persons claiming any right, title, or interest therein, order the payment, conveyance, transfer, assignment or delivery to said claimant of the money or other property so held by the alien property custodian or by the Treasurer of the United States or of the interest therein to which the President shall determine said claimant is entitled: Provided, That no such order by the President shall bar any person from the prosecution of any suit at law or in equity against the claimant to establish any right, title or interest which he may have in such money or other property. If the President shall not so

² Ibid.

³ *Dakota Central Tel. Co. v. S. Dakota*, 250 U. S. 163; 39 Sup. Ct. 507; 63 L. ed. —.

⁴ Ibid. *MacLeod and others as*

Public Service Co. of Mass. v. N. E. Tel. & Tel. Co., 250, 51 U. S. 195; 39 Sup. Ct. 511, 63 L. ed. —.

⁵ *Cf. Witherspoon & Sons v. Postal Tel. & Cable Co.*, 257 Fed. 758.

order within sixty days after the filing of such application, or if the claimant shall have filed the notice as above required and shall have made no application to the President, said claimant may, at any time before the expiration of six months after the end of the war, institute a suit in equity in the district court of the United States for the district in which such claimant resides, or, if a corporation, where it has its principal place of business (to which suit the alien property custodian or the Treasurer of the United States, as the case may be, shall be made a party defendant), to establish the interest, right, title, or debt so claimed, and if suit shall be so instituted then the money or other property of the enemy, or ally of enemy, against whom such interest, right, or title is asserted or debt claimed, shall be retained in the custody of the alien property custodian, or in the Treasury of the United States, as provided in this Act, and until any final judgment or decree which shall be entered in favor of the claimant shall be fully satisfied by payment or conveyance, transfer, assignment, or delivery by the defendant or by the alien property custodian or Treasurer of the United States on order of the court, or until final judgment or decree shall be entered against the claimant, or suit otherwise terminated.

Except as herein provided, the money or other property conveyed, transferred, assigned, delivered, or paid to the alien property custodian shall not be liable to lien, attachment, garnishment, trustee process, or execution, or subject to any order or decree of any court.

This section shall not apply, however, to money paid to the alien property custodian under section ten hereof."¹ By Section 10: "(f) The owner of any patent, trade-mark, print, label, or copyright under which a license is granted hereunder may, after the end of the war and until the expiration of one year thereafter, file a bill in equity against the licensee in the district court of the United States for the district in which the said licensee resides, or, if a corporation, in which it has its prin-

§ 96k. ¹ Act of Oct. 6, 1917, ch. 106, § 9, 40 St. at L. 419, Comp. St. § 3115½e. As to the confiscation of a debt owed by a citizen to an enemy, compare Am. Exchange

Nat. Bank v. Palmer, U. S. D. C., S. D. N. Y. March 5, 1919. Cohn v. Jacob & Josef Cohn Inc. U. S. D. C. S. D. N. Y. April 1920.

principal place of business (to which suit the Treasurer of the United States shall be made a party), for recovery from the said licensee for all use and enjoyment of the said patented invention, trademark, print, label, or copyrighted matter: Provided, however, that whenever suit is brought, as above, notice shall be filed with the alien property custodian within thirty days after date of entry of suit: Provided further, That the licensee may make any and all defenses which would be available were no license granted. The court on due proceedings had may adjudge and decree to the said owner payment of a reasonable royalty. The amount of said judgment and decree, when final, shall be paid on order of the court to the owner of the patent from the fund deposited by the licensee, so far as such deposit will satisfy said judgment and decree: and the said payment shall be in full or partial satisfaction of said judgment and decree, as the facts may appear; and if, after payment of all such judgments and decrees, there shall remain any balance of said deposit, such balance shall be repaid to the licensee on order of the alien property custodian. If no suit is brought within one year after the end of the war, or no notice is filed as above required, then the licensee shall not be liable to make any further deposits, and all funds deposited by him shall be repaid to him on order of the alien property custodian. Upon entry of suit and notice filed as above required or upon repayment of funds as above provided, the liability of the licensee to make further reports to the President shall cease.

If suit is brought as above provided, the court may, at any time, terminate the license, and may, in such event, issue an injunction to restrain the licensee from infringement thereafter, or the court, in case the licensee, prior to suit, shall have made investment of capital based on possession of the license, may continue the license for such period and upon such terms and with such royalties as it shall find to be just and reasonable." ² By Section 12: "Any money or property required or authorized by the provisions of this Act to be paid, conveyed, transferred, assigned, or delivered to the alien property custodian shall, if said custodian shall so direct by written order, be paid, conveyed, transferred, assigned, or delivered to the Treasurer

² Ibid § 10, 40 St. at L. 420, Comp. St. § 3115½ee; *supra*, § 87.

of the United States with the same effect as if to the alien property custodian.

"After the end of the war any claim of any enemy or of an ally of enemy to any money or other property received and held by the alien property custodian or deposited in the United States Treasury, shall be settled as Congress shall direct: Provided, however, That on order of the President as set forth in section nine hereof, or of the court, as set forth in sections nine and ten hereof, the alien property custodian or the Treasurer of the United States, as the case may be, shall forthwith convey, transfer, assign, and pay to the person to whom the President shall so order, or in whose behalf the court shall enter final judgment or decree, any property of an enemy or ally of enemy held by said custodian or by said Treasurer, so far as may be necessary to comply with said order of the President or said final judgment or decree of the court: And provided further, That the Treasurer of the United States, on order of the alien property custodian shall, as provided in section ten hereof, repay to the licensee any funds deposited by said licensee."²

§ 97. District Court practice in suits against the United States. The practice in suits in the District Courts against the United States is as follows: The plaintiff must file a petition duly verified with the clerk of the respective courts having jurisdiction of the case, and in the district where the plaintiff resides.¹ Whether the requirement as to the district² applies to non-residents has been doubted.³ It is waived by the appearance of the United States District Attorney without taking the objection.⁴

Such petition should set forth the full name and residence of the plaintiff, the nature of his claim, and a succinct statement of the facts upon which the claim is based, the money or any other thing claimed, or the damages sought to be recovered, and must pray the court for a judgment or decree based upon the facts and the law.⁵ The plaintiff must cause a copy of his peti-

¹ Ibid § 12, 40 St. at L. 423, Comp. St. § 3115½ ff.

² § 97. 124 St. at L. Ch. 359, p. 505, § 5, 2 Fed. St. Ann. 80, Comp. St. § 752, Pierce Fed. Code, § 7825. This provision has not been repealed. U. S. v. Hvoslef, 237 U. S. 1.

³ U. S. v. S. Y. & O. S. S. Co., C. C. A., 216 Fed. 61, 69.

⁴ U. S. v. N. Y. & O. S. S. Co., C. C. A., 216 Fed. 61, 69.

⁵ Thames v. Mersey Ins. Co. v. U. S., 237 U. S. 19, 24.

⁶ Mr. Justice Gray, Colt, J., con-

tion, after filing the same, to be served upon the district attorney of the United States in the district wherein suit is brought, and must mail another copy by registered letter to the Attorney-General of the United States; and must thereupon file with the clerk of the court wherein the suit is instituted, an affidavit of such service and mailing.⁶ It has been held to be proper practice to bring in the United States by serving the summons on the District Attorney.⁷ The United States appears by the district attorney, and is allowed sixty days, or as much more time as the court may in its discretion allow, within which to file a plea, answer, or demurrer; "and to file a notice of any counter-claim, set-off, claim for damages, or other demand or defense whatsoever, of the government in the premises: provided, that should the district attorney neglect or refuse to file the plea, answer, demurrer, or defense, as required, the plaintiff may proceed with the case under such rules as the court may adopt in the premises." But the plaintiff cannot have a judgment or decree in his favor unless he establishes the same by proof satisfactory to the court.⁸ It is the duty of the court to cause a written opinion to be filed in the case, "setting forth the specific findings by the court of the facts therein and the conclusions of the court upon all questions of law involved in the case, and to render judgment thereon."⁹ "That opinion is not to be regarded as the usual trial judgment, but must be accepted as a part of the record."¹⁰ "The purpose of the opinion is to enable the public and the appellate court, to find upon the record a formal statement of the findings of the District Court, both upon questions of law and fact, and the reasons for such findings."¹¹ It seems that an agreed statement of facts, when filed, will be accepted as a part of the record.¹² Where a trial judge filed two papers, one entitled a de-

curing in *Harmon v. U. S.*, 43 Fed. 560, 564, 565.

⁶ 24 St. at L. Ch. 359, p. 505, § 6, 2 Fed. St. Ann. 80, Comp. St. 752, Pierce Fed. Code, § 7826.

⁷ *Mill Creek & Minehill Nav. & R. Co.*, 246 Fed. 1013.

⁸ 24 St. at L. Ch. 359, p. 505, § 6, Comp. St. § 752.

⁹ *Ibid.*, § 7, Pierce Fed. Code, § 7827. For findings concerning the

services of a marshal, which were held not to be sufficiently specified to enable the appellate court to determine the Government's liability, see *U. S. v. Tisdale*, 114 Fed. 883.

¹⁰ *U. S. v. Swift*, C. C. A., 139 Fed. 225, 226.

¹¹ *Hyams v. U. S.*, 139 Fed. 997, 999.

¹² *U. S. v. Swift*, C. C. A., 139 Fed. 225, 226.

creed for the petitioner, and the other the opinion of the court, the two setting out sufficient findings of fact to sustain its conclusions; it was held, that these papers were sufficiently formal to constitute a compliance with the statute.¹³ A general refusal to comply with the Government's requests for several findings of fact and rulings of law was held to be as effectual as if the same were denied *seriatim*.¹⁴ "If the suit be in equity or admiralty, the court shall proceed with the same according to the rules of such court."¹⁵ Judgment may be rendered in favor of the United States for the balance due upon a counterclaim.¹⁶ If the United States puts in issue the right of the plaintiff to recover, the court may in its discretion allow costs to the prevailing party, which, however, cannot exceed what is actually incurred for witnesses, 'and for summoning the same, and fees paid to the clerk of the court.'¹⁷ From the date of final judgment or decree against the government, interest is allowed 'to be computed thereon, at the rate of four per centum per annum, until the time when an appropriation is made for the payment of the judgment or decree.'¹⁸ It has been held that no interest can be allowed before judgment, except upon a contract which stipulates for interest.¹⁹ The exemption of the United States from interest does not extend to all subordinate governmental agencies such as The National Home for Disabled Volunteer Soldiers.²⁰ The judgment can be reviewed only by the Supreme Court of the United States.²¹ The plaintiff can appeal where the amount in controversy exceeds three thousand dollars, or where his claim is forfeited to the United States by the judgment of the court below²² for fraud in connection with its presentation or proof.²³ A judgment in a suit to recover offi-

¹³ U. S. v. Hyams, C. C. A., 146 60 Fed. 523, 527; U. S. R. S., § 1091. Fed. 15.

¹⁴ Ibid.

¹⁵ U. S. v. Hyams, C. C. A., 146 Fed. 15, 24 St. at L. Ch. 359, § 7, p. 506.

¹⁶ U. S. v. Saunders, C. C. A., 79 Fed. 407; McElrath v. U. S., 102 U. S. 426, 26 L. ed. 189.

¹⁷ 24 St. at L. 508, § 15. See U. S. v. Harmon, 147 U. S. 268, 282, 37 L. ed. 164, 169.

¹⁸ 24 St. at L. 507, § 10.

¹⁹ Int. B. & S. Dock Co. v. U. S.,

²⁰ National Home for Disabled Volunteer Soldiers v. Parish, 229 U. S. 494.

²¹ J. Homer Fritch v. United States, 248 U. S. 458, overruling Ogden v. U. S., 148 U. S. 390; U. S. v. Morgan, C. C. A., 64 Fed. 4.

²² 24 St. at L. 506, § 9.

²³ Jud. Code, § 182, re-enacting U. S. R. S., § 1086; U. S. R. S., § 707; U. S. v. Davis, 131 U. S. 36, 39, 33 L. ed. 93, 94; Strong v. U. S., 40 Fed. 183.

cial fees, salary or compensation is ordinarily reviewable by writ of error, not by appeal.²⁴ A judgment in a suit to recover rent is reviewable by writ of error.²⁵ Such appeal or writ of error should be taken within ninety days after the judgment is rendered.²⁶ An appeal or writ of error may be taken, irrespective of the amount involved, by the district attorney, at the direction of the Attorney-General, within six months after the judgment or decree.²⁷ Upon appeal or writ of error the findings of fact of the trial court are conclusive unless the record would warrant the conclusion that the ultimate facts are not supported by any evidence.²⁸ The only question is whether the conclusions of law are justified by the facts found.²⁹ Otherwise, the practice in all courts in suits brought under this statute is similar to that in other suits, with "such additions and modifications as said courts may adopt."³⁰

§ 98. Suits against the United States for partition. The Judicial Code gives the District Courts jurisdiction "of suits in equity brought by any tenant in common or joint tenant for the partition of lands in cases where the United States is one of such tenants in common or joint tenants, such suits to be brought in the district in which such land is situate."¹ The Act of May 17, 1898, of part of which this is a reenactment, further provides: that "when such suit is brought by any person owning an undivided interest in such land, other than the United States, against the United States alone or against the United States and any other of such owners, service shall be made on the United States by causing a copy of the bill filed to be served upon the district attorney of the district wherein the suit is brought, and by mailing a copy of the same by registered letter to the Attorney-General of the United States; and the complainant in such bill shall file with the clerk of the court in

²⁴ U. S. v. Harsha, 172 U. S. 567, 43 L. ed. 556; U. S. v. Adv. C. C. A., 76 Fed. 359; U. S. v. Tinsley, C. C. A., 75 Fed. 369; U. S. v. Morgan, C. C. A., 64 Fed. 4; U. S. v. Fletcher, C. C. A., 60 Fed. 53.

²⁵ Chase v. U. S., 155 U. S. 489, 39 L. ed. 234.

²⁶ 24 St. at L. 596, § 9; U. S. R. S., § 708. But see U. S. v. Davis, 131 U. S. 36, 39, 33 L. ed. 93, 94.

²⁷ 24 St. at L., ch. 359, 507, § 10; U. S. v. Davis, 131 U. S. 36, 39, 33 L. ed. 93, 94; U. S. v. Yukers, 60 Fed. 641.

²⁸ U. S. v. Buffalo Pitts Co., 234 U. S. 228.

²⁹ Ibid.

³⁰ 24 St. at L., ch. 359, 506, § 4.

§ 98. 136 St. at L. 1087, § 24, Comp. St. § 991, subd. (25).

which such bill is filed an affidavit of such service and of the mailing of such letter. It shall be the duty of the district attorney upon whom service of the bill is made as aforesaid to appear and defend the interests of the Government, and within sixty days after service upon him as hereinabove prescribed, unless the time shall be enlarged by order of the court made in the case, to file a plea, answer, or demurrer on the part of the Government, and the cause shall proceed as other cases for partition by courts of equity, and in making such partition the court shall be governed by the same principles of equity that control courts of equity in partition proceedings between private persons. Whenever in such suit the court shall order a sale of the property or any part thereof the Attorney-General of the United States may, in his discretion, bid for the same in behalf of the United States. If the United States shall be the purchaser the amount of the purchase money shall be paid from the Treasury of the United States upon a warrant drawn by the Secretary of the Treasury on the requisition of the Attorney-General."²

§ 99. Suits by Indians for allotments of land. The Judicial Code gives the District Courts of the United States jurisdiction "of all actions, suits, or proceedings involving the right of any person, in whole or in part of Indian blood or descent, to any allotment of land under any law or treaty."¹ The Act of August 15, 1894, of which this is a reenactment, further provides: "And the judgment or decree of any such court in favor of any claimant to an allotment of land shall have the same effect, when properly certified to the Secretary of the Interior, as if such allotment had been allowed and approved by him; but this provision shall not apply to any lands now held by either of the Five Civilized Tribes, nor to any of the lands within the Quapaw Indian Agency: Provided, That the right of appeal shall be allowed to either party as in other cases."² This act gives the district courts jurisdiction to decree relief to an Indian, entitled under the law to an allotment of land, when he has been deprived of that right by the rulings of the Land Department.³ The provision of the act, that the decree of the court, in favor

² 30 St. at L. 416, Comp. St. § 1579.

² 28 St. at L. 286, 305, Comp. St. § 4214.

³ 99. 136 St. at L. 1087, § 24, Comp. St. § 991, subd. 24.

³ Hy-Yu-Tse Mil-Kin v. Smith, C. A., 119 Fed. 114.

of a claimant, shall have the same effect as an allotment allowed and approved by the Secretary of the Interior is a consent upon the part of the United States to be bound by such decree; and where the suit involves simply a question of priority of right between two claimants, the United States is not a necessary party.⁴

The Act of June 25, 1910, provides that when an Indian to whom an allotment of land has been made dies without a will before the expiration of the trust period the Secretary of the Interior upon notice and hearing under such rules as the Secretary may prescribe shall ascertain the Indian's legal heirs and that the decision of the Secretary thereon shall be final and conclusive.⁵ This statute is constitutional and such decision cannot be reviewed by the courts.⁶

§ 99a. Suits to establish the rights of bona fide purchasers of lands erroneously patented or certified. The Act of March 2nd, 1896, provides:

"Suits by the United States to vacate and annul any patent to lands heretofore erroneously issued under a railroad or wagon road grant shall only be brought within five years from the passage of this Act, and suits to vacate and annul patents hereafter issued shall only be brought within six years after the date of the issuance of such patents, and the limitation of section eight of chapter five hundred and sixty-one of the acts of the second session of the Fifty-first Congress and amendments thereto is extended accordingly as to the patents herein referred to. But no patent to any lands held by a *bona fide* purchaser shall be vacated or annulled, but the right and title of such purchaser is hereby confirmed; *Provided*, That no suit shall be brought or maintained, nor shall recovery be had for lands or the value thereof, that were certified or patented in lieu of other lands covered by a grant which were lost or relinquished by the grantee in consequence of the failure of the Government or its officers to withdraw the same from sale or entry."⁷

"If any person claiming to be a *bona fide* purchaser of any

⁴ Ibid.

§ 99a. 129 St. at L. 42, Comp.

⁵ 36 St. at L. 855; *Hallowell v. Commons*, C. C. A., 210 Fed. 793.

⁶ *Hallowell v. Commons*, C. C. A., 210 Fed. 793.

lands erroneously patented or certified shall present his claim to the Secretary of the Interior prior to the institution of a suit to cancel a patent or certification, and if it shall appear that he is a *bona fide* purchaser, the Secretary of the Interior shall request that suit be brought in such case against the patentee, or the corporation, company, person or association of persons for whose benefit the certification was made, for the value of said land, which in no case shall be more than the minimum Government price thereof, and the title of such claimant shall stand confirmed. An adverse decision by the Secretary of the Interior on the *bona fides* of such claimant shall not be conclusive of his rights, and if such claimant, or one claiming to be a *bona fide* purchaser, but who has not submitted his claim to the Secretary of the Interior, is made a party to such suit, and if found by the court to be a *bona fide* purchaser, the court shall decree a confirmation of the title, and shall render a decree in behalf of the United States against the patentee, corporation, company, person, or association of persons for whose benefit the certification was made for the value of the land as hereinbefore provided. Any *bona fide* purchaser of lands patented or certified to a railroad company, and who is not made a party to such suit, and who has not submitted his claim to the Secretary of the Interior, may establish his rights as such *bona fide* purchaser in any United States court having jurisdiction of the subject-matter, or at his option, as prescribed in sections three and four of chapter three hundred and seventy-six of the Acts of the second session of the Forty-ninth Congress.”²

“If at any time prior to the institution of suit by the Attorney-General to cancel any patent or certification of lands erroneously patented or certified a claim or statement is presented to the Secretary of the Interior by or on behalf of any person or persons, corporation or corporations, claiming that such person or persons, corporation or corporations, is a *bona fide* purchaser or are *bona fide* purchasers of any patented or certified land by deed or contract or otherwise, from or through “the original patentee or corporation to which patent or certification was issued, no suit or action shall be brought to cancel or annul the patent or certification for said land until such claim is investi-

² 29 St. at L. 43, Comp. St. § 4902.

gated in said Department of the Interior; and if it shall appear that such person or corporation is a *bona fide* purchaser as aforesaid, or that such persons or corporations are such *bona fide* purchasers, then no such suit shall be instituted and the title of such claimant or claimants shall stand confirmed; but the Secretary of the Interior shall request that suit be brought in such case against the patentee, or the corporation, company, person, or association of persons for whose benefit the patent was issued or certification was made for the value of the land as hereinbefore specified.”³

It has been held that this statute is broad enough to include all patents erroneously or fraudulently issued under any of the Acts of Congress.⁴

§ 100. Injunctions against officers of the United States. An officer of the United States,¹ even a cabinet officer,² may be enjoined from an act in violation of the complainant's rights, which is not discretionary and which is beyond the scope of his authority. An injunction may be granted when the officer transcends the limits of his authority under a constitutional statute.³

Such injunctions have been granted: to restrain the Secretary of the Interior from revoking the approval by his predecessor of the maps of a right of way over public lands⁴ to enjoin subordinates of that Secretary from collecting unlawful charges for the use of water under the Reclamation Act of June 17, 1902.⁵ To restrain subordinates of the Secretary of Agriculture, the Chief and Chief Inspector of the Bureau of Animal Industry from enforcing illegal rulings of the Secretary of Agriculture.⁶ To restrain the Board of Tea Appeals from excluding tea upon

³ 29 St. at L. 43, Comp. St. § 4903.

⁴ United States v. Pitan, 224 Fed. 604.

⁵ § 100. ¹ Caldwell v. Robinson, 59 Fed. 653, 660.

² Noble v. Union R. L. R. Co., 147 U. S. 165, 171, 37 L. ed. 123, 125.

³ Philadelphia Co. v. Stimson, 223 U. S. 605, 56 L. ed. 570.

⁴ Noble v. Union R. L. R. Co., 147 U. S. 165, 37 L. ed. 123.

⁵ Magruder v. Belle Fourche Valley Water Users' Ass'n, 219 Fed. 72; Masses Pub. Co. v. Patton, 245 Fed. 102; s. c. 11.

⁶ Hall v. Willecox, 225 Fed. 333; St. Louis Independent Packing Co. v. Houston, C. C. A., 242 Fed. 337; Brougham v. Blanton Mfg. Co., C. C. A., 243 Fed. 503. In both these cases the injunctions were reversed but the jurisdiction sustained.

an unlawful test prescribed by the Secretary of the Treasury.⁷ To restrain the collector of a port from refusing to enter and release imports when there is no dispute as regards the amount of duty;⁸ or the unlawful removal of goods from his district, although he acts under an order of the Secretary of the Treasury.⁹ To restrain an acting collector of Internal Revenue from refusing to issue liquor licenses.¹⁰ To enjoin an Indian agent from interfering with the right to land which he claims belonged to an Indian tribe.¹¹ An injunction may be granted: to restrain the Secretary of War from unlawfully changing harbor lines and from instituting criminal proceedings to enforce the same.¹²

To restrain the withholding of mail by a postmaster under an order of the Postmaster General, when the plaintiff's rights are clear.¹³ But an injunction to prevent the withholding of mail will rarely be granted, in a case where the Postmaster General has made a decision against the complainant upon a disputed question of fact or a mixed question of fact and law, which is committed by Congress to his judgment;¹⁴ nor when his decision

⁷ *Waite v. Macy*, 246 U. S. 606.

⁸ *Gretsch Mfg. Co. v. Scheening & Malone*, 231 Fed. 57.

⁹ *Waite v. Macy*, 246 U. S. 606.

¹⁰ *Jacob Hoffman v. McElligot*, C. C. A., 259 Fed. 525, modifying 259 Fed. 321.

¹¹ *Caldwell v. Robinson*, 59 Fed. 653; *Wadsworth v. Boysen*, C. C. A., 148 Fed. 71. It has been held that an Indian agent is a proper, although not an indispensable party to a suit to determine rights under leases of Indian lands. *Texas Co. v. Central Fuel Oil Co.*, C. C. A., 194 Fed. 1. See *infra*, § 119.

¹² *Philadelphia Co. v. Stimson*, 223 U. S. 605, 620, 32 Sup. Ct. 340, 56 L. ed. 570.

¹³ *Am. School of Magnetic Healing v. McAnnulty*, 187 U. S. 94, 47 L. ed. 90; *New Orleans Nat. Bank v. Merchant*, 18 Fed. 841; *Hoover v. McChesney*, 81 Fed. 472; *Fairfield Floral Co. v. Bradbury*, 87 Fed. 415; *Davis v. Brown*, 103 Fed. 909; Fed. Prac. Vol. I—41

Rosenberger v. Harris, 139 Fed. 1001; *Donnell Mfg. Co. v. Wyman*, 156 Fed. 415; *Lewis Pub. Co. v. Wyman*, 152 Fed. 787, where the complainant had been denied a full hearing before an order, excluding his publication from second class matter in the mails, was made. But see s. c., 168 Fed. 752; *aff'd* C. C. A., 182 Fed. 13, *Lewis Pub. Co. v. Wyman*, 168 Fed. 756; *Brooklyn Daily Eagle v. Voorhies*, 181 Fed. 579. See a note to *Timmons v. U. S.*, 30 C. C. A. 74.

¹⁴ *Bates & Gould Co. v. Payne*, 194 U. S. 106, 48 L. ed. 894; *Central Trust Co. v. Central Trust Co. of Illinois*, 216 U. S. 251, 54 L. ed. 469; *Enterprise Sav. Ass'n v. Zumstein*, C. C. A., 67 Fed. 1000; *People's United States Bank v. Gilson*, 140 Fed. 1, holding that upon the hearing, the person affected may be required to assume the burden of proof and to show affirmatively that his business is legitimate and hon-

depends upon a doubtful question of law.¹⁵ Where there has been a dispute as to the right to send publications through the mails as second-class matter, preliminary injunctions have been granted in return for a bond, given by the complainant, to pay the excess postage in case the controversy should ultimately be decided against him.¹⁶ In such a case, where payments of postage had been made under protest, it was held that the complainant's right to recover the same was enforceable at common law and that, upon a determination that it was not entitled to an injunction, the bill should be dismissed without prejudice.¹⁷

When the United States is willing to pay money which it owes into court to have the rights of the respective claimants thereto judicially determined, the court may take jurisdiction of a suit for that purpose.¹⁸ The Supreme Court took jurisdiction of a suit by a State, to enjoin the Secretary of the Interior from selling certain land upon the ground that the United States was a party and had given statutory consent to suits against it in respect to the subject matter;¹⁹ but where no such statutory consent had been given, that court refused to entertain jurisdiction of a similar case.²⁰

In the absence of the statutory consent of the United States, a suit cannot be brought to enjoin the Secretary of the Interior from executing an act of Congress, authorizing the sale of certain lands, the title to which is still in the government, in which the complainant claims an interest, and for an accounting of the proceeds of the same.²¹ The Supreme Court has no jurisdiction of an action brought by a State against the Secretary of the Interior to establish title to lands and to prevent other disposition of the same, where there is a disputed question of law and fact

est; *Appleby v. Cluss*, 160 Fed. 984, *People's United States Bank v. Gilson*, C. C. A., 161 Fed. 286; *Putnam v. Morgan*, 172 Fed. 450; *Branaman v. Harris*, 189 Fed. 461.

¹⁵ *Smith v. Hitchcock*, 226 U. S. 53, 57 L. ed. —.

¹⁶ *Lewis Pub. Co. v. Wyman*, C. C. A., 182 Fed. 13.

¹⁷ *Ibid.*

¹⁸ *McGowan v. Parish*, 237 U. S. 285.

¹⁹ *Minnesota v. Hitchcock*, 185 U. S. 373, 46 L. ed. 954.

²⁰ *Oregon v. Hitchcock*, 202 U. S. 60, 50 L. ed. 935; *Masses Pub. Co. v. Patten*, 245 Fed. 102.

²¹ *Naganab v. Hitchcock*, 202 U. S. 473, 50 L. ed. 1113.

concerning the ownership thereof by the United States.²² Nor by a State against the Secretary of the Interior and the Commissioner of the General Land Office to enjoin the issue of a patent.²³ In general, no injunction will lie against an officer of a Department, interfering with the discharge of his duties in the sale of public lands, so long as the title thereto remains in the United States.²⁴

No court has jurisdiction of a suit to review the action of the Secretary of the Treasury in determining the rate of duty to be collected, under statutes and treaties, and to compel him to collect a specific amount.²⁵ Nor of a suit to enjoin the Postmaster General or one of his assistants from terminating a contract for the carriage of mail.²⁶ Nor to enjoin a District Attorney of the United States from instituting criminal proceedings under an erroneous construction of a valid statute.²⁷ Nor to restrain the Director General of Railroads from changing the location of railroad shops from one place to another.²⁸ Nor to restrain the commissioner of health of Porto Rico, in his official capacity, from purchasing land and erecting a tuberculosis hospital.²⁹ An injunction was denied when prayed to prevent an army officer, acting under the orders of the Secretary of War and claiming statutory authority, from constructing in a proper manner a sewer upon Government lands which would injuriously affect other land on the stream into which the sewer emptied.³⁰ It has been doubted whether a suit against the members of the Mississippi River Commission to enjoin them from constructing levees is not a suit against the United States.³¹ In a proper case, an injunction will lie against a marshal of the United States

²² *State of Louisiana v. Garfield*, 211 U. S. 70.

²³ *New Mexico v. Lane*, 243 U. S. 52.

²⁴ *Johnson v. Towsley*, 13 Wall. 72, 87, 20 L. ed. 485, 458; *Marquez v. Frisbie*, 101 U. S. 473, 475, 25 L. ed. 800, 801; *Humbird v. Avery*, 195 U. S. 480, 503, 49 L. ed. 286, 296; *Cameron v. Weedin*, Register of U. S. Land Office, 226 Fed. 44; *Devil's Den Consol. Oil Co. v. United States*; *Lost Hills Mining Co. v. Same*, C. C. A., 251 Fed. 548.

²⁵ *Louisiana v. McAdoo*, 234 U. S. 627.

²⁶ *Wells v. Roper*, 246 U. S. 335.

²⁷ *Jacob Hoffman Brewing v. McElligot*, C. C. A., 259 Fed. 525, modifying 259 Fed. 321.

²⁸ *Nueces Valley Town-Site Co. v. M'Adoo*, 257 Fed. 141.

²⁹ *Solder v. Scoville*, C. C. A., 253 Fed. 932.

³⁰ *Sheriff v. Turner*, 119 Fed. 782.

³¹ *Cubbins v. Mississippi River Commission*, 241 U. S. 351.

to prevent the enforcement of a judgment which is void for want of jurisdiction, when such want of jurisdiction does not appear upon the face of the writ;³² but in such a case, no injunction will be granted against the United States or a clerk of one of its courts.³³

Payment of a sum of money by the United States cannot be compelled by a suit against the Comptroller of the Treasury or other public officer.³⁴

An injunction will not be granted against an officer or agent of the United States forbidding the infringement of a patent right in the use of Government property.³⁵ The only remedy of the patentee in such a case is a suit in the Court of Claims against the United States to recover reasonable compensation for the use of the patent, in accordance with the Act of June 25, 1910,³⁶ except when the facts show an express or implied contract between the parties, when a suit will lie upon the same.³⁷ Nor against a Government contractor forbidding the making of articles which would contribute to an infringement of a patent by the Government.³⁸ In a proper case a bill in equity will lie for an accounting to the patentee by a Government contractor who has infringed his patent.³⁹ It has been held that no injunc-

³² *Kirk v. U. S.*, 124 Fed. 324; s. c., 131 Fed. 331. But see *Buckley v. U. S.*, 196 Fed. 429, 431.

³³ *Buckley v. U. S.*, 196 Fed. 429.

³⁴ *Case v. Terrell*, 11 Wall. 199, 20 L. ed. 134; *Van Antwerp v. Hulburd*, Fed. Cas. No. 16,827 (8 Blatchf. 282).

³⁵ *Cammeyer v. Newton*, 94 U. S. 225, 235, 24 L. ed. 72, 75; *Belknap v. Schild*, 161 U. S. 10, 17, 40 L. ed. 599, 601; *International Postal Supply Co. v. Bruce*, 194 U. S. 601, 48 L. ed. 1134, affirming 114 Fed. 509; *infra*, § 100. *Crozier v. Fried, Krupp Aktiengesell-Schaft*, 224 U. S. 290, 56 L. ed. 771.

³⁶ 36 St. at L. 851; *Crozier v. Fried, Krupp Aktiengesell-Schaft*, 224 U. S. 290, 56 L. ed. 771. See Chapter on the Court of Claims, *infra*.

³⁷ *U. S. v. Palmer*, 128 U. S. 262, 32 L. ed. 442; *The United States v. Societe Anonyme des Anciens Etablissements Cail*, 224 U. S. 309, 56 L. ed. 778; § 96a, *supra*. But see *Schillinger v. U. S.*, 155 U. S. 163, 39 L. ed. 108; *Russell v. U. S.*, 182 U. S. 516, 45 L. ed. 1210; *Harley v. U. S.*, 198 U. S. 229, 49 L. ed. 1029; *Beach v. U. S.*, 226 U. S. 243, 57 L. ed. —. In the last three cases, it was held that the facts did not justify an inference of such a contract. So as to the use of copyright. *Lau- man's Case*, 27 Ct. Cl. 260.

³⁸ *Marconi Wireless Tel. Co. v. Simon*, 246 U. S. 46, modifying, *C. C. A.*, 231 Fed. 1021, 227 Fed. 906; *Sperry-Hutchinson Co. v. Kuhn*, 212 Fed. 555.

³⁹ *Wm. Cramp & Sons*, and so

tion will lie against an individual or corporation to prevent the infringement of a patent by the use of a chute used in the collection of the mail under the regulations of the Post Office Department and that an action for damages is the only remedy, if any, of the patentee, against the owner of the building where the same is used.⁴⁰

The right to a mandamus against an officer of the United States is subsequently considered.⁴¹

§ 100a. Injunctions against collection of Federal taxes. The Revised Statutes provide as follows: "No suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court."¹ Under this provision, it has been held that wherever a tax is imposed by a person in office having authority in the assessment of taxes for the United States, who acts under color of the statute, no injunction will be issued to restrain its collection, no matter how erroneous the assessment may be, and although the person against whom the assessment is made does not own the property taxed.² "It is sufficient that a statute has authorized the assessor to entertain the general subject of taxation; that it was in fact entertained, and a judgment, lawful or unlawful, was rendered concerning it."³ It has been held that the unconstitutionality of the statute imposing the tax will not authorize the issue of an injunction.⁴ The Supreme Court of the District of Columbia has denied an application for an injunction against the enforcement of the Act of October 3,

forth, *Co. v. International Curtiss Marine Turbine Co.*, 246 U. S. 28.

⁴⁰ *Cutler v. Maryland Hotel Co.*, 168 Fed. 931.

⁴¹ *Infra*, §§ 457-459.

§ 100a. 1 U. S. R. S., § 3224, Comp. St. § 1901.

² *Kensett v. Stivers*, 18 Blatchf. 397, 10 Fed. 517; *Pullan v. Kinsinger*, 2 Abb. U. S. 94, Fed. Cas. No. 11,463; *Howland v. Soule*, Deady, 418, Fed. Cas. No. 6,800; *Delaware E. Co. v. Prettyman*, 17 Int. Rev. Rec. 99, Fed. Cas. No. 3,767; *Kissinger v. Bean*, 7 Biss. 60, Fed. Cas. No. 7,853; *Alkan v.*

Bean, 23 Int. Rev. Rec. 351, Fed. Cas. No. 202; *United States v. Black*, 11 Blatchf. 538, Fed. Cas. No. 14,600. But see *Frayser v. Russell*, 3 Hughes, 227, Fed. Cas. No. 5,067. On general question of injunction to restrain collection of illegal tax, see note in 22 L.R.A. 699.

³ *Emmons, J.*, in *Pullan v. Kinsinger*, 2 Abb. U. S. 94, 99, Fed. Cas. No. 11,463.

⁴ *Robbins v. Freeland*, 14 Int. Rev. Rec. 28, Fed. Cas. No. 11,883; *Shelton v. Platt*, 139 U. S. 591, 598, 35 L. ed. 273, 277, 11 Sup. Ct. Rep. 646.

1913.⁵ It has been held that a mandatory injunction requiring a collector of internal revenue to accept an export bond for spirits in a bonded warehouse and to allow their withdrawal for export without payment of taxes, is in effect a bill to restrain the collection of internal revenue taxes and cannot be granted.⁶ "The inhibition of section 3224 applies to all assessments of taxes made under color of their offices by internal revenue officers." "The remedy of a suit to recover back the tax after it is paid is provided by statute, and a suit to restrain its collection is forbidden. The remedy so given is exclusive, and no other remedy can be substituted for it. Such has been the current of decisions in the Circuit Courts of the United States, and we are satisfied it is a correct view of the law."⁷ This prohibition is constitutional, since the remedy by injunction is not a remedy at common law, and therefore the statute does not deny the citizen a right to legal process.⁸ "The system prescribed by the United States in regard to both customs duties and internal revenue taxes, of stringent measures, not judicial, to collect them, with appeals to specified tribunals, and suits to recover back moneys illegally exacted, was a system of corrective justice intended to be complete, and enacted under the right belonging to the Government to prescribe the conditions on which it would subject itself to the judgment of the courts in the collection of its revenues. In the exercise of that right, it declares, by section 3224, that its officers shall not be enjoined from collecting a tax claimed to have been unjustly assessed, when those officers in the course of general jurisdiction over the subject-matter in question, have made the assignment and claim that it is valid."⁹ The prohibition was

⁵ Dodge v. Osborn, S. C. D. C., May 14, 1914.

⁶ Miles v. Johnson, 59 Fed. 38.

⁷ Mr. Justice Blatchford, in Snyder v. Marks, 109 U. S. 189, 193, 27 L. ed. 901, 903, 3 Sup. Ct. 159; citing Howland v. Soule, Deady, 413, Fed. Cas. No. 6,800; Pullan v. Kinsinger, 2 Abb. U. S. 94, Fed. Cas. No. 11,463; Robbins v. Freeland, 14 Int. Rev. Rec. 28, Fed. Cas. No. 11,883; Delaware R. R. Co. v. Prettyman, 17 Id. 99, Fed. Cas. No.

14,600, United States v. Black, 11 Blatchf. 538, 543, Fed. Cas. No. 14,600; Kissinger v. Bean, 7 Biss. 60, Fed. Cas. No. 15,983; Alkan v. Bean, 23 Int. Rev. Rec. 351, Fed. Cas. No. 202; Kemsett v. Stivers, 18 Blatchf. 397, 10 Fed. 517.

⁸ Pullan v. Kinsinger, 2 Abb. U. S. 94, Fed. Cas. No. 11,463.

⁹ Mr. Justice Blatchford, in Snyder v. Marks, 109 U. S. 189, 194, 27 L. ed. 901, 903, 3 Sup. Ct. Rep. 159.

held to apply so as to forbid an injunction against assessments made and warrants for collection issued prior to the enactment of the original statute.¹⁰ It has been suggested that an injunction might be granted to restrain an unlawful increase of an assessment when sufficient ground for equitable relief was shown.¹¹ An injunction by a State court against the assessment or collection of a Federal tax will be vacated after a removal of the case into a Federal court.¹²

This statute does not apply so as to forbid an injunction by a Federal court against the collection or assessment of taxes by State or municipal authorities in a proper case for relief.¹³ Judge Hughes in the Circuit Court of the United States for the eastern district of Virginia granted an injunction against the assessment of the tax against a citizen who had already paid all that was due. That judge said: "His threatened levy was for what was *not* a tax, and it was threatened to be made in a manner which set at naught the provisions of section 3371. It was a clear case for the exercise of the restraining power of the court; and was not a case falling within either the letter or spirit or intention of section 3224."¹⁴

The case which held that the Income Tax of 1894 was unconstitutional was brought by a stockholder to prevent his corporation from paying the tax. The government did not raise the objection of an adequate remedy at law and an injunction was consequently granted.¹⁵ But where it appeared that the suit was collusive, the Supreme Court dismissed a similar bill;¹⁶ and in a later case, where that did not appear but the district attorney

¹⁰ *Kensett v. Stivers*, 18 Blatchf. 397, 10 Fed. 517. Co., 14 Blatchf. 426, Fed. Cas. No. 17,390.

¹¹ *Magee v. Denton*, 5 Blatchf. 130, Fed. Cas. No. 8,943, A. D. 1863. ¹⁴ *Frayser v. Russell*, 3 Hughes, 227, 330, Fed. Cas. No. 5,067.

¹² *Kissinger v. Bean*, 7 Biss. 60, Fed. Cas. No. 7,853. ¹⁵ *Pollock v. Farmers' Loan & Trust Co.*, 157 U. S. 429, 554 (Harlan and White, JJ., dissenting at p. 653), 39 L. ed. 759, 809, 844, 15 Sup. Ct. Rep. 673.

¹³ *Re Tyler*, 149 U. S. 164, 37 L. ed. 689, 23 L. ed. 669; *Schulenberg-Boeckeler Lumber Co. v. Town of Hayward*, 20 Fed. 422, 424. But see *Wells v. Central Vermont R.* ¹⁶ *Corbus v. Alaska Treadwell Gold Min. Co.*, 187 U. S. 455, 47 L. ed. 256, 23 Sup. Ct. Rep. 157.

took the objection, the injunction was denied in a District court.¹⁷

§ 100b. Injunctions against Interstate Commerce Commission. The Act of October 22, 1913, provides: "No interlocutory injunction suspending or restraining the enforcement, operation, or execution of, or setting aside, in whole or in part, any order made or entered by the Interstate Commerce Commission shall be issued or granted by any district court of the United States, or by any judge thereof, or any circuit judge of the United States, unless the application therefor shall be presented to a circuit judge of the United States, or by any judge thereof, or any circuit judge of the United States, and unless a majority of said three judges shall concur in granting such application. When such application as aforesaid is presented to a judge, he shall immediately call to his assistance to hear and determine the application two other judges. Said application shall not be heard or determined before at least five days notice of the hearing has been given to the Interstate Commerce Commission, to the Attorney General of the United States, and to such other persons as may be defendants in the suit: Provided, That in cases where irreparable damage would otherwise ensue to the petitioner, a majority of said three judges concurring, may, on hearing, after not less than three days' notice to the Interstate Commerce Commission and the Attorney General, allow a temporary stay or suspension in whole or in part, of the operation of the order of the Interstate Commerce Commission for not more than sixty days from the date of the order of said three judges pending the application for the order of injunction, in which case the said order shall contain a specific finding, based upon evidence submitted to the judges making the order and identified by reference thereto, that such irreparable damage would result to the petitioner and specifying the nature of the damages. The said judges may, at the time of hearing such application, upon a like finding, continue the temporary stay or suspension in whole or in part upon such application for an interlocutory injunction shall be given precedence and shall be

¹⁷ *Straus v. Abrast Realty Co.* (E. D. N. Y.), 200 Fed. 327; *infra*, § 145.

in every way expedited and be assigned from a hearing at the earliest practicable day after the expiration of the notice hereinbefore provided for. An appeal may be taken direct to the Supreme Court of the United States from the order granting or denying after notice and hearing, an interlocutory injunction, in such case if such appeal be taken within thirty days after the order, in respect to which complaint is made, is granted or refused; and upon the final hearing of any suit brought to suspend or set aside, in whole or in part, any order of said commission the same requirement as to judges and the same procedure as to expedition and appeal shall apply."¹ The repeal of the statute creating the Commerce Court, left this section of the act fully in force.² Upon the decision of the motion the courts may balance the damages to be suffered by the complainants if the injunction is denied against those which will be incurred by the shippers for whose benefit the commission has acted, if the writ is issued.³ After such an injunction has

§ 100b. 1 Act of Oct. 22, 1913, ch. 32, 38 St. at L. 220. Comp. St. § 998, see *supra*, § 84a, *infra*, § 151.

2 *Louisville & N. R. Co. v. U. S.*, 227 Fed. 273, 275.

3 *Brown Drug Co. v. U. S.*, 235 Fed. 603, 605, 606, *per Smith, J.*: "Such injunctions are ordinarily granted before proofs are complete, and in determining whether to grant them or not, the court must consider the damages which would be sustained by the defendants if a writ of injunction did issue before proof, and the damages to be incurred by the complainants if it did not issue. As Sioux City has, according to the findings of the Interstate Commerce Commission been suffering from this discrimination against it for about two years and seven months, we cannot find that within the thirty or sixty days between this and the final hearing the South Dakota towns will suffer more damages from the failure to grant this injunction than

Sioux City would suffer from granting in this case. The presumption is that the Interstate Commerce Commission's determination was correct and valid. We cannot assume that that controversy would be determined in favor of the complainants against the Interstate Commerce Commission, and thus grant this injunction when the damages to Sioux City from the granting of the injunction would be substantially equal to the damages to the South Dakota towns by refusing it." *Per Wade, J.*, 606-608: "This being the situation I personally do not feel that it justifies action by a court of equity at this stage. I do not believe that a court should grant a temporary injunction unless there is irreparable injury to the complainants and unless it can be granted without imposing irreparable injury upon some one else; and, it being impossible to grant a temporary injunction without imposing

been granted the court has power to issue a supplementary injunction forbidding the further prosecution of a suit within the class originally restrained.⁴ Such an interlocutory injunction is not within the statute and a direct appeal therefrom to the Supreme Court cannot be taken.⁵ An injunction should not be granted against suits to enforce an order by the Commission for reparation, unless all the parties to whom reparation is directed are before the court.⁶ Nor it seems when it is proved to be their intention to prosecute their claims in a consolidated action at or by a test case at common law.⁷

It has been held that a motion to dismiss the bill cannot be heard by the three judges convened to hear the motion for an injunction but that the former motion must be heard by a single judge who may be one of these.⁸

damages upon the merchants of Sioux City, as aforesaid, I do not believe that the court at this time should exercise its extraordinary power to restrain the defendants from proceeding under the order of the Interstate Commerce Commission."

⁴ *Looney v. Eastern Texas R. R. Co.*, 247 U. S. 214, 219.

⁵ *Ibid.*

⁶ See *Louisville & Nashville R. Co. v. Garrett*, 231 U. S. 298, 230. *Cf. S. C. as Louisville & N. R. Co. v. Kentucky R. R. Co.*, 214 Fed. 465, 471.

⁷ *Louisville & N. R. Co. v. Kentucky R. R. Co.*, 214 Fed. 465, 471.

⁸ *Brown Drug Co. v. U. S.*, 235 Fed. 603, 605; per Reed, J. (dissenting) 609, 610. "As to the question of a temporary injunction, I agree with the majority that the relative damages that may be sustained by one or the other of the parties may, and ordinarily should be considered. But if any damage is likely to result to Sioux City, or any other party, the injunction should not be denied upon that

ground, but should be granted, if the plaintiff is otherwise entitled thereto, upon the plaintiff giving proper security to indemnify the party against whom it shall issue against such damages as the granting of the injunction may cause. The plaintiffs are commercial clubs and jobbers in five of the largest cities and towns in South Dakota that will be seriously injured if the proposed increase of rates by the express companies is put into effect. I cannot agree that this court as now constituted may not determine the question of jurisdiction to grant a temporary injunction at the proper time. It is apparent upon the face of the petition that jobbers in these five towns will be discriminated against if the proposed rates shall go into effect, and will suffer damages—how much I do not know. But whatever they may be, the plaintiffs may be required to give proper security that will indemnify those who will be damaged by the granting of the writ. If I was to now determine the question of the merits of the demurrers of the ex-

After a motion for an injunction under the statute has been denied, the District Court composed of the same judges may grant a temporary injunction, to expire at the end of thirty days unless, meanwhile the complainant takes an appeal and applies to the Supreme Court for a continuance of such an injunction pending the appeal, upon which appeal and application the injunction shall continue until the Supreme Court's decision.⁹

The decisions under the statute regulating applications for injunctions against the enforcement of State statutes and orders of State boards of administration and commissions may be examined in connection with this act.¹⁰

§ 100c. Injunctions against the United States Shipping Board. The Act of September 7, 1916, which creates the United States Shipping Board, provides: "The venue and procedure in the courts of the United States in suits brought to enforce, suspend, or set aside, in whole or in part, any order of the board shall, except 'as herein otherwise provided, be the same as in similar suits in regard to orders of the Interstate Commerce Commission, but such suits may also be maintained in any district court having jurisdiction of the parties.'" ¹

§ 100d. Injunctions against Federal Trade Commission. "The jurisdiction of the Circuit Court of Appeals of the United States to enforce, set aside, or modify orders of the "Federal Trade" Commission, shall be exclusive." ¹

§ 101. Ejectment against officers of the United States. An action of ejectment has been sustained against government officers sued as individuals for land, such as a soldiers' cemetery ¹ and a pier ² held by them for governmental purposes in the name

press companies to the petition, I might be inclined as now advised to overrule it; but that question, as before stated, is not now for determination."

⁹ *Louisville & N. R. Co. v. U. S.*, 227 Fed. 273. See *Interstate Commerce Commission v. Louisville & Nashville R. R. Co.*, 101 Fed. 146, 148; *Louisville & N. R. Co. v. Siler*, 186 Fed. 176, 203, *infra*, § 300.

¹⁰ *Lykin v. Chesapeake & O. Ry. Co.*, C. C. A., 209 Fed. 573.

§ 100c. 139 St. at L. 735, ch.

451, § 31. Comp. St. § 8146(oo).

§ 100d. ¹ Act of Sept. 26, 1914, ch. 311, § 5, 38 St. at L. 719, Comp. St. § 8836e, *supra*, § 77h; *infra*, § 693.

§ 101. ¹ *U. S. v. Lee*, 106 U. S. 196, 27 L. ed. 171; *Stanley v. Schwalby*, 147 U. S. 508, 37 L. ed. 259; *Tindal v. Wesley*, 167 U. S. 204, 42 L. ed. 137. But see *Stanley v. Schwalby*, 162 U. S. 255, 40 L. ed. 960.

² *Scranton v. Wheeler*, C. C. A., 57 Fed. 803, 807.

of the United States; but the United States are not bound by any adjudication in such a suit.³

§ 102. Replevin against officers of the United States. Papers on file in a Government Department cannot be obtained by replevin.¹ Before the Tucker act, it was held that no suit would lie to compel the Treasurer and Comptroller of the United States to deliver to the complainant the surplus of bonds deposited as security for bank notes when the bank notes had been paid.² Since the Tucker act, it has been held that a suit thereunder will lie against the United States to recover taxes which a statute had directed the Secretary of the Treasury to refund,³ but that no injunction should issue to prevent a collector from disposing of duties paid by the complainant, which the Board of General Appraisers and the court have held should be refunded.⁴

§ 102a. Liability of a foreign government to suit. To what extent the Supreme Court has jurisdiction over a foreign state or sovereign has not yet been decided.¹ The State courts have no jurisdiction over a foreign government upon any cause of action either by attachment or otherwise.² A District Court of the United States has no jurisdiction in personam against a foreign state or sovereign.³ The execution of a contract in the United States for war supplies or equipment does not make the foreign government subject to suit.⁴ The institution of a suit by the foreign government does not justify an interpleader of another defendant with a claim against it.⁵

The Federal courts have no jurisdiction over a foreign man-of-war.⁶ A vessel owned or chartered by a foreign government

³ U. S. v. Lee, 106 U. S. 196, 223, 27 L. ed. 171, 182; Stanley v. Schwalby, 147 U. S. 508, 37 L. ed. 259; s. c., 162 U. S. 255, 272, 40 L. ed. 960, 966; Scranton v. Wheeler, 57 Fed. 803, 807; Tindal v. Wesley, 167 U. S. 204, 223, 42 L. ed. 137, 143.

¹ § 102. ¹ Van Antwerp v. Hulburd, Fed. Cas. No. 16,827 (8 Blatchf. 282). See Case v. Terrel, 11 Wall. 199, 20 L. ed. 134.

² Brent v. Hagner, 5 Cranch (C. C.) 71, 6 Opinions of Attorney General, 223.

³ U. S. v. Shipley, C. C. A., 197 Fed. 265.

⁴ Joannidis v. Loeb, 191 Fed. 93 § 102a. ¹ See *supra*, § 3.

² Hassard v. U. S. of Mexico, 29 Misc. (N. Y.) 311, aff'd 46 App. Div. 623, aff'd — N. Y. — Manning v. Nicaragua, 14 How. Pr. N. Y. 917. See The Sapphire, 11 Wall. 164, 20 L. Co-Op. 127, 130 and note.

³ Kingdom of Roumania v. Guaranty Trust Co., C. C. A., 250 Fed. 341.

⁴ Ibid.

⁵ Ibid.

⁶ The Schooner Exchange v. McFadden, 7 Cranch, 116, L. ed. 287.

while in its possession and used in governmental acts cannot be libeled by a Court of Admiralty.⁷ That a foreign government has no longer possession of the vessel it may be libeled for the negligence of its crew while in such government's employ, has been held in a single case.⁸

The avowal of the foreign government, a certificate from its ambassador⁹ or a suggestion by the Attorney General of the United States or his representative¹⁰ that the ship is in use by it as a governmental act is conclusive upon the court.

A court will not entertain a suit which requires the determination of the validity of the act of a foreign government performed in its sovereign capacity within its own territory, although such government is not a party defendant.¹¹ Thus the Federal courts have refused to take jurisdiction: of an action for assault and false imprisonment by the soldiers of a foreign government.¹² Of an action against a corporation chartered by one of the states of the Union because of its instigating soldiers of a foreign government to seize the plaintiff's property.¹³ Of a suit to impress a lien upon a fund which had been wrongfully paid to citizens of the United States by a foreign government in violation of a contract by such government.¹⁴

But the courts have jurisdiction to adjudicate upon the validity of the title to property which it is alleged has been condemned and sold by a foreign government recognized by the United States¹⁵ although the action of the authorities of such foreign government must be accepted as the rule of decision.¹⁶

A court has jurisdiction to decide the title to land held by an individual in territory over which the United States exercises *de*

⁷ *The Maipo*, 252 Fed. 627; *M. Baars & Co. v. The Adriatic*, C. C. A., March, 1919.

⁸ *The Adriatic*, C. C. A., 258 Fed. 902.

⁹ *The Florence H.*, 248 Fed. 1013.

¹⁰ *The Florence H.*, 248 Fed. 1013.

¹¹ *Underhill v. Hernandez*, 168 U. S. 250, 18 Sup. Ct. 83, 42 L. ed. 456, affirming C. C. A., 65 Fed. 577, 38 L.R.A. 405; *Am. Banana Co. v. United Fruit Co.*, 213 U. S. 347, 29 Sup. Ct. 511, 53 L. ed. 826, 16 Ann. Cas. 1047, affirming C. C. A., 166

Fed. 261; *Hewitt v. Speyer*, C. C. A., 250 Fed. 367; *Ricard v. Am. Metal Co.*, 246 U. S. 304.

¹² *Underhill v. Hernandez*, 168 U. S. 250, 18 Sup. Ct. 83, 42 L. ed. 456.

¹³ *Am. Banana Co. v. United Fruit Co.*, 213 U. S. 347, 29 Sup. Ct. 511, 53 L. ed. 826.

¹⁴ *Hewitt v. Speyer*, C. C. A., 250 Fed. 367.

¹⁵ *Oetjen v. Central Leather Co.*, 246 U. S. 297, *Ricard v. Am. Metal Co.*, 246 U. S. 304.

¹⁶ *Ibid.*

facto jurisdiction, although negotiations are pending by the United States and a foreign government to determine which of them has the right of sovereignty thereover.¹⁷

§ 103. Liability of a State to a suit by the United States.

A State may be sued by the United States in any proper case, without consenting to the jurisdiction.¹ Such consent was given by the State when it was admitted into the Union, upon an equal footing with the other States.²

§ 104. Liability of a State to a suit by another State. The Constitution provides that "the judicial power shall extend . . . to Controversies between two or more States, . . . and between a State, and the Citizens thereof, and foreign States, Citizens, or Subjects."¹ The Eleventh Amendment has not taken away the liability of one of the United States to a suit by another such State or a foreign State. Such jurisdiction, however, is confined to controversies concerning rights affecting property; not to those merely affecting political rights.² It includes controversies concerning boundaries between different States, even though the complainant claim no title other than that of sovereignty and jurisdiction over the lands in question.³ For, "in this country, where feudal tenures are abolished, in cases of escheat the State takes the place of the feudal lord, by virtue of its sovereignty, as the original and ultimate proprietor of all the lands within its jurisdiction."⁴ If, however, in a bill which prays relief against a threatened invasion of rights purely political in their nature, a threatened injury to property be stated "only by way of showing one of the grievances resulting from the threatened destruction of the State, and in aggravation of it, not as a specific ground of relief;" and "this matter

¹⁷ *Cordova v. Grant*, 248 U. S. 413.

¹ *U. S. v. Texas*, 143 U. S. 621, 36 L. ed. 285; *Kansas v. U. S.*, 204 U. S. 331, 51 L. ed. 510.

² *U. S. v. Texas*, 143 U. S. 621, 646, 36 L. ed. 285, 293.

¹ Art. III, § 2.

² *Cherokee Nation v. Georgia*, 5 Pet. 1, 8 L. ed. 25; *Georgia v. Stanton*, 6 Wall. 50, 18 L. ed. 721;

Georgia v. Grant, 6 Wall. 241, 18 L. ed. 848.

³ *Rhode Island v. Massachusetts*, 12 Pet. 657, 9 L. ed. 1233; *Missouri v. Iowa*, 7 How. 660, 12 L. ed. 861; *Florida v. Georgia*, 17 How. 478, 15 L. ed. 181; *Alabama v. Georgia*, 23 How. 505, 16 L. ed. 556; *Virginia v. West Virginia*, 11 Wall. 39, 20 L. ed. 67.

⁴ *Georgia v. Stanton*, 6 Wall. 50, 73, 18 L. ed. 721, 724.

of property is neither stated as an independent ground, nor is it noticed at all in the prayers for relief:" the bill will be dismissed.⁵

A State may sue another State for an injunction against the diversion of the waters of a stream flowing through both which unreasonably interferes with their use for irrigation,⁶ and to enjoin a public nuisance affecting a large number of the complainant's citizens, such as the pollution of the water.⁷ A State cannot sue another State or the Government and Health officials of the latter to enjoin their enforcement of unreasonable quarantine regulations which interfere with commerce between the two States.⁸ A State cannot obtain an order or judgment compelling a governor of another State to return a fugitive from labor or justice.⁹ A suit cannot be maintained when brought by one State against another to enforce the payment by the latter of its bonds originally held by citizens of the former State, and assigned by them to it solely for the purpose of collection.¹⁰ But a State which owns absolutely the bonds of another State, although it has received them as a gift after they have been due, may sue the latter and recover a decree adjudging the amount due and directing the foreclosure and sale of shares of corporate stock owned by the defendant and mortgaged as security for the bonds.¹¹ A State may sue another State, and a municipal cor-

⁵ *Georgia v. Stanton*, 6 Wall. 50, 77, 18 L. ed. 721, 725.

⁶ *Kansas v. Colorado*, 206 U. S. 46, 51 L. ed. 956.

⁷ *Missouri v. Illinois*, 180 U. S. 208, 45 L. ed. 497; s. c., 200 U. S. 496, 50 L. ed. 572.

⁸ *Louisiana v. Texas*, 176 U. S. 1, 44 L. ed. 347; *Kansas v. Colorado*, 206 U. S. 46, 86, 51 L. ed. 956, 970.

⁹ *Kentucky v. Dennison*, 24 How. 66, 16 L. ed. 717.

¹⁰ *New Hampshire v. Louisiana*, 108 U. S. 76, 27 L. ed. 656.

¹¹ *South Dakota v. North Carolina*, 192 U. S. 286, 48 L. ed. 448. Before the day fixed for the sale, the defendant paid the amount of the plaintiff's claim in full, namely,

\$27,400, with costs. The Committee of the North Carolina bondholders subsequently offered, to the Governor of South Dakota, other bonds of North Carolina, which with principal and interest aggregated \$150,000. Governor Elrod wrote, in answer: "Your kind offer is declined, for the reason that it seems to me to be against public policy and good conscience." On January 8th, 1907, he recommended the passage of an act returning the money received from South Carolina, saying: "Morally, we have no right to one cent of this money, and we ought to be brave enough and true enough to give it back. This money was clearly intended for our university. She

poration of the latter, for an injunction against the excessive and unreasonable discharge of sewage into a river, which poisons the water supply of the inhabitants of the plaintiff and injuriously affects that portion of the bed of the river which lies within the plaintiff's territory.¹² A State may sue another State, to prevent the latter from authorizing the diversion of the waters of a stream flowing through both States, so as to deprive the plaintiff's inhabitants of the water, to which they were entitled;¹³

can use it, but it is tainted money. I would send this money back to North Carolina for her university and appropriate a like sum for our splendid university. It will be no burden on our people. It is entirely plain that ingenious schemers are using our State for private ends. * * * It is plain that designing individuals would continue to use the good name of the State of South Dakota to collect questionable securities of other States. * * * It is clear to me that our State ought not to become a collecting agency, neither ought it to forget the doctrine of 'comity between States.' The decision in the case of the State of South Dakota v. the State of North Carolina opens up endless opportunities for States to deal in the bonds and other obligations of sister States. It is not possible to exaggerate the scandals, the corruption of Legislatures and State officials, and the possibilities of graft which would follow if States should start to trade on the power which the decision gives them. No State ought to be endowed with the power to speculate upon unenforceable claims of individuals against other States. Under the Federal Constitution individuals cannot sue States on such bonds, so the holder gives or sells them to us, and we can sue the State that issued the bonds. The decision in

the above entitled case hangs entirely on the fact that South Dakota was the *bona fide* owner of the bonds in question. There is no magic in the fact that she got them as a gift. She would be equally the *bona fide* owner if she had bought them." The Sun, January 15th, 1907. Mr. Justice Brewer said: "I can but think her conduct far above that of the State of South Dakota, which willingly took a donation of bonds with the idea of collecting them from a sister State, in disregard of that generous feeling which should control all the States of the Union; and I do not wonder that the Governor of South Dakota, who retired from office last January, in his final message recommended that the Legislature appropriate the full amount of the money received and tender it back to North Carolina!" Report, p. 171, Mohonk Conference, A. D. 1907.

¹² Missouri v. Illinois, 180 U. S. 208, 45 L. ed. 497; s. c., 200 U. S. 496, 50 L. ed. 572; where the bill was dismissed without prejudice after a trial of the issues of fact.

¹³ Kansas v. Colorado, 185 U. S. 125, 46 L. ed. 838; where the bill was eventually dismissed, without prejudice to the right of the plaintiff to institute new proceedings whenever it shall appear that through a material increase in the depletion of the waters of the Ar-

and where the navigability of the stream is not affected, the United States has no right of intervention because of its alleged duty of legislating for the reclamation of arid lands.¹⁴ A State cannot sue another State, to enjoin the enforcement of quarantine regulations, which impose unreasonable restraint upon commerce between ports of the two States.¹⁵ A tribe of Indians domiciled within the borders of the United States does not constitute a foreign State within the meaning of the Constitution.¹⁶

§ 105. Liability of States to suits by private persons. Under the Constitution of the United States as originally adopted, it was provided that the judicial power of the United States should extend to controversies "between a State and Citizens of another State."¹ This was held to subject a State to liability to an action by a citizen of another State.² The decision was opposed to the opinions of Marshall and others, as expressed in the conventions which ratified the Constitution,³ and was repugnant to the feelings of the people. Consequently, the Eleventh Amendment was adopted. This enacted that "the Judicial Power of the United States shall not be construed to extend to any suit, in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

A State cannot, without its consent, be sued by one of its own citizens, even on a cause of action arising under the Constitution and laws of the United States.⁴ It has been suggested, but not decided, that, in a case arising under the Fourteenth Amendment, the inhibition of the Eleventh Amendment may not

kanas by Colorado, its corporations or citizens, the substantial interests of Kansas are being injured to the extent of destroying the equitable apportionment of benefits between the two States resulting from the flow of the river. *Kansas v. Colorado*, 206 U. S. 46, 117, 118, 51 L. ed. 956, 983.

¹⁴ *Kansas v. Colorado*, 206 U. S. 46, 86, 51 L. ed. 956, 970.

¹⁵ *Louisiana v. Texas*, 176 U. S. 1, 44 L. ed. 347. *Supra*, § 3.

¹⁶ *Cherokee Nation v. Georgia*, 5 Pet. 1, 8 L. ed. 25.

§ 105. ¹ Art. III., § 2. The liability of a State to suit by the United States or another State is described, *supra*, § 3.

² *Chisholm v. Georgia*, 2 Dall. 419, 1 L. ed. 440.

³ See *Elliott's Debates*. In *Hans v. Louisiana*, 134 U. S. 1, Bradley, J., speaking for the court, said that *Chisholm v. Georgia* was erroneously decided.

⁴ *Hans v. Louisiana*, 134 U. S. 1, 33 L. ed. 842; *North Carolina v. Temple*, 134 U. S. 22, 33 L. ed. 849.

apply.⁵ It has been said: "The Constitution, with its amendments, is construed as one instrument, and the Eleventh Amendment cannot be applied to nullify the power conferred on Congress to regulate commerce among the several States. It is not a barrier to judicial investigation to ascertain whether other provisions of the Constitution have been disregarded by the State action."⁶

A corporation chartered by Congress cannot sue a State.⁷

An action at law or a suit in equity or in admiralty, against a municipal corporation,⁸ or against a county,⁹ or any other political subdivision of a State,¹⁰ is not a suit against a State and a State statute cannot divest a Federal court of jurisdiction over such a suit.¹¹ Where a State statute authorizes suits against the State only in a State court, the District Courts of the United States have no jurisdiction.¹² An action against a corporation, such as a railroad company, all the stock of which is owned by a State, is not an action against a State.¹³ A State agricultural college may be sued for a tort.¹⁴

It has been held at circuit, that a crossbill may be filed against

⁵ Perkins v. Northern Pac. Ry. Co., 155 Fed. 445, 447; *Ex parte* Young, 209 U. S. 123, 150, 52 L. ed. 714, 725, 13 L.R.A. (N.S.) 932, 14 Ann. Cas. 764.

⁶ Illinois Cent. R. Co. v. Mississippi Railroad Commission, C. C. A., 138 Fed. 327, 331; per Shelby, J. See also Southern Ry. Co. v. Greensboro Ice & Coal Co., 134 Fed. 82.

⁷ Smith v. Reeves, 178 U. S. 436, 44 L. ed. 1140.

⁸ Camden Interstate Ry. Co. v. Catlettsburg, 129 Fed. 421; U. S. v. Port of Portland, 147 Fed. 865.

⁹ Lincoln County v. Luning, 133 U. S. 529, 33 L. ed. 766; Eaton v. Shiawassee County, C. C. A., 218 Fed. 588; Lauderdale County v. Kittel, C. C. A., 229 Fed. 593; United States v. C. A. Riffe Co., 247 Fed. 374.

¹⁰ Hopkins v. Clemson Agricul-

tural College of South Carolina, 221 U. S. 636, 55 L. ed. 890. See *supra*, § 95.

¹¹ Lincoln County v. Luning, 133 U. S. 529, 33 L. ed. 766.

¹² Smith v. Reeves, 178 U. S. 436, 44 L. ed. 1140; Smith v. Rackliffe, C. C. A., 87 Fed. 964; Deseret Water, Oil & Irr. Co. v. State of California, C. C. A., 202 Fed. 498.

¹³ Southern Ry. Co. v. North Carolina R. Co., 81 Fed. 595, 599, 600; Simonton, J.: "When the State entered into this enterprise with private persons, she did not carry into it her functions of sovereignty; but stripped herself of them."

¹⁴ Hopkins v. Clemson Agricultural College of South Carolina, 221 U. S. 636, 55 L. ed. 890. But a State court has held that an action against a State industrial school in Alabama is an action against the

a State, which has brought an original bill;¹⁵ but it seems that no affirmative judgment can be rendered against the State in such case.¹⁶ It has been held at circuit: that after the removal of a suit brought by a State, an injunction may be granted to stay further proceedings in the State court therein.¹⁷

A State may waive its exemption from suit.¹⁸ An appearance by the State attorney general, "for and on behalf of the State," under statutory authority is a waiver, by the State, of its immunity from suit.¹⁹ But not when the statute limits his right of appearance in such litigation to the Courts of the State,²⁰ nor when he has no statutory authority.²¹

When the statute creating a State board makes it a body corporate, with power to sue and be sued without limitations, the State waives its immunity so far as such board is concerned.²² A statute providing that a State officer should be made a party defendant to all actions to recover taxes²³ or to set aside tax sales²⁴ was held not to be a waiver, by the State, of its constitutional immunity from suit in a Federal Court. It has been held that the defense that the defendant is a State, which cannot be sued without its consent, may be raised for the first time upon an appeal.²⁵

Where, in the regular course of judicial administration, property of the State, or in which the State has an interest, has

State. *Alabama Girls' Industrial School v. Reynolds*, 143 Ala. 579, 42 So. 114.

¹⁵ *Port Royal & A. Ry. Co. v. South Carolina*, 60 Fed. 552. See *the Siren*, 7 Wall. 152, 154, 19 L. ed. 129, 130. *Supra*, § 95.

¹⁶ *Reeside v. Walker*, 11 How. (U. S.) 272, 13 L. ed. 693; *New York v. Dennison*, 84 N. Y. 272.

¹⁷ *Abeel v. Culberson*, 56 Fed. 329. See *infra*, §§ 268, 284, 361.

¹⁸ *Gunter v. Atlantic Coast Line R. R. Co.*, 200 U. S. 273, 50 L. ed. 477; *Interstate Const. Co. v. Regents of the University of Idaho*, 199 Fed. 509.

¹⁹ *Gunter v. Atlantic Coast Line R. R. Co.*, 200 U. S. 273, 50 L. ed.

477. See *Cotting v. Kansas City Stock Yards Co.*, 183 U. S. 79, 114, 46 L. ed. 92, 110. See *supra*, § 95.

²⁰ *Deseret Water, Oil & Irr. Co. v. State of California*, C. C. A., 202 Fed. 498.

²¹ *Farish v. State Banking Board of Okla.*, 235 U. S. 489, 512.

²² *Interstate Const. Co. v. Regents of the University of Idaho*, 199 Fed. 509.

²³ *Smith v. Reeves*, 178 U. S. 436, 46 L. ed. 1140.

²⁴ *Chandler v. Dix*, 194 U. S. 590, 48 L. ed. 1129.

²⁵ *Alabama Girls' Industrial School v. Reynolds*, 143 Ala. 579, 42 So. 114.

come under the control of the court, without being forcibly taken from the possession of the government; the court will proceed to discharge its duty in regard to the same; and the State, if it choose to come in as plaintiff, as in prize cases, or to intervene in other cases where it has a lien or other claim upon the property, will be permitted so to do, subject, however, to the State's rights and will receive the same consideration as those of any other party interested in the matter, and will so far as its rights in such property are concerned be subjected in like manner to the judgment of the court.²⁶

Cases have often arisen where, although a State was not a party to the record, it had rights which it claimed would be affected by the determination of the suit before the court. To determine accurately the jurisdiction of the Federal court in such cases has been a very difficult and delicate matter; and the questions which thus continually arise are hard to answer. The fact that a State is not named as a party to the record does not of itself remove a case from the terms of the Eleventh Amendment.²⁷ Whether a State is an actual party in the sense of the prohibition must be determined by a consideration of the nature of the case as presented by the whole record.²⁸

§ 105a. Actions at common law against State officers. An action at common law against a public officer who is sued as an individual and justifies under the authority of the State, is usually held not to be an action against the State.¹ To make out his defense, he must show that his authority was sufficient in law to protect him.² It has been so held of an action of

²⁶ *Clark v. Barnard*, 108 U. S. 436, 27 L. ed. 780; *Cunningham v. Macon & Brunswick R. Co.*, 109 U. S. 446, 452, 27 L. ed. 992, 994; citing *The Siren*, 7 Wall. 152, 157, 19 L. ed. 129; *The Davis*, 10 Wall. 15, 20, 19 L. ed. 875, 877. *Supra*, § 95.

²⁷ *Elliott v. Wiltz*, 107 U. S. 711, 27 L. ed. 448; *Cunningham v. Macon & Brunswick R. Co.*, 109 U. S. 446, 27 L. ed. 992; *Hagood v. Southern*, 117 U. S. 52, 29 L. ed. 805; *In re Ayers*, 123 U. S. 443, 31 L. ed. 216; *Fitts v. McGhee*, 172 U. S. 516, 43 L. ed. 535.

²⁸ *Poindexter v. Greenhow*, 114 U. S. 270, 287, 29 L. ed. 185, 191; *In re Ayers*, 123 U. S. 443, 492, 29 L. ed. 185, 191; *Fitts v. McGhee*, 172 U. S. 516, 43 L. ed. 535. See *supra*, §§ 95, 100.

§ 105a. 1 *Cunningham v. Macon & Brunswick R. Co.*, 109 U. S. 446, 452, 27 L. ed. 992, 994.

2 *Cunningham v. Macon & Brunswick R. Co.*, 109 U. S. 446, 452, 27 L. ed. 992, 994.

ejectment against a State officer, who held land in the name and for the uses of the State;³ even when the defendant was sued as Comptroller of the State;⁴ and that after a judgment in ejectment against him, another State officer cannot intervene and have the judgment opened upon an answer containing the same defense.⁵ An action of detinue may be maintained against a State officer, to recover the possession of personal property, which he has seized under State authority.⁶ A State officer may be sued in trespass for the seizure of personal property in obedience to an unconstitutional statute of the State.⁷ A State Bank Commissioner may be sued for damages caused by his loss in guarding the business and assets of a bank,⁸ but an action against a State treasurer, to recover taxes illegally exacted,⁹ and an action against a County Dispensary Board, in South Carolina, to recover the price of supplies bought on behalf of the State, the proceeds of the sale of which had been paid to other State officers,¹⁰ are suits against the State, and cannot be maintained. And, it has been held, that a State officer cannot be sued for damages under the Federal anti-trust law¹¹ for aiding the State in monopolizing interstate commerce.¹² When a State officer has a well defined duty in regard to a specific matter, which is not discretionary, and which does not affect the general powers or function of the government; but in the performance of which one or more individuals have a distinct interest capable of enforcement by judicial process: a writ of mandamus will usually issue against

³ *Tindal v. Wesley*, 167 U. S. 204, 42 L. ed. 137.

⁴ *Saranac, L. & T. Co., v. Roberts*, 68 Fed. 521.

⁵ *Vance v. Wesley*, 85 Fed. 157.

⁶ *Poindexter v. Greenhow*, 114 U. S. 270, 29 L. ed. 185.

⁷ *Virginia Coupon Cases*, 114 U. S. 269, 29 L. ed. 185; *McGahey v. Virginia*, 135 U. S. 662, 684, 34 L. ed. 304, 312; *Scott v. Donald*, 165 U. S. 58, 41 L. ed. 632.

⁸ *Johnson v. Lankford*, 245 U. S. 541. But see *Lankford v. Platte Iron Works Co.*, 235 U. S. 461 cited *infra*, § 105b.

⁹ *Smith v. Reeves*, 178 U. S. 436, 44 L. ed. 1140.

¹⁰ *Carolina Glass Co. v. Murray*, 197. Fed. 392. Where the statute (25 St. at L., South Carolina, p. 463) provided for a purchase in the name of the State and "that the State should not be liable on any contract for the purchase thereof beyond the actual assets of the dispensary for which the purchase was made."

¹¹ 26 St. at L. 209.

¹² *Lowenstein v. Evans*, 69 Fed. 908.

him; and it is ordinarily held, that an application for such a writ is not a suit against the State;¹³ but an application for a writ of mandamus, to compel a State officer to pay money out of the treasury of a State, is a suit against the State and cannot be maintained.¹⁴

§ 105b. Suits in equity to which a State is an indispensable party defendant. Courts of equity proceed upon different principles in regard to parties.¹ A suit in equity cannot be maintained, in a case where the State would be an indispensable party if it were an individual similarly affected.² Consequently, a suit cannot be maintained against the officers of a State, to compel specific performance by them of its contract for the sale of land.³ Nor for the reformation of such a contract.⁴ Nor to enjoin acts such as the taking of water authorized by a contract with the State.⁵ Nor to compel its officers to pay out of the money in its treasury, taxes which have been assessed for the purpose of paying interest upon the plaintiff's bonds,⁶ or to pay out of such treasury any money in discharge

¹³ Board of Liquidation of McComb, 92 U. S. 531, 23 L. ed. 623; Cunningham v. Macon & Brunswick R. Co., 109 U. S. 446, 453, 27 L. ed. 992, 994. See Rolston v. Missouri Fund Commissions, 120 U. S. 390, 411, 30 L. ed. 721, 728.

¹⁴ Elliott v. Wiltz, 107 U. S. 711, 27 L. ed. 448.

§ 105b. ¹ Cunningham v. Macon & Brunswick R. Co., 109 U. S. 446, 456, 27 L. ed. 992, 995.

² Louisiana v. Jumel, 107 U. S. 711, 27 L. ed. 448; Walsh v. Preston, 109 U. S. 297, 27 L. ed. 940; Cunningham v. Macon & Brunswick R. Co., 109 U. S. 446, 456, 27 L. ed. 992; Hagood v. Southern, 117 U. S. 52, 29 L. ed. 805; Rolston v. Missouri Fund Com'rs, 120 U. S. 390, 30 L. ed. 721; Christian v. Atlantic & N. C. R. Co., 133 U. S. 233, 33 L. ed. 589; Chandler v. Dix, 194 U. S. 590, 48 L. ed. 1129; Preston v. Walsh, 10 Fed. 315; Brown University v.

Rhode Island College, 56 Fed. 55; Morrill v. American Reserve Bond Co., 151 Fed. 305; Sanders v. Saxton, 182 N. Y. 477. See *supra*, §§ 41, 43, *infra*, §§ 119, 120. But see Swasey v. N. C. R. Co., 1 Hughes, 17.

³ Preston v. Walsh, 10 Fed. 315. See Walsh v. Preston, 109 U. S. 297, 27 L. ed. 940; Jobe v. Urquhart, 98 Ark. 525, 136 S. W. 663.

⁴ Jobe v. Urquhart, 98 Ark. 525, 136 S. W. 663.

⁵ Veitia v. Fortuna Estates, C. C. A., 240 Fed. 256.

⁶ Louisiana v. Jumel, 107 U. S. 711, 27 L. ed. 448. It has been held, however, that a State treasurer may be compelled to deliver to receivers of a corporation, securities deposited with him, to secure performance of the contracts of such company. Morrill v. American Reserve Bond Co., 151 Fed. 305.

of its debts.⁷ Nor to compel a State Banking Board and Bank Commissioner to pay bank deposits out of a depositors' guaranty fund and to enforce a claim of subrogation to securities in which the fund was invested.⁸ Nor to establish a claim to property held by its officers claiming a title in the State thereto; although the relief prayed is a declaration that a sale,⁹ or a deed in pursuance of a sale,¹⁰ is void. Nor to compel a railroad company to pay to the complainant dividends declared upon shares of the corporate stock standing in the name of a State; nor for a receiver of such stock; nor for its sale.¹¹ Nor to compel State officers to redeem certain certificates of State indebtedness and accept the same in payment for taxes;¹² nor it has been held, to compel a State officer to execute a trust vested by a statute in the State or in such officer, designated by his official title.¹³ Nor to abate a nuisance upon property belonging to the State.¹⁴ Nor to restrain the infringement in a county court house of a patent.¹⁵ Nor to a suit by a port district of Washington to enjoin the exercises of control over the tide lands within the territorial limits of the port district.¹⁶ It has been held: that a State is an indispen-

⁷ Ibid.

⁸ *Lankford v. Platte Iron Works*, 235 U. S. 461; *Farish v. State Banking Board of Okla.*, 235 Fed. 498. Both of these cases were decided by a majority of one in a divided court.

⁹ *Cunningham v. Macon & Brunswick R. Co.*, 109 U. S. 446, 27 L. ed. 992; (a foreclosure sale to the governor); *Chandler v. Dix*, 194 U. S. 590, 48 L. ed. 1129; (a tax sale where the auditor general was made defendant in pursuance of a State statute).

¹⁰ *Sanders v. Saxton*, 182 N. Y. 477, 1 L.R.A. (N.S.) 727, 108 Am. St. Rep. 826.

¹¹ *Christian v. Atlantic & N. C. R. Co.*, 133 U. S. 233, 33 L. ed. 589. But see *Swasey v. N. C. R. Co.*, 1 Hughes, 17.

¹² *Hagood v. Southern*, 117 U. S. 52, 29 L. ed. 805; *Lankford v. Platte Iron Works*, 235 U. S. 461; *Farish*

v. State Banking Board of Okla. 235 U. S. 498. Both of these cases were decided by a majority of one in a divided court. But see *Rolston v. Chittenden*, 120 U. S. 390, 30 L. ed. 721.

¹³ *Brown University v. Rhode Island College*, 56 Fed. 55. *Contra*, *Morrill v. American Reserve Bond Co.*, 151 Fed. 305, (a suit to compel the State treasurer to deliver to receivers security deposited to insure policy-holders against loss). *Cf.* *Ervien v. U. S.*, 251 U. S. 41, *infra*, § 105c.

¹⁴ *Hopkins v. Clemson Agricultural College of South Carolina*, 221 U. S. 636, 55 L. ed. 890.

¹⁵ *McCreery Engineering Co. v. Massachusetts Fan Co.*, 180 Fed. 115.

¹⁶ *Port of Seattle v. Oregon & W. R. Co.*, 242 Fed. 986.

sable party to a suit to enjoin an express company from refusing to carry liquor into the State where the defendant contends that the State statutes forbid such transportation.¹⁷ But a State is not an indispensable party to a suit against a private individual to cancel a contract between him and that State, by which the State acquired lands of the United States through mistake or fraud.¹⁸ It seems, that a State is not an indispensable party to a stockholder's suit, to enjoin a corporation from obeying an unconstitutional State law.¹⁹

§ 105c. Injunctions against State officers. The jurisdiction of the Federal courts in suits against officers of States is in many respects similar to their jurisdiction in suits for injunctions against officers of the United States,¹ and the decisions in the latter cases are of assistance in the former.²

A suit may be maintained to enjoin the State Attorney General,³ or any prosecuting officer,⁴ or other State officer, except possibly the State governor,⁵ or State judges, or to enjoin a

¹⁷ *H. Clark & Sons v. Southern Express Co.*, 203 Fed. 580.

¹⁸ *Williams v. U. S.*, 138 U. S. 514, 516, 34 L. ed. 1026, 1028.

¹⁹ *Cotting v. Kansas City Stock Yards Co.*, 183 U. S. 79, 114, 46 L. ed. 92, 110; *Poor v. Iowa Cent. Ry Co.*, 155 Fed. 226.

§ 105c. ¹ *Jacob Hoffman Brewing Co. v. McElligot*, C. C. A., 259 Fed. 525, modifying 259 Fed. 321.

² *Supra*, § 100.

³ *Smyth v. Ames*, 169 U. S. 466, 42 L. ed. 819; *Cotting v. Kansas City Stock Yards Co.*, 183 U. S. 79, 46 L. ed. 92; *Prout v. Starr*, 188 U. S. 537, 47 L. ed. 584; *Ex parte Young*, 209 U. S. 123, 159; 28 Sup. Ct. 441, 453, 14 Ann Cases, 764; 52 L. ed. 714, 13 L.R.A. (N.S.) 932; *Hunter v. Wood*, 209 U. S. 205, 52 L. ed. 747; *Reagan v. Farmers' L. & T. Co.*, 154 U. S. 362, 38 L. ed. 1014; *Rast v. Van Deman & Lewis*, 240 U. S. 342, 355. *St. Louis & S. F. R. Co. v. Hadley*, 161 Fed. 419;

Western Union Tel. Co. v. Julian, 169 Fed. 166. The late decisions have overruled a number of cases to the contrary. It was held in 1899: that such a suit could not be maintained in a case where the defendants were not specially charged with the execution of an unconstitutional statute, and were not, under the authority of the same, committing or about to commit some specific wrong or trespass, to the injury of the plaintiff's rights. *Fitts v. McGhee*, 172 U. S. 516, 529, 43 L. ed. 535, 541; *Ball v. Rutland R. Co.*, 93 Fed. 513; *Little v. Tanner*, 208 Fed. 805; *Louisville & N. R. Co. v. Bosworth*, 209 Fed. 380.

⁴ *Herndon v. Chicago, Rock Island & Pac. Ry. Co.*, 218 U. S. 135, 54 L. ed. 970; *St. Louis & S. F. R. Co. v. Allen*, 181 Fed. 710; *Louisville & N. R. Co. v. Bosworth*, 209 Fed. 380.

⁵ Such suits have been sustained in *Davis v. Gray*, 16 Wall. 203, 21 L. ed.

State board,⁶ from bringing suits, whether civil or criminal, in its courts, in pursuance of a State statute, which is unconstitutional; or from enforcing such a statute;⁷ or from enforcing the order of a State board in pursuance of such a statute;⁸ or to enjoin a State railroad commission from suing to recover penalties for the violation of an order made by it, which was void as a regulation of interstate commerce.⁹ An injunction may be granted against a State officer,¹⁰ even, it seems, a State prosecuting officer,¹¹ to prevent his invasion of the rights of the complainant to property, although he acts under color of the attempted administration of a constitutional statute. Where State officers, under a statute which

447; *Pennoyer v. McConnaughy*, 140 U. S. 1, 35 L. ed. 363, s. c., 43 Fed. 196, 339; *Southern Ry. Co. v. North Carolina R. Co.*, 81 Fed. 595. It has been held that the court may take jurisdiction of such a suit. *Crane v. Johnson*, 223 Fed. 334. But see *Cunningham v. Macon & Brunswick R. Co.*, 109 U. S. 446, 453; 27 L. ed. 992, 905, per Miller, J. "It is clear that in enjoining the governor of the State in the performance of one of his executive functions, the case goes to the verge of sound doctrine, if not beyond it, and that the principle should be extended no further."

⁶ *Smyth v. Ames*, 169 U. S. 466, 42 L. ed. 819; *University of the South v. Jetton*, 155 Fed. 182, approved as to this, reversed upon another point, 208 U. S. 489, 52 L. ed. 584. *Scully v. Bird*, 209 U. S. 481, 52 L. ed. 899. *Western Union Tel. Co. v. Andrews*, 216 U. S. 165, 54 L. ed. 430; *Herndon v. Chicago, Rock Island & Pac. Ry. Co.*, 218 U. S. 135, 54 L. ed. 970; *St. Louis & S. F. R. Co. v. Hadley*, 161 Fed. 419; *Central of Georgia Ry. Co. v. Railroad Commission of Alabama*, 161 Fed. 925; *Kansas Natural Gas Co. v. Haskell*, 172 Fed. 545; *St. Louis &*

S. F. R. Co. v. Allen, 181 Fed. 710; *Louisville & N. R. Co. v. Railroad Commission of Alabama*, 191 Fed. 757. An individual may be enjoined from suing, to recover a penalty or damages under a State statute, which is unconstitutional. *McNeill v. Southern Ry. Co.*, 202 U. S. 543, 50 L. ed. 1142; *Louisville & N. R. Co. v. Bosworth*, 209 Fed. 380.

⁷ *Rast v. Van Deman & Lewis*, 240 U. S. 342, 355; *Louisville & N. R. Co. v. Bosworth*, 209 Fed. 380; *Rockaway Pacific Corporation v. Stotesbury*, 255 Fed. 345.

⁸ *Smyth v. Ames*, 169 U. S. 466, 42 L. ed. 819; *Herndon v. Chicago, Rock Island & Pac. Ry. Co.*, 218 U. S. 135, 54 L. ed. 970.

⁹ *McNeill v. Southern Ry. Co.*, 202 U. S. 543, 50 L. ed. 1142; affirming *Southern Ry. Co. v. Greensboro Ice & Coal Co.*, 134 Fed. 82; *Central of Georgia Ry. Co. v. Railroad Commission of Alabama*, 161 Fed. 925; *Louisville & N. R. Co. v. Railroad Commission of Alabama*, 191 Fed. 757.

¹⁰ *Greene v. Louisville Interurban R. R. Co.*, 244 U. S. 499.

¹¹ *Jacob Hoffman Brewing Co. v. McElligot, C. C. A.*, 259 Fed. 525, 527, 542.

was constitutional, denied the complainant the equal protection of the laws by an arbitrary discrimination against it, on its application for a racing license the court held, that it had jurisdiction to grant an injunction.¹² To prevent irreparable injury, an injunction may be granted against a State officer, to prevent him from making a trespass by seizure of personal property in obedience to an unconstitutional State statute;¹³ even when acting under the orders of the State court in a case of which the Federal court had prior jurisdiction;¹⁴ from infringement of the copyright of an edition of the State statutes under express legislative authority;¹⁵ from revoking a license to transact business in the State, which has been issued to a foreign corporation,¹⁶ or from annulling the franchise of a corporation, in pursuance of an unconstitutional State statute;¹⁷ but not, it has been held, from refusing to reissue an annual license to a foreign corporation, unless it complies with the terms of a statute which it claims is unconstitutional.¹⁸ It has been held, that the State governor and the commissioner of its land office may be enjoined from the sale and delivery of patents for land, which the State has previously granted to the complainant.¹⁹ A State board has been enjoined from exchanging new State bonds for a class of bonds previously issued, as to which the statute did not authorize such an exchange.²⁰ An injunction was granted against a State treasurer

¹² *Douglas Park Jockey Club v. Grainger*, 146 Fed. 414.

¹³ *Scott v. Donald*, 165 U. S. 107, 41 L. ed. 648.

¹⁴ *In re Tyler*, 149 U. S. 164, 37 L. ed. 689.

¹⁵ *Howell v. Miller*, C. C. A., 91 Fed. 129. But see *supra*, § 100.

¹⁶ *Met. Life Ins. Co. v. McNall*, 81 Fed. 888; *Chicago, R. I. & P. Ry. Co. v. Ludwig*, 156 Fed. 152; *Chicago, R. I. & P. Ry. Co. v. Swanger*, 157 Fed. 783; *infra*, § —.

¹⁷ *Chicago, R. I. & P. Ry. Co. v. Ludwig*, 156 Fed. 152.

¹⁸ *Manchester Fire Ins. Co. v. Herriott*, 91 Fed. 711, 716.

¹⁹ *Davis v. Gray*, 16 Wall. 203,

21 L. 447. "It is clear that in enjoining the governor of the State in the performance of one of his executive functions, the case goes to the verge of sound doctrine, if not beyond it, and that the principle should be extended no further." *Miller, J., in Cunningham v. Macon & Brunswick R. Co.*, 109 U. S. 446, 453, 27 L. ed. 992, 995. The original case was followed, however, in *Pennoyer v. McConnaughy*, 140 U. S. 1, 35 L. ed. 363; s. c., 43 Fed. 196, 339. But see *New Mexico v. Lane*, 243 U. S. 52, *supra*, § 100.

²⁰ *Board of Liquidation v. McComb*, 92 U. S. 531, 28 L. ed. 623.

forbidding him from paying, to anyone but the plaintiff the income of a fund, to which the plaintiff had a contractual right.²¹ In two State courts, it has been held: that a taxpayer's bill can be brought to prevent the payment of money from the State treasury, under an unconstitutional law.²² An injunction may be issued to restrain a State officer from levying an illegal tax;²³ or making an illegal assessment for taxation.²⁴ The latest authorities are to the effect that when a State statute is constitutional, a State Attorney General or other public prosecutor can not be enjoined from acting under a mistaken construction thereof.²⁵ It has been held: that no injunction can be issued against a State Attorney General to restrain him from enforcing an unconstitutional statute, which does not impose upon him a specific duty when he has not threatened to enforce it.²⁶ It has been held: that a Federal court cannot enjoin either criminal or civil proceedings pending in the State court when the bill is filed.²⁷ Nor the issue under a State statute by State officers of a certificate of nomination to a candidate for Representative in Congress. Nor to require a State officer to certify the nomination of a certain candidate for such office.²⁸

It seems: that affirmative relief will not be granted to compel a State officer to perform an act forbidden by a State statute; even if such statute is unconstitutional.²⁹

²¹ President, etc., of Yale College v. Sanger, 62 Fed. 177. See Chaffraix v. Board of Liquidation, 11 Fed. 638. The United States obtained an injunction against the use by a State Land Commission of the proceeds of public lands in violation of the terms of the gift. Ervin v. U. S. 251 U. S. 41.

²² Lynn v. Polk, 76 Tenn. 121, 123, 125; Butler v. Ellerbe, 44 S. C. 256, 276, 283.

²³ Osborn v. Bank of U. S., 9 Wheat, 738, 6 L. ed. 204; *infra*, §§ 151g, 271b.

²⁴ Union Pac. Ry. Co. v. Alexander, 113 Fed. 347; *infra*, §§ 151g, 271b.

²⁵ Arbuckle v. Blackburn, C. C. A.,

113 Fed. 616, 65 L.R.A. 864; Central Consumers Co. v. Austin, 238 Fed. 616; Jacob Hoffman Brewing Co. v. McElligot, C. C. A., 259 Fed. 525, 529, 532, 542. See Harkrader v. Wadley, 172 U. S. 148, 169, 43 L. ed. 399.

²⁶ Cavanaugh v. Looney, 248 U. S. 453.

²⁷ St. Louis & S. F. R. Co. v. Allen, 181 Fed. 710, citing U. S. R. S., § 720, Comp. St. 1901, p. 581. See *infra*, §§ 270, 271. Scully v. Bird, 209 U. S. 481, 52 L. ed. 899.

²⁸ Anthony v. Burrow, 129 Fed. 783.

²⁹ Cunningham v. Macon & Brunswick, R. Co., 109 U. S. 446, 453, 454, 27 L. ed. 992, 994, 995; Pennoyer v.

The existence of a remedy in the State courts does not deprive the injured party of his rights to relief in the Federal jurisdiction.³⁰ When, however, the proceedings are administrative rather than judicial in their nature, the Federal courts will require him first to exhaust his remedies by appeal or otherwise in the State Tribunal.³¹

§ 105d. Practice upon applications for injunctions against State officers. The Judicial Code provides: "No interlocutory injunction suspending or restraining the enforcement, operation, or execution of any statute of a State by restraining the action of any officer of such State in the enforcement or execution of such statute or in the enforcement or execution of an order made by an administrative board or commission acting under and pursuant to the statutes of such State, shall be issued or granted by any justice of the Supreme Court, or by any District court of the United States, or by any judge thereof, or by any circuit judge acting as district judge, upon the ground of the unconstitutionality of such statute, unless the application for the same shall be presented to a justice of the Supreme Court of the United States, or to a circuit or district judge, and shall be heard and determined by three judges, of whom at least one shall be a justice of the Supreme Court, or a circuit judge, and the other two may be either circuit or district judges, and unless a majority of said three judges shall concur in granting such application. Whenever such application as aforesaid is presented to a justice of the Supreme Court, or to a judge, he shall immediately call to his assistance to hear and determine the application two other judges: *Provided, however,* That one of such three judges shall be a justice of the Supreme Court, or a circuit judge. Said application shall not be heard or determined before at least five days' notice of the hearing has been given to the governor and to the attorney general of the State, and to such other persons as may be defendants in the suit: *Provided,* That if of opinion that irreparable loss or

McConaughy, 140 U. S. 1, 35 L. ed. 363.

³⁰ Smyth v. Ames, 169 U. S. 466, 18 Sup. Ct. 418, 42 L. ed. 819; Manufacturers' Light & Heat Co. v. Ott, C. C. A., 215 Fed. 940, 943.

³¹ Prentiss v. Atlantic Coast Line Co., 211 U. S. 210, 29 Sup. Ct. 67, 56 L. ed. 150; Kern Trading & Oil Co. v. Associated Pipe Line Co., 217 Fed. 273. See *infra*, § 105d.

damage would result to the complainant unless a temporary restraining order is granted, any justice of the Supreme Court, or any circuit or district judge, may grant such temporary restraining order at any time before such hearing and determination of the application for an interlocutory injunction, but such temporary restraining order shall remain in force only until the hearing and determination of the application for an interlocutory injunction upon notice as aforesaid. The hearing upon such application for an interlocutory injunction shall be given precedence and shall be in every way expedited and be assigned for a hearing at the earliest practicable day after the expiration of the notice hereinbefore provided for. An appeal may be taken direct to the Supreme Court of the United States from the order granting or denying, after notice and hearing, an interlocutory injunction in such case."¹ *It is further provided*, That if before the final hearing of such application a suit shall have been brought in a court of the State having jurisdiction thereof under the laws of such State to enforce such statute or order, accomplished by a stay in such State court, of proceedings under such statute or order pending the determination of such suit by such State court, all proceedings in any court of the United States to restrain the execution of such statute or order shall be stayed pending the final determination of such suit in the courts of the State. Such stay may be vacated upon proof made after hearing and notice of ten days served upon the attorney general of the State that the suit in the State courts is not being prosecuted with diligence and good faith."²

The words "or in the enforcement or execution of an order made by an administrative Board or Commission acting under and pursuant to the statutes of such State" were inserted by amendment; because of decisions of the Circuit Courts which held that a city ordinance³ and the order of a State Railroad

§ 105d. 1 § 266, 36 St. at L. 1087. As amd. by Act of March 4, 1913, P. L. No. 445. R. v. Niles, 218 Fed. 944; Equitable Trust Co. v. Western Pac. Ry. Co., 233 Fed. 334; Jackson v. Cravens, 235 Fed. 212.

² Sperry & Hutchinson Co. v. City of Tacoma, 190 Fed. 682; Birmingham Waterworks Co. v. City of Birmingham, 211 Fed. 497; Calhoun et al. v. City of Seattle, 215 Fed. 226; Boston & M. R. ³ Cumberland Tel. & Tel. Co. v. City of Memphis, 198 Fed. 955; Palermo Land & Water Co. v. Railroad Commission of California, 227 Fed. 708.

Commission ⁴ were not State Statutes within the meaning of this law although these courts took jurisdiction to set them aside on the ground that they were laws of the respective States. The statute applies to a suit against a State Railroad Commission ⁵ or Public Safety Commission.⁶ It does not apply to injunctions against officers, boards or commissions of Porto Rico.⁷ It applies when the order is attacked as an infringement of the Federal Constitution although the validity of the statute under which the board or commission acts is not questioned.⁸ It does not apply when the validity of the statute is questioned solely because it is an infringement of the State Constitution ⁹ or where the validity of an order of a State Board is questioned because it is a violation of a State Statute.¹⁰ It has been said that no such injunctions should be granted except in clear cases where intervention is essential to protect rights effectually against injuries otherwise irremediable,¹¹ and that the complainant assumes the burden of showing with reasonable certainty that rates for a public service charged by a State Commission are unconstitutional.¹² But it has been held by the lower courts that where the penalties for disobedience are great an injunction may be granted against their enforcement until the complainant has a reasonable time to comply with the order of the State officer or board.¹³ That excessive and accumulative penalties may be enjoined until the final hearing of the suit.¹⁴

Upon an application for a temporary injunction restraining

⁴ Chicago, B. & Q. R. Co. v. Oglesby, 198 Fed. 153; Lykin v. Chesapeake & O. Ry. Co., C. C. A., 209 Fed. 573.

⁵ Louisville & N. R. Co. v. R. R. Commission of Alabama, 208 Fed. 35; Seaboard Airline Ry. Co. v. Railroad Commission of Georgia, C. C. A., 213 Fed. 27; Eastern Texas R. Co. v. Railroad Commission of Texas, 242 Fed. 300.

⁶ Cook v. Burnquist, 242 Fed. 321.

⁷ Benedicto v. West Indian & Panama Tel. Co., C. C. A., 256 Fed. 417.

⁸ Louisville & N. R. Co. v. Railroad Commission, 208 Fed. 35. But

see Lykins v. Chesapeake & O. Ry. Co., C. C. A., 209 Fed. 573.

⁹ McDougal v. Mudge, 233 Fed. 234.

¹⁰ Lykin v. Chesapeake & O. Ry. Co., C. C. A., 209 Fed. 573.

¹¹ Cavanaugh v. Looney, 248 U. S. 453, 456.

¹² Manufacturers Light & Heat Co. v. Ott, 215 Fed. 940.

¹³ Phoenix Ry. Co. of Arizona v. Geary, 209 Fed. 694.

¹⁴ Kern Trading & Oil Co. v. Associated Pipe Line Co., 217 Fed. 273. See Eastern Texas R. Co. v. Railroad Commission of Texas, 242 Fed. 300.

a State Railroad Commission and others from suing to enforce rates prescribed by the State Commission which were charged to be in conflict with an order of the Interstate Commerce Commission it was held to be unnecessary for the court to decide upon the merits of the case but the court finding that the bill presented a case for equitable relief and that proceedings affecting some of the rates were still pending before the Federal Commission, the injunction was granted.¹⁵ In the same case it was held, that an order of the Interstate Commerce Commission could not be thus attacked collaterally.¹⁶

It has been held that the statute forbids a single judge from denying a motion for such an injunction, and even from vacating such a restraining order previously issued by himself,¹⁷ and that the Supreme Court may issue a mandamus to set aside such second order when made by him.¹⁸ It has been held that mandamus will not issue to compel a court of first instance to dismiss a case, in which it is claimed that a State is a party, when such court has held that the State is not an indispensable party to the suit,¹⁹ and that where the Supreme Court takes cognizance of a case dismissed as against a State for want of jurisdiction, it cannot determine whether the bill should have been dismissed because not presenting a case for equitable relief.²⁰ The Supreme Court of the United States has held that no such injunction should be granted against the enforcement of an order of the State was until such appeals therefrom as are authorized by the State statute have been exhausted.²¹ It has been held that where a supersedeas upon such an appeal to a State court is denied, the injunction may be granted,²² and where the court was of the opinion that the statutory power

¹⁵ *Eastern Texas R. Co. v. Railroad Commission of Texas*, 242 Fed. 300.

¹⁶ *Ibid.*

¹⁷ *Ex parte Metropolitan Water Co.*, 220 U. S. 539, 55 L. ed. 575.

¹⁸ *Ibid.*

¹⁹ *Ex parte Nebraska*, 209 U. S. 436, 52 L. ed. 876.

²⁰ *Scully v. Bird*, 209 U. S. 481, 52 L. ed. 899.

²¹ *Prentiss v. Atlantic Coast Line*

Co., 211 U. S. 210, 29 Sup. Ct. 67, 53 L. ed. 150. But see *City of Kankakee v. Am. Water Supply Co.*, 199 Fed. 757; *Kern Trading & Oil Co. v. Associated Pipe Line Co.*, 217 Fed. 273. But see *Manufacturers Light & Heat Co. v. Ott*, 215 Fed. 940.

²² *Love v. Atchison, T. & S. F. Ry. Co.*, C. C. A., 185 Fed. 321; affirming *Atchison, T. & S. F. Ry. Co. v. Love*, 174 Fed. 59.

of review was unauthorized by the State constitution, such an injunction was sustained.²³

Where the Federal Court denied the injunction an appeal, a supersedeas and a restraining order pending such appeal were denied without prejudice to the right of the plaintiff to renew its application in the Supreme Court.²⁴

²³ *Kankakee v. Am. Water Supply Co.*, C. C. A., 199 Fed. 757.

²⁴ *Louisville & N. R. Co. v. Railroad Commission*, 208 Fed. 35, 58, 60. *Shelby, J.*: "The application now before the court seeks to enjoin or stay the order of the Commission pending an appeal by the plaintiff to the Supreme Court from the order refusing the interlocutory injunction. The first application was for an injunction pending the suit which stood for trial in the District Court; the second application is for an injunctive order pending the appeal. Relief on either application meant the suspension of the rates fixed by the Commission and the re-establishment of the higher rates fixed by the plaintiff. Both applications are urged by the same arguments and the same offer of bond. I can see no reason for granting the second application that would not have been equally applicable to granting the first. To have granted the first would not have delayed a trial on the merits, while to grant the second may have that effect. The real practical question on both applications is whether the Commission's order shall remain in force or be suspended. It is, of course, just as satisfactory to the plaintiff to enjoin it on appeal, with bond, as on the first application, with bond. The delay in enforcing the order, if it is finally enjoined, is likely to be greater by the granting of the stay

on the second application than if it had been granted on the first. It seems to me utterly useless to have refused the first application, if the second is to be granted. If a case is now presented for the exercise of judicial discretion by revoking, in effect, our former order, we should have granted the interlocutory injunction on the first application. We gave reasons for the refusal of the injunction which seem to me equally controlling on the second motion. Conceding that the statutes allow a supersedeas after denial of the injunction in cases arising under section 266, we have before us practically the same question that we had on the first application—whether or not the Commission's order should be in force pending the litigation. The only difference is that the Commission's order is now fortified by the opinion of this court. Having refused to enjoin it and having put it in force on the merits after full hearing, it seems to me that it would be practically a reversal of our position to suspend it now after our elaborate approval of it. I do not lose sight of the fact that the first application was for an interlocutory injunction only, and that the second is also for appeal. The question of suspending the Commission's order is separate from the claim for appeal. The latter is granted as a matter of course. But as to the suspension of the Commis-

§ 106. Suits against infants. An infant when sued should be provided by the court with a guardian *ad litem*.¹ For an omission to appoint a guardian *ad litem*, a decree against an infant will be reversed upon appeal.² An application for the appointment of a guardian *ad litem* for an infant should be made by petition, which, if the appointment of a particular person is desired, should state his name and his consent to act as such.³ The court will usually appoint the infant's general guardian or "the nearest relative not concerned, in point of interest, in the matter in question;"⁴ but the choice of the guardian rests in the sound discretion of the court, and only in an extraordinary case would a decree be reversed for an error in this respect.⁵ The interests of an infant are guarded jealously by the court, which will not hold him bound by any admission made by him or in his behalf, whether in the pleadings⁶ or

sion's order pending an appeal, if we have authority to grant it, like the one for the interlocutory injunction, is addressed to the judicial discretion.

"It is argued that, because one of the judges dissented from the decision on the first application, such doubt is created that the second application should be granted. If one thing is made clear by the statute, it is that one judge cannot grant the injunction. If, when the injunction is refused by the court, composed of three judges, the dissent of one of the judges was permitted to control a second application and cause an injunction or a continuance of the restraining order, the purpose of the statute would be defeated. One judge could still prevent the enforcement of the rates fixed by a Commission or by a Legislature.

"It is urged that the second application should be granted because the decision of this court may be reversed. If a majority of the court now believe we have decided erro-

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neously in refusing the injunction on the first application, the way to correct it here, if we have authority to do so, is to set aside the order and grant the injunction. That should be done, if at all, directly, and not indirectly." See *supra*, § 100b.

§ 106. ¹ Rule 70; *Bank of U. S. v. Ritchie*, 8 Pet. 128, 144, 8 L. ed. 890, 897. See *Woolridge v. McKenna*, 8 Fed. 650, 670.

² *O'Hara v. MacConnell*, 93 U. S. 150, 23 L. ed. 840.

³ *Rhineland v. Sanford*, 3 Day (U. S. C. C. D. Conn.), 279.

⁴ *Bank of U. S. v. Ritchie*, 8 Pet. 128, 144, 8 L. ed. 890, 897; *Story's Eq. Pl.*, § 70; *Calvert on Parties*, Book III., ch. xxxi.

⁵ *Bank of U. S. v. Ritchie*, 8 Pet. 128, 144, 8 L. ed. 890, 897. See *Kingsbury v. Buckner*, 134 U. S. 650, 33 L. ed. 1047.

⁶ *Bank of U. S. v. Ritchie*, 8 Pet. 128, 144, 145, 8 L. ed. 890, 897; *Walton v. Coulson*, 1 McLean, 125; *s. c.*, *Coulson v. Walton*, 9 Pet. 62, 84, 9 L. ed. 51, 60; *Hawkins v. Lus-*

otherwise;⁷ but a decree by consent as the result of a compromise approved by the court may be made without a reference to a master,⁸ although the safer practice is to have it referred. The guardian *ad litem* is responsible for the propriety of the defense.⁹ He must pay costs for scandal;¹⁰ and he may be removed by the court at any time.¹¹ This may be done if he is unable or unwilling to pay the expenses of the defense.¹² If no person of substance is willing to serve for the infants, the court "might suspend further proceedings until it could send a next friend or guardian *ad litem* to the State courts having jurisdiction of their person and property, to secure such guardianship as would protect them."¹³ Infants may defend *in forma pauperis*; but, except under extraordinary circumstances, their expenses will not be advanced out of a fund in the hands of a receiver.¹⁴ A guardian *ad litem* may recoup his expenses from the infant's property.¹⁵ According to English practice, an appearance could be entered for an infant before a guardian *ad litem* had been appointed.¹⁶ It is the safer practice in this country to serve the infant with a subpoena before the appointment of a guardian *ad litem*;¹⁷ but where a guardian *ad litem* has been appointed, it will be presumed, in the absence of evidence to the contrary, that the infant was duly served.¹⁸ A decree against an infant is void unless he has been personally served with process, although a general guardian has appeared for him,¹⁹ except in the cases where substituted service²⁰ or service by publication is authorized.²¹

combe, 2 Swanst. 375, 390; Savage v. Carroll, 1 Ball. & B. 553.

⁷ Legard v. Sheffield, 2 Atk. 377; White v. Miller, 158 U. S. 128, 39 L. ed. 921. See also Kingsbury v. Buekner, 134 U. S. 650, 33 L. ed. 1047; Clarke v. Clarke, 178 U. S. 186, 44 L. ed. 1028.

⁸ Thompson v. Maxwell L. G. & Ry. Co., 168 U. S. 451, 42 L. ed. 539.

⁹ Knickerbacker v. De Freest, 2 Paige (N. Y.), 304.

¹⁰ Daniell's Ch. Pr. (2d Am. ed.) 204.

¹¹ Russell v. Sharpe, 1 Jac. & W. 482.

¹² Ferguson v. Dent, 15 Fed. 771, 772.

¹³ Ferguson v. Dent, 15 Fed. 771, 772.

¹⁴ Ferguson v. Dent, 15 Fed. 771.

¹⁵ Ferguson v. Dent, 15 Fed. 771, 772.

¹⁶ Braithwaite's Pr. 322.

¹⁷ Smith v. Reid, 134 N. Y. 568; Settlemer v. Sullivan, 97 U. S. 444, 24 L. ed. 1110; *infra*, § 163.

¹⁸ Sloane v. Martin, 77 Hun (N. Y.), 249; *infra*, § 163.

¹⁹ N. Y. Life Ins. Co. v. Bangs, 103 U. S. 435, 26 L. ed. 580.

²⁰ *Infra*, § 165.

²¹ *Infra*, § 166.

§ 107. **Suits against idiots, lunatics, and persons of weak mind.** Idiots and lunatics defend by guardians *ad litem*, appointed for them by the court.¹ A committee will usually be appointed guardian *ad litem* of the person in his charge,² unless his interest be opposed to that of the idiot or lunatic,³ or perhaps if he refuse to answer or defend.⁴ The guardian *ad litem* is usually joined with the idiot or lunatic as co-defendant.⁵ It was held by Chancellor Kent, that in New York the committee appointed in accordance with statute, and not the idiot or lunatic, is the proper party to the bill;⁶ but the rule in the Federal courts seems to be otherwise.⁷ "A person reduced by age or infirmity to a second infancy may defend by guardian."⁸ It is said that the answer of a superannuated person, put in by guardian, may be read against him as an answer of one of full age put in in person; and that the difference in this respect between such answer and that of an infant put in by guardian is, because an infant improves and mends, and therefore is to have a day to show cause after he comes of age; but the other grows worse, and is to have no day.⁹

§ 108. **Suits against married women.** In suits against a married woman by a third person, her husband, if not civilly dead or permanently absent from the State, should be joined with her as a co-defendant;¹ except in States where she has the same rights and liabilities as a spinster,² or when she is sued in a representative capacity.³ She may, however, answer separately

§ 107. ¹ Rule 70; Harrison v. Rowan, 4 Wash. C. C. 202, 207. 224, 225; citing Leving v. Caverly, Prec. Ch. 229.

² Story's Eq. Pl., § 70; Westcomb v. Westcomb, 1 Dick. 233; Harrison v. Rowan, 4 Wash. C. C. 202, 207.

³ Snell v. Hyat, 1 Dick. 287; Story's Eq. Pl., § 70.

⁴ Lloyd v. —, 2 Dick. 460.

⁵ Harrison v. Rowan, 4 Wash. C. C. 202.

⁶ Brasher's Ex'rs. v. Van Cortlandt, 2 Johns. Ch. (N. Y.) 242.

⁷ Harrison v. Rowan, 4 Wash. C. C. 202, 207.

⁸ Markle v. Markle, 4 J. Ch. 168.

⁹ Daniell's Ch. Pr. (2d Am. ed.)

§ 108. ¹ Story's Eq. Pl., § 71; Calvert on Parties, Book III., ch. xxx; Hulme v. Tenant, 1 Brown, Ch. C. 16; Taylor v. Holmes, 14 Fed. 498, 514.

² Lorillard v. Standard Oil Co., 2 Fed. 902. But see Taylor v. Holmes, 14 Fed. 499, 514; Douglas v. Butler, 6 Fed. 228; U. S. v. Pratt Coal & Coke Co., 18 Fed. 708; O'Hara v. MacConnell, 93 U. S. 150, 23 L. ed. 840.

³ Moore v. Meynell, 2 Vern. 614, note.

from her husband.⁴ A bill filed in the name of a married woman suing alone, may be amended by the addition of a next friend, when necessary.⁵

§ 109. Foreign executors and administrators as defendants.

In the absence of a statute giving its courts jurisdiction over them, foreign executors and administrators are not subject to suit,¹ unless they have assets within the jurisdiction where the suit was filed.² In the latter case, they are liable, as trustees, to account for the same, to those entitled thereto.³ But a Federal court has no power to require an executor or administrator to deliver a fund to an administrator appointed in another State.⁴ The exemption from the jurisdiction may be waived.⁵ A foreign executor, by filing a bill for an accounting of the affairs of a firm to which his testator belonged, waives his privilege and requesting an adjudication of the claims of partnership creditors waives his privilege as against the partners and such creditors as intervene.⁶

A State statute⁷ which authorized a foreign executor or administrator to sue or be sued was enforced in the New York State courts in an action at law under the Sherman Anti-Trust Act,⁸ although the Federal court had previously quashed a summons in a similar action against the same person.⁹ Subsequently, the Federal Court directed that service of a summons in a similar action be set aside, unless the defendant, upon the plaintiff's demand, should show that one of such States would recognize a judgment against a foreign executor in the pending action.

⁴ *Duke of Chandos v. Talbot*, 2 P. Wms. 372.

⁵ *Douglas v. Butler*, 6 Fed. 228.

§ 109. ¹ *Vaughn v. Northrup*, 15 Pet. 1, 10 L. ed. 639; *Courtney v. Pradt*, 196 U. S. 89, 49 L. ed. 398; s. c., 135 Fed. 818; *Lewis v. Parrish*, C. C. A., 115 Fed. 285; *Skiff v. White*, 127 Fed. 175; *Lawrence v. Southern Pac. Co.*, 177 Fed. 547; *Story's Eq. Pl.*, § 179; *Thorburn v. Gates*, 225 Fed. 613.

² *Sandilands v. Innes*, 3 Sim. 363; *McNamara v. Dwyer*, 7 Paige (N. Y.), 239, 32 Am. Dec. 627; *Campbell v. Tousey*, 7 Cow. (N. Y.) 64.

³ *Lewis v. Parrish*, C. C. A., 115 Fed. 285. See *Columbia Law Rev.*, June 1911, quoted in N. Y. L. J. June 8, 1911.

⁴ *Watkins v. Eaton*, C. C. A., 183 Fed. 384.

⁵ *Lackner v. McKechney*, C. C. A., 252 Fed. 403.

⁶ *Ibid.*

⁷ N. Y. Code of Civil Procedure, § 1836a.

⁸ *Thorburn v. Gates*, 184 N. Y. App. Div. 443.

⁹ *Thorburn v. Gates*, 230 Fed. 922, s. c., 225 Fed. 613.

CHAPTER IV.

PARTIES.

§ 110. **General rule as to parties.** In ordinary cases, all persons should be made parties to a suit in equity, who are directly interested in obtaining or resisting the relief prayed for in the bill or granted in the decree.¹ If interested in obtaining the relief prayed for, they should join as plaintiffs; unless some refuse to appear in that capacity, when the rest should make them defendants.² This rule has been also stated by the expressions: that "all persons interested in the subject of the suit should be before the court;"³ and that "all persons who have in the object or objects of the suit an interest or interests apparent upon the record, are necessary parties."⁴

"In determining who are proper parties to a suit, courts of equity are guided by two leading principles. One of them is a principle admitted in all courts of justice in this country, upon questions affecting liberty, or life, or property; namely, that no proceedings shall take place with respect to the rights of any one, except in his presence. Thus a decree of a court of equity binds no one who is not to be regarded, according to the rule of the court, either as a party, or else as one who claims under a party, to the suit. The second is a principle which in this country is peculiar to courts of equity; namely, that when

§ 110. ¹ Calvert on Parties, Book I ch. i, and cases there cited.

² Harding v. Handy, 11 Wheat. 103, 6 L. ed. 429; Wisner v. Barnet, 4 Wash. C. C. 631, 642; Fallows v. Williamson, 11 Ves. 313; Calvert on Parties, Book I, ch. viii. But see Hicklin v. Marco, 56 Fed. 549. For the rule in patent cases, see *infra*, § 112.

³ Sir William Grant in Wilkins v. Fry, 1 Mer. 244, 262.

⁴ Calvert on Parties (2d ed.), p. 13, and cases there cited. Iron Cliffs Co. v. Negaunee Iron Co., 197 U. S. 463, 49 L. ed. 836; Clagett v. Duluth Tp., 143 Fed. 824; holding that an injunction restraining a municipal corporation from buying bonds is no defense to an action against it by a bondholder, who was not a party to that suit.

a decision is made, it shall provide for all the rights which different persons have in the matters decided. For a court of equity in all cases delights to do complete justice, and not by halves;⁵ to put an end to litigation, and to give decrees of such a nature that the performance of them may be perfectly safe to all who obey them: *interest reipublicæ ut sit finis litium*. In this respect there is a manifest distinction between the practice of a court of law and that of a court of equity. A court of law decides some one individual question which is brought before it; a court of equity not merely makes a decision to that extent, but also arranges all the rights which the decision immediately affects."⁶ Thus, when a person who is charged with the payment of a sum of money is surety to another, the principal must be joined as defendant to the bill; as in the case of a suit against an heir for the performance of a covenant by his ancestor which binds him as well as the ancestor's personal estate, when the personal representative must also be joined. For "the court of equity in all cases delights to do complete justice, and not by halves: as, first to decree the heir to perform this covenant, and then to put the heir upon another bill against the executor to reimburse himself out of the personal assets, which, for aught appears to the contrary, may be more than sufficient to answer the covenant; and when the executor and heir are both brought before the court, complete justice may be done by decreeing the executor to perform this covenant as far as the personal assets will extend, the rest to be made good by the heir out of the real assets. And here appears no difficulty or inconvenience in bringing the executor before the court. On the contrary, it would prevent a multiplicity of suits, which a court of equity ought to do."⁷

The equity rules now provide: "All persons having an interest in the subject of the action and in obtaining the relief demanded may join as plaintiffs, and any person may be made a defendant who has or claims an interest adverse to the plaintiff. Any person may at any time be made a party if his presence is necessary or proper to a complete determination of the cause.

⁵ Knight v. Knight, 3 P. Wms. 333.

⁷ Lord Chancellor Talbot in Knight v. Knight, 3 P. Wms. 331,

⁶ Calvert on Parties (2d. ed.), 334. pp. 2, 3.

Persons having a united interest must be joined on the same side as plaintiffs or defendants, but when any one refuses to join, he may for such reason be made a defendant."⁸ Where a contract is joint, all the obligees of the obligation sought to be enforced must be joined as plaintiffs,⁹ but when the residence of one of them would defeat the jurisdiction all the obligors need not be joined as defendants.¹⁰ When a suit might have been brought by either a corporation or the owner of its stock alone, it was held that the defendant could not complain because both were joined as complainants.¹¹

§ 111. Parties with no interest in the subject-matter of the suit. As a general rule, no person can be made a party against whom, if brought to a hearing, the plaintiff can have no decree.¹ The clerk of a court is not a proper party to a suit to enjoin the enforcement of a judgment entered in his office.² The English practice allowed strangers in certain cases to be made parties for the sake of discovery, and even in order to mulct them with costs. In a suit against a corporation, its officers, book-keeper, or members might be made parties for the sake of discovery concerning matters which had come to their knowledge while transacting the business of the corporation;³ but not, it seems to obtain discovery of such as they knew only through their participation in its formation.⁴ It is held in the Federal courts that when an answer under oath is waived, it is improper to make the officers of a corporation parties to a suit against it, if no relief is asked against them; and a demurrer by them to

⁸ Eq. Rule 37.

⁹ *Himes v. Schmehl*, C. C. A., 257 Fed. 69.

¹⁰ *Camp v. Gress*, 250 U. S. 308.

¹¹ *Bellevue Mills Co. v. Baltimore Trust Co.*, 214 Fed. 817, aff'd C. C. A., 223 Fed. 753. See *infra*, § 140.

§ 111. ¹ *Wych v. Meal*, 3 P. Wms. 310, 311, note; *Dan. Ch. Pr.* (2d Am. ed. 342.)

² *Buckley v. U. S.*, 196 Fed. 429; *Wm. A. Rogers v. Nichols*, C. C. A., 124 Fed. 415.

³ *Wych v. Meal*, 3 P. Wms. 310, Anon., 1 Vern. 117; *Fenton v. Hughes*, 7 Ves. 289; *Glyn v. Soares*, 1 Y. & C. 644; *Many v. Beekman*

Iron Co., 9 Paige (N. Y.) 189; *Doyle v. San Diego L. & Tr. Co.*, 43 Fed. 349; *Virginia & A. Min. & Mfg. Co. v. Hale*, 93 Ala. 542, 9 So. 256; *Continental Nat. Bank v. Heilman*, 66 Fed. 184; *Consolidated Brake-Shoe Co. v. Chicago P. & St. L. Ry. Co.*, 69 Fed. 412; *Calvert on Parties* (2d ed.) 92-94. But see *Boston W. H. Co. v. Star R. Co.*, 40 Fed. 167; *Cleveland F. & B. Co. v. U. S. Rolling S. Co.*, 41 Fed. 476; *Calahan v. Holland-Cook Mfg. Co.*, 201 Fed. 607, quoting with approval the author upon the subject.

⁴ *McComb v. Chicago, St. L. & N. O. R. Co.*, 7 Fed. 426.

such a bill making them parties defendant was sustained.⁵ Officers of corporations, who have taken no part in an unlawful contract that it has made, are not proper parties to a suit for an injunction against its enforcement.⁶ It has been held that officers of a corporation, who have committed no acts of infringement except in their official capacity, cannot properly be made defendants to a suit to enjoin the infringement of a patent,⁷ or trademark,⁸ unless the corporation is insolvent;⁹ or unless the officers took an active part in the infringement or directed the same¹⁰ or in the formation of the corporation to continue infringements made by themselves in their individual capacity;¹¹ or under other special circumstances.¹² Where an officer of a corporation has actively participated in an infringement¹³

⁵ Colonial & U. S. Mtg. Co. Ltd., v. Hutchinson Mtg. Co., 44 Fed. 219; Matthews & W. Mfg. Co. v. Trenton L. Co., 73 Fed. 212. See Boston W. H. Co. v. Star Rubber Co., 40 Fed. 167.

⁶ U. S. v. Standard Sanitary Mfg. Co., 191 Fed. 172.

⁷ Loomis-Manning Filter Co. v. Manhattan Filter Co., 117 Fed. 325; Farmers' Mfg. Co. v. Spruks Mfg. Co., 119 Fed. 594; Greene v. Buckley, 120 Fed. 955; National Casket Co. v. Stolls, C. C. A., 135 Fed. 534 (a suit against the agent of a joint stock association); Glucose Sugar Refining Co. v. St. Louis, S. & P. Co., 135 Fed. 540; Weston El. Instrument Co. v. Empire Electrical Instrument Co., C. C. A., 177 Fed. 1006; Steber Mach. Co. v. Random Knitting Co., 217 Fed. 796. See Wm. A. Rogers v. Nichols, C. C. A., 224 Fed. 415; Reis v. Rosenfeld, 204 Fed. 282. *Contra*, Peters v. Union Biscuit Co., 120 Fed. 679, 685. See Saxlehner v. Eisner, C. C. A., 147 Fed. 189; s. c., 140 Fed. 938.

⁸ Vassar College v. Loose-Wiles Biscuit Co., 197 Fed. 982; Wm. A. Rogers v. Nichols, C. C. A., 224 Fed. 415.

⁹ Saxlehner v. Eisner, 140 Fed. 938.

¹⁰ Where an officer of a corporation was joined with it as defendant to a suit for the infringement, it was held that he was not liable to account for profits realized by the corporation alone. McSherry Mfg. Co. v. Dowagiac Mfg. Co., C. C. A., 160 Fed. 948; Hitchcock v. Am. Plate Glass Co., C. C. A., 259 Fed. 948. But that such an officer was liable for such proceeds as he had received from the infringement by dividends, salary, payment for his time, or in any other way. Hitchcock v. Am. Plate Glass Co., C. C. A., 259 Fed. 948, 955. See § 389f.

¹¹ Wm. G. Rogers Co. v. International Silver Co., C. C. A., 118 Fed. 133; Simplex El. Heating Co. v. Leonard, 147 Fed. 744.

¹² Westinghouse El. & Mfg. Co. v. Mutual Life Ins. Co., 129 Fed. 213; Simplex El. Heating Co. v. Leonard, 147 Fed. 744; Weston El. Instrument Co. v. Empire Electrical Instrument Co., C. C. A., 177 Fed. 1006.

¹³ Eddy et al. v. Kramer et al., 247 Fed. 962; Steber Mach. Co.

or other tort,¹⁴ or the violation of a contract by the corporation,¹⁵ he may be joined with the latter in an action by the party injured. Where fraud or *ultra vires* is charged against them, the officers, directors and attorneys, of a corporation, are proper,¹⁷ but not indispensable parties.¹⁸ Stockholders who have not taken part in the transactions of which complaint is made are improper parties defendant to a suit for an injunction;¹⁹ not even, it has been held, in a stockholders' suit,²⁰ nor in the case of a corporation holding a majority of the stock of another corporation, which has taken part in an infringement;²¹ but they may be joined when they have organized the corporation with a small capital for the purpose of the infringement.²² A party, with whom a corporation has contracted, to make the article which is charged to be an infringement of a patent, and another corporation, with whom he has contracted to have the same made, are properly joined as parties defendant to an infringement suit.²³ Community of officers, directors, and stock

v. Random Knitting Co. et al., 217 Fed. 796. A surety company which, in aid of an infringing paving contractor, executed a bond to indemnify the city which employed him against liability for infringement thereby became a party to the infringement and jointly liable for the consequences. *Saxlehner v. Eisner*, 140 Fed. 938. See *Am. Bank Protection Co. v. El. Protection Co.*, 181 Fed. 350.

¹⁴ *Board of Trade v. Price et al.*, C. C. A., 213 Fed. 336; *Favorite v. Cottrill*, 6 Mo. App. 119; *Peck v. Cooper*, 112 Ill. 192, 54 Am. Rep. 231; *Cameron v. K.-C. Com. Co.*, 22 Montana 312.

¹⁵ *United Cigarette Mach. Co. v. Winston C. Mach. Co.*, C. C. A., 194 Fed. 947.

¹⁷ *Geer v. Mathieson Alkali Works*, 190 U. S. 428, 436, 47 L. ed. 1122, 1126; *Ervin v. Oregon Ry. & Nav. Co.*, 27 Fed. 625; *Jones v. Missouri-Edison Electric Co.*, C. C. A., 144 Fed. 765; *United Cigarette*

Mach. Co. v. Winston, C. Mach. Co., C. C. A., 194 Fed. 947; *Ferguson v. Wilson*, L. R. 2 Ch. App. 77, 90; *Clinch v. Financial Corporation*, L. R. 4 Ch. App. 117.

¹⁸ *Sidway v. Missouri Ld. & L. S. Co.*, 116 Fed. 381; *Geer v. Mathieson Alkali Works*, 190 U. S. 428, 436, 47 L. ed. 1122, 1126; *Hatch v. Chicago, Rock Island & Pac. R. R. Co.*, 6 Blatchf. 105, 114.

¹⁹ *Westinghouse El. & Mfg. Co. v. Allis-Chalmers Co.*, 168 Fed. 91; *Johns-Pratt Co. v. Sachs Co.*, C. C. A., 175 Fed. 70.

²⁰ *McCrea v. McClenahan*, 114 App. Div. (N. Y.), 70.

²¹ *Westinghouse El. & Mfg. Co. v. Allis-Chalmers Co.*, 168 Fed. 91.

²² *Crown Cork & Seal Co. v. Brooklyn Bottle Stopper Co.*, 172 Fed. 225; s. c., 190 Fed. 323.

²³ *Nat. Mechanical Directory Co. v. Polk*, 121 Fed. 742; *Reliance Const. Co. v. Hassam Paving Co.*, C. C. A., 248 Fed. 701.

owners is not sufficient in the absence of other evidence to render one corporation liable for acts of infringement committed by another on the premises occupied by both.²⁴

The State Attorney General and the County Prosecutor are proper parties defendant to a suit to enjoin the enforcement of a State statute, the violation of which is declared a criminal offence.²⁵ A party cannot be made defendant to a suit because he has contributed to the defense of the same.²⁶

Agents to sell, auctioneers, arbitrators, and attorneys, could, under the former practice, be made defendants for the purpose of discovery in any suits against their principals concerning transactions, with which they were connected;²⁷ but it is now held, that this cannot usually be done where their principals are peculiarly responsible.²⁸ And in a few cases of fraud it has been held that persons implicated in the fraud might be made parties merely to make them liable for costs.²⁹

The obligor of an agreement to loan a mortgagor the difference between its earnings and its operating expenses and mortgage interest, and to pay the mortgagee such balance as might be due for interest and sinking fund, when the mortgage covered the mortgagor's rights under this contract but did not authorize a sale of such rights, was held not to be a necessary or proper party to a foreclosure suit and the court refused to order that it be brought in.³⁰ An Indian agent is a proper, although not an indispensable party, to a suit to determine rights under leases of Indian lands.³¹

²⁴ Union Sulphur Co. v. Freeport Texas Co., 251 Fed. 634.

²⁵ Little v. Tanner, 208 Fed. 605.

²⁶ Parsons Non-Skid Co. v. E. J. Willis Co., 176 Fed. 176.

²⁷ Fenton v. Hughes, 7 Ves. 288, 289; Dummer v. Corporation of Chippenham, 14 Ves. 252; Bowles v. Stewart, 1 Scho. & Lefr. 209; Brady v. McCorker, 1 N. Y. 214; s. c., 1 Barb. Ch. 343.

²⁸ Seiford v. Mulligan, 36 App. Div. (N. Y.) 33; Bowles v. Stewart, 1 Scho. & Lef. 209.

²⁹ Texas Co. v. Central Fuel Oil Co.,

C. C. A., 194 Fed. 1; Taylour v. Rochford, 2 Ves. Sen. 281; Smith v. Green, 37 Fed. 424; Huggins v. King, 3 Barb. (N. Y.) 617; Hammond v. Hudson R. I. & N. Co., 20 Barb. (N. Y.) 386; Pritchard v. Palmer, 88 Hun. 412; Calvert on Parties (2d ed.), 96, and cases cited. See Ervin v. Oregon Ry. & Nav. Co., 27 Fed. 625.

³⁰ *Ex parte* Equitable Trust Co., C. C. A., 231 Fed. 573.

³¹ Texas Co. v. Central Fuel Oil Co., C. C. A., 194 Fed. 1.

§ 112. **Persons who on account of their interest need not be made parties to a suit in equity.** No persons should be joined as parties to a suit in equity, either as co-plaintiffs or co-defendants, who are not directly interested in obtaining or resisting the relief prayed for in the bill¹ or who claim the property in question under inconsistent titles.²

Thus, prior incumbrancers should not be made parties to a bill for the foreclosure of a mortgage,³ unless it prays for a receiver,⁴ or seeks to obtain a sale of the entire mortgaged property free from all liens,⁵ or unless "there is substantial doubt respecting the amount of debts due prior lien creditors," in which case "there is obvious propriety in making them parties, that the amount of the charge remaining on the land after the sale may be determined, and that purchasers at the sale may be advised of what they are purchasing;"⁶ or unless there are other peculiar circumstances making it necessary. Nor need a mortgagor who has sold his equity of redemption,⁷ or a guarantor of the mortgage debt even if he has paid interest,⁸ be made a party to a foreclosure, unless relief is sought against him.⁹ When, however, such relief is sought against the mortgagor or a grantee of the equity of redemption who has assumed payment of the mortgage, all grantees who have made such an assumption should ordinarily be joined as defendants in order that their respective rights may be determined.¹⁰ Lessees are

§ 112. ¹ Calvert v. Parties (2d ed.) 6; Mare v. Malachy, 1 M. & C. 559; Seymour v. Farmers' L. & T. Co., C. C. A., 128 Fed. 907.

² Calvert on Parties (2d ed.). 105; Marquis Cholmondely v. Lord Clinton, 2 Jac. & W. 138 Saumarez v. Saumarez, 4 M. & C. 331; Dial v. Reynolds, 96 U. S. 340, 24 L. ed. 644; *infra*, § 141.

³ Hagan v. Walker, 14 How. 29, 37, 14 L. ed. 312, 316; Jerome v. McCarter, 94 U. S. 734, 24 L. ed. 136; Nalle v. Young, 160 U. S. 624, 40 L. ed. 560.

⁴ Miltenberger v. Logansport Ry. Co., 106 U. S. 286, 306, 27 L. ed. 117, 125.

⁵ Hagan v. Walker, 14 How. 29, 14 L. ed. 312; Jerome v. McCarter, 94 U. S. 734, 735, 24 L. ed. 136, 137; McClure v. Adams, 76 Fed. 899.

⁶ Strong, J., in Jerome v. McCarter, 94 U. S. 734, 735, 736, 24 L. ed. 136, 137.

⁷ Kanawha Coal Co. v. Kanawha & O. C. Co., 7 Blatch. 391, 416; Grove v. Grove, 93 Fed. 865. But see Matcarm v. Smith, 6 McLean, 416. As to receivers, *infra*, § 113.

⁸ Columbia F. & Trust Co. v. Kentucky U. Ry. Co., 60 Fed. 794.

⁹ Ayers v. Wisawall, 112 U. S. 187, 28 L. ed. 693.

¹⁰ Skinner v. Harker, 23 Colo. 333; s. c., 48 Pac. 648. But see

not necessary, although they are proper parties to a suit to foreclose a mortgage prior to their leases,¹¹ or to foreclose a vendor's lien.¹² Where part of the mortgaged premises had been sold to the sovereign power, which refused to waive its exemption from suit, and all the other parties in interest were joined; it was held, that the court could except the land so conveyed, decree a sale of the balance and enter a deficiency judgment, if the proceeds were insufficient.¹³ To a suit by the holder of bonds secured by a trust mortgage to recover damages from the trustee for his negligent administration of the trust, the mortgagor need not be made a party; but it has been held that the bill must be filed on behalf of all the bondholders and not merely on behalf of those who are joined as complainants.¹⁴

It seems: that in a suit to set aside attachments, attaching creditors, who have no joint interest with the defendants, may be omitted if their citizenship will oust the court of jurisdiction.¹⁵ Where the receivers of a corporation had made an absolute assignment of a cause of action to the complainant; it was held, that neither the corporation nor its receivers were necessary parties to a bill to enforce such cause of action, although one of the receivers was entitled to one-quarter of the collection.¹⁶ The personal representatives of a deceased partner are not necessary

Kelly v. Ashford, 133 U. S. 610, 626, 33 L. ed. 667, 674; *infra*, § 120.

¹¹ Tyler v. Hamilton, 62 Fed. 187. It has been held that tenants under leases by a railway company, subject to mortgages of the property, are not necessary parties to a foreclosure suit, and that their rights are therefore extinguished by the foreclosure sale (*Ibid.*), and that when all the property is in the hands of the receivers, neither the first mortgagee, the mortgagor, nor any lessor, is a necessary party to the foreclosure of a second railroad mortgage covering leased lines, but not affecting the rights of the lessors. Grand Trunk Ry. Co. v. Central Vt. R. Co., 88 Fed. 622.

¹² Brisco v. Minah Consol. Min. Co., 82 Fed. 952. It was held in Mississippi where a mortgagor had conveyed land to the children of his mortgagee, that the latter were not necessary parties to a suit by the mortgagor against the mortgagee for an injunction and an accounting. Lipscomb v. Jack (Miss., 1896), 20 S. R. 883.

¹³ Kawanakoa v. Polyblank, 205 U. S. 349, 51 L. ed. 834.

¹⁴ Frishmuth v. Farmers' L. & T. Co., 95 Fed. 5.

¹⁵ Watson v. Bonfils, C. C. A., 116 Fed. 157, 160.

¹⁶ Fidelity & Deposit Co. of Maryland v. Fidelity Trust Co., 143 Fed. 152.

parties to a bill to vacate a decree in favor of the partnership.¹⁷ The United States are not necessary parties to a suit by a materialman upon a bond given to the Government for the benefit of the plaintiff and persons similarly interested.¹⁸

In suits for specific performance, it is a general rule that none are necessary parties but parties to the contract, or their representatives,¹⁹ including in a proper case their heirs²⁰ and devisees;²¹ unless there are other persons, such as the wife of the defendant,²² with such an interest in the contract or the property agreed to be sold that their concurrence is necessary to the completion of the title, or that their rights would be prejudiced were a decree made in their absence.²³ But where the contract calls for a title free from incumbrances the court may permit or direct the lienors to be joined.²⁴ Where the contract is made by an agent in his own name he is a necessary party to a suit by his principal for specific performance.²⁵ It has been held that in such a case he can sue without joining his principal, although defendant knew that he acted as an agent only.²⁶ The licensee or assignee of a playright is not a proper party to a suit to enjoin the production of a motion picture play, which is an infringement of a copyright reserved by a licensor or assignor.^{26a} Where the wife did not sign the contract and is unwilling to join in the conveyance she may be omitted.²⁷ In a suit to enforce a constructive trust in certificates of the stock of a corporation, neither the corporation nor the former owner of the stock is a necessary party.²⁸ In a suit by the pledgee of corporate bonds to protect the security from waste, seeking a re-

¹⁷ Perkins v. Hendryx, 149 Fed. 526.

¹⁸ Title Guaranty & Trust Co. of Scranton, Pa., v. Crane Co., 219 U. S. 24, 55 L. ed. 72. See § 5a *supra*.

¹⁹ Tasker v. Small, 3 M. & C. 63, 68; Calvert on Parties (2d ed.), Book III, ch. xvii.

²⁰ Morgan's Heirs v. Morgan, 2 Wheat. 290, 4 L. ed. 242.

²¹ Woodward v. Davidson, 150 Fed. 840.

²² Buck v. Buck, 11 Paige (N. Y.), 170.

²³ Jones v. Lewis, 1 Cox. Eq. 199;

Evans v. Jackson, 8 Sim. 217; Calvert on Parties, Book III, ch. xvii.

²⁴ Bryan v. Barriger, 251 Fed. 328

²⁵ Pennsylvania & N. J. R. Co. v. Byerson, 36 N. J. Eq. 112, 116.

²⁶ Kelley v. Tracy, 102 Mo. 522; Brown v. Fletcher, C. C. A., 206 Fed. 461.

^{26a} Tully v. Triangle Film Corp., 229 Fed. 297.

²⁷ Dixon v. Anderson, C. C. A., 252 Fed. 694.

²⁸ Brissell v. Knapp, 155 Fed. 809.

ceivership, the appointment of a new trustee and the termination of the company's business, the pledgor is a proper party.²⁹ Nor need the assignor of the whole interest in a thing in action be made a party to a suit by the assignee;³⁰ except in the case of a suit by the equitable assignee of a patent,³¹ or copyright,³² or trade-mark³³ or by the licensee,³⁴ or mortgagor by a mortgage

²⁹ *State Nat. Bank v. Syndicate Co.*, 178 Fed. 359.

³⁰ *Harris v. Johnston*, 3 Cranch, 311, 2 L. ed. 450; *Boon v. Chiles*, 8 Pet. 532, 8 L. ed. 1034; *Robertson v. Carson*, 19 Wall. 94, 22 L. ed. 178; *s. c.*, *Chases' Dec.* 475; *Batesville Institute v. Kauffman*, 18 Wall. 151, 21 L. ed. 775; *Fulham v. McCarthy*, 1 H. L. C. 703.

³¹ *Stimpson v. Rogers*, 4 Blatchf. 333; *North v. Kershaw*, 4 Blatchf. 333; *Patterson v. Stapler*, 7 Fed. 210; *Goodyear v. Allen*, 3 Fisher, 284. To a suit by the assignee of an applicant for a patent against the applicant and a corporation, to which the patent had been issued, later applicants, who were in interference with the first, are not necessary parties, although they have assigned their applications to the same company and received stock in return. *Thompson v. Automatic Fire Protection Co.*, 197 Fed. 750. For transactions that passed the legal title see *Am. Bank Protection Co. v. City Nat. Bank*, 181 Fed. 375. For a transaction that did not, see *Central Brass & Stamping Co. v. Stuber, C. C. A.*, 220 Fed. 909.

³² *Colburn v. Duncombe*, 9 Sim. 151; *Chappell v. Purday*, 4 Y. & C. 485; *Calvert on Parties* (2d ed.), 315.

³³ A singer, who receives a royalty on the number of mechanical records of his song that are sold, is not a necessary party to a suit by the patentee and owner of the

records for an injunction against the sale of copies made by a reproduction of the same. *Fonotipia Limited v. Bradley*, 171 Fed. 951.

³⁴ *Krauss v. Jos. R. Peebles Sons Co.*, 58 Fed. 585; *Wayman v. Louis Lipp Co.*, 222 Fed. 679; *Southern Machinery Co. v. Fay Stocking Co.*, 243 Fed. 917. *Waterman v. Mackenzie*, 138 U. S. 252, 255, 256, 260, 261, 34 L. ed. 923, 925, 926, 927, 928, per Gray, J.: "The patentee or his assigns may, by instrument in writing, assign, grant and convey either, first, the whole patent comprising the exclusive right to make, use and vend the invention throughout the United States; or, second, an undivided part or share of that exclusive right; or, third, the exclusive right under the patent within and throughout a specified part of the United States, R. S., § 4898. A transfer of either of these three kinds of interests is an assignment, properly speaking, and vests in the assignee a title in so much of the patent itself, with a right to sue infringers; in the second case, jointly with the assignor; in the first and third cases, in the name of the assignee alone. Any assignment or transfer, short of one of these, is a mere license, giving the licensee no title in the patent, and no right to sue at law in his own name for an infringement. R. S., § 4919; *Gaylor v. Wilder*, 10 How. 477, 494, 495, 13 L. ed. 504, 511, 512; *Moore v. Marsh*, 7 Wall.

duly recorded at Washington,³⁵ or by an assignee under an

515, 19 L. ed. 37. In equity, as at law, when the transfer amounts to a license only, the title remains in the owner of the patent and suit must be brought in his name, and never in the name of the licensee alone, unless that is necessary to prevent an absolute failure of justice, as where the patentee is the infringer, and cannot sue himself." *Adriance, P. & Co. v. McCormick H. M. Co.*, C. C. A., 56 Fed. 918; *Littlefield v. Perry*, 21 Wall. 205, 22 L. ed. 577. Where the owner of the patent has been enjoined in another jurisdiction from suing alleged infringers of the same, the licensee may sue alone. *Hurd v. James Goold Co.*, 197 Fed. 756. "Any rights of the licensee must be enforced through or in the name of the owner of the patent, and perhaps, if necessary, to protect the rights of all parties, joining the licensee with him as a plaintiff. R. S., § 4921; *Littlefield v. Perry*, 21 Wall. 205, 223, 22 L. ed. 577, 579; *Paper Bag Cases*, 105 U. S. 766-771, 26 L. ed. 959-961; *Birdsell v. Shaliol*, 112 U. S. 485-487, 28 L. ed. 768, 769. And see *Renard v. Levinstein*, 2 Hem. & Mil. 628.

Whether a transfer of a particular right or interest under a patent is an assignment or a license does not depend upon the name by which it calls itself, but upon the legal effect of its provisions. For instance, a grant of an exclusive right to make, use and vend two patented machines within a certain district is an assignment, and gives the grantee the right to sue in his own name for an infringement within the district, be-

cause the right, although limited to making, using and vending two machines, excludes all other persons, even the patentee, from making, using or vending like machines within the district. *Wilson v. Rousseau*, 4 How. 646, 686," 11 L. ed. 1141, 1159. See *D. M. Sechler Carriage Co. v. Deere & Mansur Co.*, 113 Fed. 285. "Where, however, the patentee reserved the right to use the inventions within the territory, for a specified purpose, and to make them therein for such use and for use outside of the territory, and the licensee agreed not to lease or sell any part of the inventions for use outside of the territory, without the patentee's consent; it was held, that the licensee could not sue in his own name." *Bowers Hydraulic Dredging Co. v. Vare*, 112 Fed. 63. "On the other hand, the grant of an exclusive right under the patent within a certain district, which does not include the right to make, and the right to use, and the right to sell, is not a grant of a title in the whole patent-right within the district, and is therefore only a license. Such, for instance, is a grant of 'the full and exclusive right to make and vend' within a certain district, reserving to the grantor the right to make within the district to be sold outside of it. *Gayler v. Wilder*, above cited, 10 How. 477, 13 L. ed. 504. So is a grant of 'the exclusive right to make and use,' but not to sell, patented machines within a certain district. *Mitchell v. Hawley*, 16 Wall. 544, 21 L. ed. 322. So is an instrument granting 'the sole right and privilege of manufacturing and

assignment still executory,³⁶ or by an assignee, such as a pledgee, whose assignor has an equitable interest in the property;³⁷ when it is the safer practice to join, as plaintiff³⁸ or defendant,³⁹ the assignor, licensor, or mortgagee, as the case may be. The exclusive licensee of a patent for a specified territory has the implied

selling' patented articles, and not expressly authorizing their use, because, though this might carry by implication the right to use articles made under the patent by the licensee, it certainly would not authorize him to use such articles made by others. *Hayard v. Andrews*, 106 U. S. 672, 27 L. ed. 271. See also *Oliver v. Rumford Chemical Works*, 109 U. S. 75, 27 L. ed. 862." It has been held: that an allegation that a patentee assigned to complainant the exclusive right to make, use, and sell for use within the United States and its territories and foreign possessions, "in connection with wireless telephone work and wireless telephonic communication only, apparatus and equipment embodying said methods and apparatus under the patents hereinabove mentioned, or any other patent or patents now or hereafter owned or controlled" by the assignor or his assignee, did not show a conveyance to the assignee of the entire monopoly granted by the government to the patentee, but a mere license; and hence the assignee had no capacity to sue in his own name to restrain infringers. *De Forest v. Collins Wireless Telephone Co.*, 174 Fed. 821. A patent-right is incorporeal property, not susceptible of actual delivery or possession; and the recording of a mortgage thereof in the Patent Office, in accordance with the act of Congress, is equivalent to a delivery of possession,

and makes the title of the mortgagee complete towards all other persons, as well as against the mortgagor. * * * The necessary conclusion appears to us to be that Shipman, being the present owner of the whole title in the patent under a mortgage duly executed and recorded, was the person, and the only person, entitled to maintain such a bill as this, and that the plea, therefore, was rightly adjudged good." An agreement pending an application to assign any patent which "may be" granted was held to transfer the legal and equitable title to the patent when issued. *Individual Drinking Cup Co. v. Osmun-Cook Co.*, 220 Fed. 335; *Southern Textile Machinery Co. v. Fay Stocking Co.*, 243 Fed. 917. An applicant for a patent cannot sue for an injunction against an infringement before the patent is issued to him. *Standard Scale & Foundry Co. v. McDonald*, 127 Fed. 709.

³⁶ *Waterman v. Mackenzie*, 138 U. S. 252, 34 L. ed. 923.

³⁶ *Land Co. of New Mexico v. Elkins*, 20 Fed. 545.

³⁷ *Hubbard v. Manhattan Trust Co., C. C. A.*, 87 Fed. 51, 57; *Western Nat. Bank v. Armstrong*, 152 U. S. 346, 38 L. ed. 470; *Ackerson v. Long Branch & L. Co.*, 28 N. J. Eq. 542; *Comptograph Co. v. Universal Accountant Mach. Co.*, 142 Fed. 539. *Contra*, *Walker on Patents*, § 400.

³⁸ *Gaumont v. Hatch*, 208 Fed. 378.

authority, even against the will of the owner, to join him as a co-complainant in a bill to enjoin an infringement.³⁹ The patentee and his exclusive licensee may join in a suit to enjoin the infringement of a patent,⁴⁰ but the patentee and a licensee whose license is not exclusive cannot.⁴¹ Such a licensee is ordinarily not a proper party plaintiff.⁴² Where the bill alleges, that the licensee has an interest in the inventions which is capable of being impaired by the infringement, the licensee may properly be joined as a complainant.⁴³ A former licensee cannot join as a co-plaintiff, unless all subsequent licensees and assignees of the license are also joined.⁴⁴ An exclusive licensee need not ordinarily be joined as complainant with the patentee.⁴⁵ When the patentee sues alone, he cannot recover profits which, but for the infringement, would have enured to the sole benefit of the

³⁹ Libbey Glass Co. v. McKee Co., 216 Fed. 172; Brush-Swan El. Co. v. Thomson-Houston El. Co., 48 Fed. 224; Brush El. Co. v. El. Imp. Co., 49 Fed. 73; Brush El. Co. v. California El. L. Co., C. C. A., 52 Fed. 945; Excelsior W. P. Co. v. Allen, C. C. A., 104 Fed. 553; Havens v. W. R. Ostrander & Co., 190 Fed. 199. It was held in Van Orden v. Nashville, 67 Fed. 331, that the part owner of a patent cannot sue at law for damages caused by an infringement without joining his fellow-owners as co-plaintiffs, and that he cannot make them defendants when they refuse to sue. Where, in consideration of the assignment of applications, the assignee agreed to prosecute them and also proposed interference proceedings between them and a patent issued to a stranger, together with an infringement suit against the latter in case patents issued; it was held that the assignor was not liable to reimburse the assignee for expenses paid in such prosecution, although the issue of the patents was refused because the assignor

refused so to amend his application as to cancel rejected claims. Strauss v. Dilg, 140 App. Div. (N. Y. 424. For a case where a licensor was joined as a defendant, see Libbey Glass Co. v. McKee Glass Co., 216 Fed. 172.

⁴⁰ Ibid., Havens v. W. R. Ostrander & Co., 190 Fed. 199.

⁴¹ Blair v. Lippincott Gl. Co., 52 Fed. 226.

⁴² Ibid. But see Wayman v. Louis Lipp Co., 222 Fed. 679, and cases cited *supra* in note.

⁴³ Daimler Mfg. Co. v. Conklin, 145 Fed. 955.

⁴⁴ Victor Talking Machine Co. v. Am. Graphophone Co., 118 Fed. 50.

⁴⁵ U. S. of S. & S. Co. v. Johnson R. R. Signal Co., 52 Fed. 857; Gayler v. Wilder, 10 How. 477, 13 L. ed. 504. "In the case of Waterman v. MacKenzie, 138 U. S. 252, 34 L. ed. 923, 11 Supr. Ct. R. 334, the Supreme Court held that a licensee might sue in his own name when it was necessary to prevent an absolute failure of justice. This is the effect, I take it, of the language of the court there used."

licensee.⁴⁶ The assignee of the whole of a patent, so far as a particular territory is concerned, need not be made a party to a suit by the assignor to enjoin infringements elsewhere.⁴⁷ It has been held that an inventor, who has assigned his application, may maintain a suit in his own name to compel the issue of the patent.⁴⁸

It has been held that any party against whom an order fixing rates is made by the Interstate Commerce Commission, may apply to the proper court for relief without joining other parties to the order, since the injury was said to be several and not joint.⁴⁹

It has been held at circuit that a tax collector is not a proper party to a bill to set aside a conveyance made by him.⁵⁰ And, as has been said before, no persons should be joined as plaintiffs,⁵¹ or defendants,⁵² who claim the property in question under inconsistent titles. For example, a mortgagee cannot maintain a bill against the mortgagor for a foreclosure, which at the same time seeks to enjoin a claimant adverse to both mortgagor, and mortgagee from asserting his title to the mortgaged property.⁵³

An interest in the question of law involved is not sufficient to make a person a necessary or even a proper party,⁵⁴ except when a bill of peace is filed.

The equity rules, following the English Orders in Chancery, also provide that "in all cases in which the plaintiff has a joint and several demand against several persons, either as principals or sureties, it shall not be necessary to bring before the court as parties to a suit concerning such demand all the persons liable thereto; but the plaintiff may proceed against one

Knowles, D. J., in *Brush El. Co. v. California E. L. Co.*, C. C. A., 52 Fed. 945, 961.

⁴⁶ *Bredin v. Solmson*, 145 Fed. 944.

⁴⁷ *Canton S. R. Co. v. Kanneberg*, 51 Fed. 599, 600.

⁴⁸ *Wende v. Horine*, 191 Fed. 620. *Contra*, *Smith v. Thompson*, 177 Fed. 721.

⁴⁹ *Atlantic Coast Line R. Co. v. Interstate Commerce Commission*, 194 Fed. 449.

⁵⁰ *West v. Duncan*, 42 Fed. 430.

⁵¹ *Marquis Cholmondeley v. Lord Clinton*, 2 Jac. & W. 1, at p. 135. *Saumarez v. Saumarez*, 4 M. & C. 331, 336. See *Parsons v. Lyman*, 4 Blatchf. C. C. 432; *infra*, § 140.

⁵² *Dial v. Reynolds*, 96 U. S. 340, 24 L. ed. 644; *infra*, § 141.

⁵³ *Ibid.* But see *Hefner v. Northwestern Life Ins. Co.*, 123 U. S. 747, 31 L. ed. 309.

⁵⁴ *Valette v. Whitewater Valley Canal Co.*, 4 McLean, 192.

or more of the persons severally liable.”⁵⁵ This rule, however, only applies when the demand is both joint and several, not when it is merely joint;⁵⁶ and when one of two or more jointly and severally indebted is the principal debtor, to whom the others are sureties, he must, it seems, always be joined in a bill filed by the creditor to enforce a security against either of the latter.⁵⁷ Concerning the chancery order from which the rule was copied, Vice-Chancellor Shadwell said that it “applied to cases where several persons were liable in different characters,—that is, some as principals and the rest as sureties; and then it was sufficient to make one individual of each class a party; but where there was only one principal and one surety, both of them must be made parties.”⁵⁸ Where an administrator had fraudulently obtained a decree of distribution in favor of those not entitled thereto, his sureties were held to be proper parties to a suit to hold him and the other distributees as constructive trustees for the next of kin.⁵⁹

§ 113. Cases where the law has furnished a representative.

On account of the inconvenience which would be caused if the general rule were enforced in all cases, there are several classes of exceptions to it.¹ The first of these exists when the law has furnished a representative of the interest in question. In such a case, those whom he represents are not usually necessary parties to the suit.²

The equity rules now provide: “Every action shall be prosecuted in the name of the real party in interest, but an executor, administrator, guardian, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party expressly authorized by statute,

⁵⁵ Eq. Rule 42; copied from Rule 56, of 1842, which was copied from the 32d Order in Chancery of August, 1841. *David v. McRae*, 183 Fed. 812.

⁵⁶ *Pierson v. Robinson*, 3 Swanst. 139, n.

⁵⁷ *Robertson v. Carson*, 19 Wall. 94, 22 L. ed. 178; *Wilson v. City Bank*, 3 Sumn. 423; *Allen v. Houliden*, 6 Beav. 148; *Pinkus v. Peters*, 5 Beav. 253.

⁵⁸ *Lloyd v. Smith*, 13 Sim. 457, 458, 459.

⁵⁹ *Diamond v. Connolly*, C. C. A., 251 Fed. 234.

§ 113. ¹ *Wallworth v. Holt*, 4 M. & C. 619; *Powell v. Wright*, 7 Beav. 449.

² *Calvert on Parties* (2d ed.), 22. See *Hopkins v. Page*, 2 Brock. 20, 42.

may sue in his own name without joining with him the party for whose benefit the action is brought."³

Thus, until they have distributed the decedent's estate,⁴ executors and administrators are deemed sufficiently to represent all legatees, creditors, and next of kin in suits brought by or against them in their representative capacity,⁵ except when they are made defendants to a suit by a residuary legatee for his share of the estate,⁶ or when the rights of the legatees or next of kin between one another are in question,⁷ or in a suit to obtain a construction of the will;⁸ or where they are sued for collusion with a legatee who should then be made a party;⁹ or, perhaps, when an executor or administrator is charged with a breach of trust and an accounting is required; but the executors do not represent the heirs at law in a suit affecting the real estate,¹⁰ and the devisees were held to be indispensable parties to a suit to foreclose a mortgage made by an executor.¹¹ It has been held that where a suit is brought to determine the ownership of a fund in the hands of the trustee of an intestate, an administrator of the decedent's estate must first be appointed, and it is error to decree that the fund be paid "to such person as may hereafter be appointed administrator."¹² So a bankrupt or insolvent debtor¹³ and his creditors¹⁴ are not

³ Eq. Rule, 37.

⁴ Carey v. Roosevelt, 81 Fed. 608.

⁵ Brown v. Dowthwaite, 1 Madd. 448; Potter v. Gardner, 12 Wheat. 499, 6 L. ed. 706; Burton v. Smith, 4 Wash. C. C. 522; Dandridge v. Washington's Ex'rs, 2 Pet. 370, 377, 7 L. ed. 454, 457; Wainwright v. Waterman, 1 Ves. Jr. 313; Anon., 12 Mod. 522; Glover v. Patten, 165 U. S. 394, 41 L. ed. 760.

⁶ Atwood v. Hawkins, Rep. temp. Finch, 113; Faithful v. Hunt, 3 Anst. 751; Calvert on Parties (2d ed.), 206, 208. But see McArthur v. Scott, 113 U. S. 340, 345, 28 L. ed. 1015; Martin v. Fort, 83 Fed. 19.

⁷ Kendall v. Hardenberg, 94 Fed. 911; Stevens v. Smith, C. C. A., 126 Fed. 706.

⁸ Stevens v. Smith, C. C. A., 126 Fed. 706. Cf. Toms v. Owen, 52 Fed. 417.

⁹ Attorney-General v. Wynne, Mos. 126.

¹⁰ Wooslin v. Cooper (N. J. Ch., 1897), 36 Atl. 281. See § 119, *infra*. But see Alger v. Anderson, 78 Fed. 729, 733.

¹¹ Detweiler v. Holderbaum, 42 Fed. 337.

¹² Read v. Bennett (N. J. Errors & Appeals, 1897), 37 Atl. 75; *infra*, § 126.

¹³ De Wolf v. Johnson, 10 Wheat. 367, 384, 6 L. ed. 343, 347; Van Reimsdyk v. Kane, 1 Gall. 371; Calvert on Parties (2d ed.), 24.

¹⁴ Spragg v. Binkes, 5 Ves. 587.

usually necessary parties to a suit brought by or against his trustee or assignee. An assignment by the owners of a number of claims against the same party, to an attorney, under an agreement that he shall receive for his services a certain percentage of the amount collected, will support an action by the assignee in his own name where there is no agreement that he shall pay the costs of the litigation.¹⁵

A stockholders' agent, elected at a meeting of shareholders in pursuance of statute, may after he has qualified sue on their behalf directors to recover money by malfeasance or misfeasance upon the part of the latter.¹⁶ It has been held improper for a creditor of an estate to join with its receiver in a suit concerning it.¹⁷ A corporation need not be, although it usually is, joined as a co-defendant to a suit against its receiver to foreclose a lien upon its property where no personal relief is sought against it.¹⁸

It has been held that the Comptroller of the Currency and the Treasurer of the United States are not necessary parties to a suit to recover from the receiver of a national bank, appointed by the Comptroller, the amount of an assessment erroneously made by the Comptroller, paid by the complainant to the receiver, and paid by him into the Treasury.¹⁹ It has been held that a receiver appointed upon a creditor's bill should not be made a defendant to an ancillary foreclosure suit;²⁰ that a receiver of a corporation is a necessary party to a suit to enforce a corporate right of action;²¹ that a receiver of a bank is a proper, but not a necessary, party to a suit in equity instituted before his appointment to recover from the bank money obtained by it through fraud;²² that a receiver is an improper party to an action at law for a tort committed before his ap-

¹⁵ *Northwestern S. S. Co. v. Cochran*, C. C. A., 191 Fed. 146.

¹⁶ *McKinnon v. Morse*, 177 Fed. 576.

¹⁷ *Doggett v. Railroad Co.*, 99 U. S. 72, 25 L. ed. 301.

¹⁸ *Central Trust Co. v. Chicago, K. & T. Ry. Co.*, 54 Fed. 598.

¹⁹ *Brown v. Tillinghast*, 84 Fed. 17.

²⁰ *Continental Tr. Co. v. Toledo, St. L. & K. C. R. Co.*, 82 Fed. 642.

²¹ *Porter v. Sabin*, 149 U. S. 473, 37 L. ed. 815. But see *Palestine W. & P. Co. v. City of Palestine*, 91 Tex. 540, 40 L.R.A. 203; s. c., 44 S. W. 814; s. c., 40 L.R.A. 203.

²² *Denton v. Baker*, C. C. A., 79 Fed. 189; *Speckart v. German Nat. Bank*, 85 Fed. 12.

pointment,²⁸ but that he is a necessary party to such an action when he holds a policy insuring the corporation from loss by the tort and the plaintiff has joined the insurer with the receiver's corporation as a co-defendant;²⁹ and that he and the corporation may be joined as defendants to a bill to enjoin infringements of a patent and for an accounting of the profits made by infringements before and after his appointment;³⁰ that the creditors of an insolvent bank are necessary parties to a suit by a stockholder against the bank and its receiver to have his certificate cancelled;³¹ and that after the discharge of a receiver and the transfer of the property to a corporation, which as part consideration for the purchase, agreed to pay all valid claims against the receiver, the purchaser is the only proper defendant to a suit to collect such a claim.³² It has been held: that the treasurer of a corporation may sue his predecessor in office for an accounting of the corporate funds, without joining the corporation.³³

A corporation represents its officers and agents acting in their official capacity in a suit for an injunction against unfair competition.³⁴ Ordinarily, a corporation represents the stockholders thereof in all litigation affecting corporate rights; and liabilities;³⁵ but not those in which the stockholder has special interest.³⁶ It has been held that a corporation is so far a representative of its stockholders that none of them need be joined in a suit for an accounting, under a lease which provides for the payment of dividends directly to its stockholders;³⁷ nor a suit to enjoin the collection of unlawful charges for the use

²⁸ Northern Pac. R. Co. v. Heflin, C. C. A., 83 Fed. 93.

²⁹ Moore v. Los Angeles I. & S. Co., 89 Fed. 73. But see Palestine W. & P. Co. v. City of Palestine, 91 Tex. 540, 44 S. W. 814; s. c., 40 L.R.A. 203.

³⁰ Union S. & S. Co. v. Philadelphia & R. R. Co., 69 Fed. 833.

³¹ Dunn v. State Board, 59 Minn. 221, 61 N. W. 27.

³² Thompson v. Northern Pac. Ry. Co., 93 Fed. 384.

³³ Hunter v. Robbins, 117 Fed. 920.

³⁴ International News Service v. The Associated Press, 248 U. S. 215; Wm. A. Rogers, Lt'd, v. H. O. Rogers Silver Co., 237 Fed. 887.

³⁵ Pacific R. of Mo. v. Atlantic & P. R. Co., 20 Fed. 277. See Witherbee v. Bowles, 201 N. Y. 427, 435; Weidenfeld v. Northern Pac. R. Co., C. C. A., 129 Fed. 305, 311; Supreme Council of the Royal Arcanum v. Green, 237 U. S. 531, 544.

³⁶ Ibid., see *infra*, § 186w.

³⁷ Pacific R. of Mo. v. Atlantic & P. R. Co., 20 Fed. 277. See Witherbee v. Bowles, 201 N. Y. 427, 435;

of water by them when the contract was made by the company for their benefit.³³ And an incorporated association of owners and representatives of newspapers is a proper party to represent them in a suit to protect their interest in the news which it collects and distributes among them.³⁴

When a statute imposes a tax upon shares of its capital stock and directs it to pay the same, it may sue to test the validity thereof;³⁵ but where a question arises affecting the respective rights of different classes of stockholders, the members of each class or representative thereof, as well as the corporation, must be joined in the suit.³⁶ Ordinarily a corporation represents unsecured creditors who have no liens nor judgments in suits affecting the rights of the company to property and its liability.³⁷ In a suit against a corporation to enforce specific performance of a contract made by it in behalf of subsidiary companies, which it controlled through ownership of their stock, it was held that such subsidiary companies were not indispensable, nor even necessary, parties.³⁸

It has been held: that a State statute authorizing one or more officers of an unincorporated association to represent the others in the courts, when suing or being sued about a matter concerning their common interest, will be followed by a Federal court of equity, and the members conclusively presumed to have the same citizenship as such officers.³⁹

The extent to which a trade union represents its individual

Weidenfield v. Northern Pac. R. Co., C. C. A., 129 Fed. 305, 311.

³³ Magruder v. Belle Fourche Valley Water Users' Ass'n, C. C. A., 219 Fed. 72.

³⁴ International News Service v. The Associated Press, 248 U. S. 215.

³⁵ Cummings v. Nat. Bank, 101 U. S. 153, 157, 25 L. ed. 903; San Francisco Nat. Bank v. Dodge, 197 U. S. 70, 75, 113, 49 L. ed. 669; Charleston Nat. Bank v. Melton, 171 Fed. 743.

³⁶ Baltimore, C. & A. Ry. Co. v. Godeffroy, C. C. A., 182 Fed. 525; Carpenter v. Knollwood Cemetery,

198 Fed. 297. But see Witherbee v. Bowles, 201 N. Y. 427.

³⁷ St. Louis-San Francisco Ry. Co. v. McElvain, 253 Fed. 123.

³⁸ Texas Co. v. Central Fuel Oil Co., C. C. A., 194 Fed. 1.

³⁹ Fargo v. Louisville, N. A. & C. Ry. Co., 6 Fed. 787; Whitman v. Hubbell, 80 Fed. 81; Liverpool Ins. Co. v. Massachusetts, 10 Wall. 566, 19 L. ed. 1029. But see Chapman v. Barney, 129 U. S. 677, 32 L. ed. 800, and *supra*, § 48.

members has not yet been definitely decided.⁴⁰ Officers of the General Assembly of the Presbyterian Church in the United States may represent the members in a suit to determine the property rights of the church.⁴¹

In suits by or against strangers affecting the partnership property, surviving partners need not have joined with them the personal representatives of their deceased associate.⁴² And firm creditors may proceed directly against the personal representative of a deceased partner without asking for judgment against the firm or the surviving partner, although the surviving partners must be made parties, since they are interested in taking the account.⁴³

Before the Clayton Act ⁴⁴ it was held: that a city and county sufficiently represents gas consumers ⁴⁵ and telephone subscribers,⁴⁶ within their territory to justify, in a suit in which the former are made parties defendant, an injunction against the latter, although not formally joined; but in a suit by a carrier against the members of a railroad commission to enjoin the enforcement of an order fixing rates under a statute which provides for awards of reparation for failure to comply with such an order, the Court will not pass upon the validity of any of such awards made to parties not before the court.⁴⁷ The United States may sue without joining the allottee Indians, to set aside their conveyances of lands within the statutory period of restriction,⁴⁸ and may sue upon the official bond of the clerk of a Federal court to recover deposits made by litigants as security for costs; ⁴⁹ upon the official bond of a Referee in Bankruptcy, to recover

⁴⁰ *Iron Moulders' Union v. Allis-Chalmers Co.*, C. C. A., 166 Fed. 45. See *infra*, §§ 114-116, 276.

⁴¹ *Barkley v. Hayes*, 208 Fed. 319.

⁴² *Pagan v. Sparks*, 2 Wash. C. C. 325.

⁴³ *U. S. v. Hughes*, 161 Fed. 1021, 1023; Story on "Partnership," § 362.

⁴⁴ 38 St. at L. 738, ch. 323, § 19, Comp. St., § 124; *infra*, § 284.

⁴⁵ *San Francisco Gas & El. Co. v. City and County of San Francisco*, 164 Fed. 884, 887. But see

Consol. Gas Co. v. Newton, 256 Fed. 238, affirmed by C. C. A., without opinion, § 258 *infra*.

⁴⁶ *Re Engelhard & Sons Co.*, Petitioner, 231 U. S. 646, p. 418 C.

⁴⁷ *Louisville & Nashville R. R. Co. v. Garrett*, 231 U. S. 300; *Merchants' & Mfg. Traffic Ass'n*, 231 Fed. 292. See *Priest v. Las Vegas*, 232 U. S. 604, 618.

⁴⁸ *Heckman v. U. S.*, 224 U. S. 413, 56 L. ed. 820.

⁴⁹ *U. S. v. Abeel*, C. C. A., 174 Fed. 12.

excessive fees which he has collected⁵⁰ and upon the official bond of a clerk in the Post Office to collect money and the value of property which he has misappropriated⁵¹ for the benefit of all parties who have been injured by the official misconduct without joining any of them. The right of the United States to sue upon contractors' bonds for the benefit of laborers and material men has been previously considered.⁵²

The English rule was that "a court of equity in many cases considers the tenant in tail as having the whole estate vested in him, at least for the purposes of suit; and for these purposes does not look beyond the estate tail in a suit aiming by the decree to bind the right to the land."⁵³ "Those in remainder were considered as cyphers"⁵⁴ "It appears that this rule was originally founded upon analogy to common law. As a tenant in tail might bar subsequent remaindermen,—in fact, might at any moment make himself master of the entire estate,—it was considered by the court that he might be assumed to offer a satisfactory defense for all those subsequent interests. The court has, however, gone one step farther, and has treated infants as sufficient representatives of the inheritance, although they are unable, by reason of infancy, to bar remaindermen. In truth the court has gone to the full extent which is requisite for convenience in practice."⁵⁵ It has been held that a tenant for life and the contingent remainderman in fee may represent the inheritance in a bill for specific performance, if the children of the remainderman will inherit if he does not.⁵⁶ But the court refused to decide whether a will conveyed a fee or a life estate, when the parties were not in existence who would take the remainder if the estate were for life only.⁵⁷

Lord Eldon said that in most cases respecting trust property the beneficiaries of the trust were necessary parties.⁵⁸ The expression naturally suggests the inquiry, in what cases are they not to be made parties? There are some cases in which the

⁵⁰ U. S. v. Ward, C. C. A., 257 Fed. 372. See *infra*, §§ 633, 662.

⁵¹ U. S. v. U. S. Fidelity & G'y. Co., C. C. A., 242 Fed. 16.

⁵² § 5a, *supra*.

⁵³ Lord Eldon in *Lloyd v. Johnes*, Ves. 65.

⁵⁴ Lord Camden in *Reynoldson v. Perkins*, Ambler, 564.

⁵⁵ Calvert on Parties (2d ed.), 56.

⁵⁶ *Sohier v. Williams*, 1 Curt. 479.

⁵⁷ *Talor v. Fisk*, 94 Fed. 242.

⁵⁸ *Adams v. St. Leger*, 1 B. & B. 182.

existence or enjoyment of property is affected by the prayer of the suit. There are others in which the existence of the property is not affected, and the only object is to transfer it into the hands of the trustees.⁵⁹ In the latter cases the beneficiaries of the trust need not,⁶⁰ although it seems they may be made parties.⁶¹ In the former, when not too numerous, their presence was always required, before the equity rules.⁶²

The former equity rules, following an English Chancery order,⁶³ provided that: "In all suits concerning real estate which is vested in trustees by devise, and such trustees are competent to sell and give discharges for the proceeds of the sale, and for the rents and profits of the estate, such trustees shall represent the persons beneficially interested in the estate, or the proceeds, or the rents and profits, in the same manner and to the same extent as the executors or administrators in suits concerning personal estate represent the persons beneficially interested in such personal estate; and in such cases it shall not be necessary to make the persons beneficially interested in such real estate, or rents and profits, parties to the suit, but the court may, upon consideration of the matter on the hearing, if it shall so think fit, order such persons to be made parties."⁶⁴ "It seems doubtful, however," says Daniell of the English order, "whether this order will apply to cases where a mortgagee seeks to foreclose the equity of redemption of estates which are subjects to such trusts."⁶⁵

Trustees under a railroad mortgage,⁶⁶ or under any other

⁵⁹ Calvert on Parties, (2d ed.), 277.

⁶⁰ Franco v. Franco, 3 Ves. 76; Carey v. Brown, 92 U. S. 171, 23 L. ed. 469; Calvert on Parties (2d ed.), 277, 278.

⁶¹ Harrison v. Rowan, 4 Wash. C. C. 202; McCampbell v. Brown, 48 Fed. 795; Hayes v. Pratt, 147 U. S. 557, 37 L. ed. 279; In re E. T. Kenney Co., 136 Fed. 451. *Contra*, Consolidated Water Co. v. City of San Diego, 92 Fed. 759; Perkins v. Hendryx, 149 Fed. 526.

⁶² Whistler v. Webb, Bunb. 53; Greene v. Sisson, 2 Curt. 171; Oli-

ver v. Platt, 3 How. 333, 11 L. ed. 622, s. c., 2 McLean, 268; Cross v. De Valle, 1 Wall. 5, 17 L. ed. 515. See Pollitz v. Wabash R. R., Bischoff, J., N. Y. Sup. Ct. Sp. Tm., N. Y. L. J. Sept. 19, 1912.

⁶³ 30th Order of August, 1841.

⁶⁴ Rule 49, of 1842.

⁶⁵ Daniell's Ch. Pr. (2d Am. ed.) 304. See also Whilton v. Jones, 2 Y. & C. 244; Cross v. De Valle, 1 Wall. 5, 17 L. ed. 515.

⁶⁶ Shaw v. Railroad Co., 100 U. S. 605, 611, 25 L. ed. 757, 758; Beals v. Illinois, Mo. & T. R. Co., 133 U. S. 290, 33 L. ed. 608; Elwell

trust-deed of a similar nature securing the rights in real property of a large number of beneficiaries,⁶⁷ are held, in all proceedings affecting the property which they thus hold, adequately to represent the latter, who will be bound, in the absence of fraud, by notice given to, or a decree entered against trustees, although the court may in its discretion make any of such beneficiaries a party to the suit at his application⁶⁸ but he cannot maintain an action at law upon the bonds, and they are not merged in a deficiency judgment taken by him in a foreclosure suit.⁶⁹ It has been held that bondholders are sufficiently represented by their trustee in a suit for a release of certain property from the lien of the mortgage.⁷⁰ A bondholder cannot sue to foreclose where there is a trustee under his mortgage in existence without making the trustee a defendant and alleging the latter's refusal to sue, or at least his unwillingness to sue and such a state of facts as to make the request an idle ceremony.⁷¹ Even where the mortgage can only be foreclosed at the request of a majority of the bondholders, the trustee need not join with him in the suit any of those who have made the request.⁷² In such a case, the trustee is bound to recognize the rights of the holders of all bonds that are *prima facie* valid and to act on their request to foreclose when made by the req-

v. Fosdick, 134 U. S. 500, 33 L. ed. 998; Leavenworth County Com'rs v. Chicago, R. I. & P. Ry. Co., 134 U. S. 688, 33 L. ed. 1064; Allen-West Commission Co. v. Brashear, 176 Fed. 119. *Ex parte* Equitable Trust Company, C. C. A., 231 Fed. 571.

⁶⁷ Van Vechten v. Terry, 2 Johns. Ch. (N. Y.) 197; Kerrison v. Stewart, 93 U. S. 155, 23 L. ed. 843; McKee v. Lamon, 159 U. S. 317, 40 L. ed. 165; Dalton v. Hazelet, C. C. A., 182 Fed. 561; Carpenter v. Knollwood Cemetery, 198 Fed. 297. The power of a trustee to sue to protect the trust estate, by the foreclosure of a mortgage or otherwise, cannot be restricted by agreement of the parties. N. Y. Tr. Co. v. Michigan Traction Co., 193 Fed. 175.

⁶⁸ Williams v. Morgan, 111 U. S. 684, 28 L. ed. 559; Thomas v. Brownville, F. K. & P. R. Co., 109 U. S. 522, 27 L. ed. 1018; *infra*, § 258.

⁶⁹ Mackay v. Randolph Macon Coal Co., C. C. A., 178 Fed. 881.

⁷⁰ Colorado & Southern Ry. Co. v. Blair, N. Y. App. Div. July, 1914.

⁷¹ Consol. Water Co. v. San Diego, 89 Fed. 272. It was held that a bondholder cannot be joined as a co-plaintiff with the trustee. Consol. Water Co. v. San Diego, 92 Fed. 759.

⁷² Grand Tr. Ry. Co. v. Central Vt. Ry. Co., 88 Fed. 622. See N. Y. S. & Tr. Co. v. Lincoln St. Ry. Co., 74 Fed. 67.

uisite number.⁷³ A provision requiring the request of the holder of one-fourth of the bonds before a foreclosure did not prevent a foreclosure at the suit of holders of a smaller number, when more than three-fourths were held by a party who had caused the default by misappropriating the earnings of the railroad.⁷⁴ The power of the trustee to sue to preserve the trust estate cannot be abridged or restricted, even by agreement of the parties.⁷⁵ In a foreclosure suit brought by holders of a minority of bonds, where there is a claim that the consent of the holders of a majority is required, it is proper to join the majority as defendants.⁷⁶ The fact that the trustee represents conflicting interests does not incapacitate him from bringing a suit to protect the trust estate,⁷⁷ although that might make it proper for the bondholders or for beneficiaries to be joined as parties to the suit.⁷⁸ In certain cases committees of bondholders have been made parties to railroad foreclosures.⁷⁹ Under a railroad lease by which the lessee covenanted to pay to a bank selected by the lessor a sum sufficient to pay the interest upon the lessor's mortgage bonds and taxes, it was held that the bondholders might present their claim directly against the receivers of the lessee without the joinder of the receiver of the lessor who had been appointed by a State court.⁸⁰

It was held that a trustee appointed by a railway company to hold mortgage bonds, pledged as security for negotiable notes of the corporation, was the agent of the latter only and not of the note holders, and did not represent them in a suit affecting the validity of the notes.⁸¹ It has been held that to a bill against the heirs of a trustee to quiet the title to property conveyed

⁷³ *Central Tr. Co. v. Cincinnati, H. & D. Ry. Co.*, 169 Fed. 466.

⁷⁴ *Linder v. Hartwell R. Co.*, 73 Fed. 320. See *Hubbard v. Galveston, H. & S. A. Ry. Co., C. C. A.*, 200 Fed. 504, 509.

⁷⁵ *N. Y. Tr. Co. v. Michigan Traction Co.*, 193 Fed. 175, 180; citing *Old Colony Tr. Co. v. City of Wichita*, 123 Fed. 762; *Guaranty Tr. Co. v. Green Cove Springs Co.*, 139 U. S. 137, 11 Sup. Ct. 512, 35 L. ed. 116.

⁷⁶ *Toler v. East Tenn. & C. Ry. Co.*, 67 Fed. 168.

⁷⁷ *Central Tr. Co. v. Cincinnati, H. & D. Ry. Co.*, 169 Fed. 466.

⁷⁸ *Farmers' L. & H. Co. v. Northern Pac. R. Co.*, 66 Fed. 169.

⁷⁹ *Farmers' L. & Tr. Co. v. Cape Fear & Y. V. Ry. Co.*, 71 Fed. 38 (by intervention).

⁸⁰ *Mercantile Tr. Co. v. Baltimore & O. R. Co.*, 94 Fed. 722.

⁸¹ *Central Tr. Co. v. Cincinnati, H. & D. Ry. Co.*, 169 Fed. 466.

by the trustee to the complainant, the beneficiary of the trust need not be joined as a party;⁸² but that the beneficiaries must be made parties to a bill by a stranger to set aside the deed of trust for fraud,⁸³ and to a suit by one of several stockholders to set aside an agreement to pool their stock by depositing the same with trustees, the other stockholders, as well as the trustees, are necessary parties.⁸⁴

§ 114. **Class suits.** When a number of persons have a common interest in a thing which is the subject of litigation, and, in some instances, when a number of persons have a common interest in a question which is before the court for decision, one or more may sue or be sued in behalf of the rest. Judge Story divides the first of these divisions into two: "(1) When the question is one of a common and general interest, and one or more sue or defend for the benefit of the whole;" and "(2) when the parties form a voluntary association for public or private purposes, and those who sue or defend may fairly be presumed to represent the rights and interests of the whole."¹ But there seems to be no reason for treating the two classes separately. These are called "class suits," "creditors' suits," or "stockholders' suits," as the case may be.²

"When the question is one of common or general interest to many persons constituting a class so numerous as to make it impracticable to bring them all before the court, one or more may sue or defend for the whole."³ When one or more thus file a bill on behalf of themselves and others similarly interested, they should state in the title of their bill that they so sue, and show that the others are numerous or unknown.⁴ In a case where a railroad mortgaged its property directly, without the intervention of a trustee to fifteen bondholders, naming them, and the adequacy of the security was doubtful, it was held that one could not sue on behalf of the rest, but that all the bond-

⁸² Gridley v. Wynant, 23 How. 500.

⁸³ Collin Mfg. Co. v. Ferguson & Hutter's Trustee, 54 Fed. 721. *Contra*, Vetterlein v. Barnes, 124 U. S. 169, 31 L. ed. 400.

⁸⁴ Ryan v. Seaboard R. Co., 89 Fed. 391.

§ 114. ¹ Story's Eq. Pl. § 97.

² Seminole Securities Co. v. Southern Life Ins. Co., 182 Fed. 85, 96.

³ Eq. Rule 38.

⁴ Hoe v. Wilson, 9 Wall. 501, 19 L. ed. 762; State of Maine Lumber Co. v. Kingfield Co., 218 Fed. 902.

holders must be joined as parties to the bill.⁵ Where there were one hundred and twenty bonds of \$500 each, secured by a mortgage to a trustee, and all the bonds were held by three persons, it was held that all the bondholders were indispensable parties to a bondholder's foreclosure suit, although the plaintiff's bondholder filed his bill on behalf of the others as well as of himself.⁶ Any others of the class have the right to join with them in the suit at any time before its settlement or termination upon payment of their share of the costs,⁷ and counsel fees,⁸ which have been then paid or incurred, provided they do not seek to act in hostility to the original complainants,⁹ in which case the court may in its discretion allow them to intervene.¹⁰ If their joinder as plaintiffs would oust the court of jurisdiction, they may be brought in as defendants.¹¹ Such a bill may be filed even when a majority of those interested object to the suit.¹² "For where a matter is necessarily injurious to the common right, the majority of the persons interested can neither excuse the wrong nor deprive all other parties of their remedy by suit."¹³ To such a bill it is not necessary to make defendants all who object to its being filed, provided that enough are brought before the court to sufficiently represent their interest.¹⁴

It was originally held that no one could sue on behalf of others who claimed for himself an interest in the matter in

⁵ *Railroad Co. v. Orr*, 18 Wall. 471, 21 L. ed. 810.

⁶ *Mangels v. Donau Brewing Co.*, 53 Fed. 513.

⁷ *Ogilvie v. Knox Ins. Co.*, 2 Black. 539, 17 L. ed. 349; s. c., 22 How. 380, 16 L. ed. 349; *Ex parte Jordan*, 94 U. S. 248, 24 L. ed. 123; *Hallett v. Hallett*, 2 Paige (N. Y.), 15; *Leigh v. Thomas*, 2 Ves. Sen. 313, *Ransom v. Davis*, 18 How. 295, 15 L. ed. 388; *Story's Eq. Pl.*, § 99.

⁸ *Central R. Co. v. Pettus*, 113 U. S. 116, 28 L. ed. 915; *Trustees v. Greenough*, 105 U. S. 527, 26 L. ed. 1157.

⁹ *Forbes v. Memphis, El Paso & Pacific R. Co.*, 2 Woods, 323.

¹⁰ *Galveston R. Co. v. Cowdrey*, 11 Wall. 459, 478, 20 L. ed. 205.

¹¹ *Brown v. Pacific Mail S. S. Co.*, 5 Blatchf. C. C. 525, 535. But see *Stewart v. Dunham*, 115 U. S. 61, 29 L. ed. 329.

¹² *Bromley v. Smith*, 1 Simons, 8; *Taylor v. Salmon*, 4 Myl. & Cr. 134; *Story's Eq. Pl.*, § 114. But see *Jones v. Garcia del Rio*, 1 Turn. & Russ. 300.

¹³ *Bromley v. Smith*, 1 Simons, 8, 11.

¹⁴ *Clinch v. Financial Corporation*, L. R. 4 Ch. App. 117, at p. 122; *Story's Eq. Pl.*, § 135b.

controversy distinct from that of those whom he sought to represent; for example, a mortgagee was not allowed to sue in behalf of general creditors while enforcing his mortgage,¹⁵ but later authorities seem to have changed this doctrine.¹⁶

All on whose behalf one sues must appear to have an interest in the relief prayed for by him.¹⁷

In such a suit, the bill may be dismissed at any time before decree by the consent of those who are then joined as plaintiffs,¹⁸ but not afterwards, since by the decree a right becomes vested in the others.¹⁹ The court will nearly always allow a bill filed by an individual in his own right to be amended, so as to allow him to sue on behalf of himself and other members of a class.²⁰ The ordinary cases of bills filed by one person of a class on behalf of others similarly situated are bills by stockholders of corporations.²¹ By members²² or officers²³ of unincorporated associations, such as a traffic association of merchants,²⁴ or a religious society,²⁵ by bondholders,²⁶ of whom the holders of bonds secured by successive mortgages may, after the death of all the trustees, sue for a foreclosure on behalf of himself and

¹⁵ *Burney v. Morgan*, 1 Sim. & S. 358, 362; *Palmer v. Foote*, 7 Paige (N. Y.) 437; *White v. Hillacre*, 3 Y. & C. 597.

¹⁶ *Galveston R. Co. v. Cowdrey*, 11 Wall. 459, 20 L. ed. 199; *Mason v. Bogg*, 2 Myl. & Cr. 443; *Story's Eq. Pl.*, § 101, and cases there cited.

¹⁷ *Newton v. Earl of Egmont*, 4 Simons, 574, 585; *Jones v. Garcia del Rio*, 1 T. & R. 297.

¹⁸ *Handford v. Storie*, 2 Sim. & S. 196; *Hubbell v. Warren*, 8 Allen (Mass.), 173; *Hirshfield v. Fitzgerald*, 157 N. Y. 166, 46 L.R.A. 839; § 361, *infra*.

¹⁹ *Handford v. Storie*, 2 Sim. & S. 196; *York v. White*, 10 Jurist, 168; *Innes v. Lansing*, 7 Paige (N. Y.), 583.

²⁰ *Johnson v. Compton*, 4 Simons, 47; *Lloyd v. Loaring*, 6 Ves. 773; *Daniell's Ch. Pr.* (5th Am. ed.) 236, note 6, and 245, and cases cited.

²¹ *Bacon v. Robertson*, 18 How. 480, 15 L. ed. 499; *Seminole Securities Co. v. Southern Life Ins. Co.*, 182 Fed. 85, 86; *Wallworth v. Holt*, 4 Myl. & Cr. 619; *Taylor v. Salmon*, 4 Myl. & Cr. 134; *Hichens v. Congreve*, 4 Russell, 562; *Gray v. Chaplin*, 2 Sim. & S. 267; *Crease v. Babcock*, 10 Met. (Mass.) 532; *Noble v. Gadsden L. & Imp. Co.*, 133 Ala. 250, 91 Am. St. Rep. 27; s. c., 31 So. 856; *Stearns Coal & Lumber Co. v. Van Winkle*, C. C. A., 221 Fed. 590.

²² *Bainbridge v. Burton*, 2 Beavan 539; *Sharpe v. Bonham*, 213 Fed. 660.

²³ *Merchants' & Mfg. Traffic Ass'n v. U. S.*, 231 Fed. 292.

²⁴ *Ibid.*

²⁵ *Sharpe v. Bonham*, 213 Fed. 660.

²⁶ *Trustees of the Wabash & Erie Canal Co. v. Beers*, 2 Black, 448, 17

the holders of each class of the bonds which he owns;³⁷ and bills by creditors.³⁸ To obtain equitable assets which must be divided equally among all creditors³⁹ or to enforce a trust in favor of creditors of the class to which the complainants belong.⁴⁰ Such bills may also be filed by one or more legatees,⁴¹ at least if not residuary legatees;⁴² by one of several next of kin;⁴³ by one of several beneficiaries of a trust fund;⁴⁴ by one of many partners;⁴⁵ by one of a class for the benefit of which a charity was founded;⁴⁶ by one of the crew of a privateer seeking an account from a defendant who has collected their joint prize money;⁴⁷ by one or more taxpayers,⁴⁸ or property owners subject to an assessment;⁴⁹ or owners of lots in a burying ground;⁵⁰ but not by one of several importers to enjoin the seizure of their different imports under an unconstitutional statute.⁵¹

Although in such cases it is proper and customary for the plaintiff to allege that he sues in behalf of all, it has been held that such an allegation is not indispensable and that the Court will guard the right of all interested and of its own motion

L. ed. 327; *Galveston R. Co. v. Cowdrey*, 11 Wall. 459, 20 L. ed. 199; *Central R. Co. v. Pettus*, 113 U. S. 116, 28 L. ed. 915; *Thompson v. Emmett Irr. Dist.*, C. C. A., 227 Fed. 561.

³⁷ *Galveston R. Co. v. Cowdrey*, 11 Wall. 459, 478, 20 L. ed. 199, 205.

³⁸ *Fink v. Patterson*, 21 Fed. 602.

³⁹ *John A. Roebling's Sons Co. v. Kinnicutt*, 248 Fed. 596; *U. S. Smelting Co. v. Hopkins*, 245 Fed. 896.

⁴⁰ *Calder & Richmond v. E. W. Rosenthal & Co.*, 250 Fed. 507; *Cook v. Flagg*, 255 Fed. 195.

⁴¹ *Bennett v. Honywood, Ambler*, 708; *Story's Eq. Pl.*, § 104, and cases cited.

⁴² Upon this point, there is a conflict of authority. Compare *Brown*

v. Ricketts, 3 J. Ch. (N. Y.) 555, and *Davoue v. Fanning*, 4 J. Ch. (N. Y.) 199, with *Kettle v. Cray*, 1 Paige (N. Y.), 417, note. See also *Story's Eq. Pl.*, § 89.

⁴³ *Story's Eq. Pl.*, § 105.

⁴⁴ *Watson v. National Life & Tr. Co.*, C. C. A., 162 Fed. 7.

⁴⁵ *Chancey v. May*, *Proc. Ch.* 592; *Small v. Atwood*, 1 *Younge*, 407.

⁴⁶ *Smith v. Swormstedt*, 16 *How.* 288, 14 L. ed. 942.

⁴⁷ *Good v. Blewitt*, 13 *Ves.* 397; *West v. Randall*, 2 *Mason*, 181, 194.

⁴⁸ *Crampton v. Zabriskie*, 101 U. S. 601, 25 L. ed. 1070.

⁴⁹ *McIntosh v. Pittsburg*, 112 Fed. 705.

⁵⁰ *Chew v. First Presbyterian Church*, 237 Fed. 219.

⁵¹ *Scott v. Donald*, 165 U. S. 107, 4 L. ed. 648.

direct others to be brought in, if this seems necessary for the administration of justice.⁴³

A class suit can not be maintained unless the persons interested are numerous.⁴³ Such bills were dismissed when so far as appeared there were only two,⁴⁴ and in another case three⁴⁵ persons entitled to the relief sought.

The bill must show the names and residences of the persons interested who are omitted, so far as they are known to the complainant,⁴⁶ and that they are too numerous for convenient joinder.⁴⁷ It was held that such suit could not be filed by a stockholder of an insolvent railroad company, to compel the issue to him of stock, which he claimed under a reorganization agreement, when he alleged: "Your orator does not know how many others are similarly situated; but he avers, upon information and belief, that there are many other stockholders of the Georgia Pacific Railway similarly situated, and that their stock amounts to at least \$500,000."⁴⁸ Where none of the complainants in the class suit are entitled to relief, the court cannot grant relief to persons who have not been joined as parties, on whose behalf it is claimed the suit was brought.⁴⁹ It has been held that the court is without jurisdiction to enter a final decree establishing the rights of parties represented by the plaintiff until by an interlocutory decree they have had an opportunity to intervene.⁵⁰

§ 115. Suits against one or more of a class. Similarly, where persons who are jointly liable are very numerous, some may be sued instead of all, provided that the manner in which they are sued, and the fact that they are numerous, are stated

⁴³ *Janch v. Socarras*, 56 N. J. E. Q. 524, 531; *Lightfoot v. Meyer*, N. Y. Sup. Ct. Sp. Tem. per Hotchkiss, J., L. J., June 13, 1916.

⁴⁴ *Railroad Co. v. Orr*, 18 Wall. 471, 21 L. ed. 810; *Mangels v. Donau Brewing Co.*, 53 Fed. 513; *Motley v. Southern Ry. Co.*, 184 Fed. 956, 958.

⁴⁵ *Kohlhamer v. Smietanka*, 239 Fed. 408.

⁴⁶ *Mangels v. Donau Brewing Co.*, 53 Fed. 513.

⁴⁷ *Whittaker v. Whittaker Iron Co.*, 238 Fed. 980; *Kohlhamer v. Smietanka*, 239 Fed. 408.

⁴⁸ *Motley v. Southern Ry. Co.*, 184 Fed. 956, 958.

⁴⁹ *Ibid.*

⁵⁰ *Watson v. National Life & Tr. Co.*, C. C. A., 189 Fed. 872.

⁵¹ *Re Dennett*, C. C. A., 221 Fed. 350, 357.

in the bill.¹ Ordinarily, the complainant selects such of the class as he chooses to represent the rest. The persons thus selected may be a committee chosen by the rest of the class to act for them in the matters complained of such as a reorganization, or a protective, committee of stockholders and bondholders,² or the managing committee of a clearing-house association.³ It is proper, however, to name all of the class in the title to the bill, and then have the court select some of these to be served and to defend for the rest.⁴

This rule has been applied to members of a club,⁵ or of another unincorporated association when sued for the collection of its debts, or to enjoin a violation of the anti-trust act;⁶ to members of a church in a suit affecting the rights of the church to property;⁷ to members of a trades union engaged in a strike;⁸ and to the stockholders of a corporation in a suit brought by a creditor after its dissolution to recover the amount of its capital stock which has been divided among them.⁹ It has been held: that in a suit for an injunction, against a voluntary association with numerous members, the whole association will be brought before the court, by service upon its president, secretary, manager and superintendent.¹⁰

It has been said that "this rule has always been understood to modify somewhat the general doctrine in England, that par-

§ 115. ¹ Story's Eq. Pl., §§ 116, 117; McArthur v. Scott, 113 U. S. 340, 395, 28 L. ed. 1015, 1032; Baltimore, C. & A. Ry. Co. v. Godeffroy, C. C. A., 182 Fed. 525; Carpenter v. Knollwood Cemetery, 198 Fed. 297.

² Railroad Co. v. Howard, 7 Wall. 392, 19 L. ed. 117; Carpenter v. Knollwood Cemetery, 198 Fed. 297.

³ Yardley v. Philler, 58 Fed. 746.

⁴ Ayres v. Carver, 17 How. 501, 15 L. ed. 179.

⁵ Cullen v. Luke of Queensberry, 1 Brown's Ch. 101; Cousins v. Smith, 13 Ves. 544; Story's Eq. Pl., § 116.

⁶ U. S. v. Coal Dealers' Ass'n of California, 85 Fed. 252.

⁷ Sharpe v. Bonham, 213 Fed. 660.

⁸ Am. Steel & Wire Co. v. Wire Drawers' & Die Makers' Unions, 90 Fed. 598.

⁹ Mandeville v. Riggs, 2 Pet. 482, 7 L. ed. 493; Railroad Co. v. Howard, 7 Wall. 392, 19 L. ed. 117; Wood v. Dummer, 3 Mason, 315.

¹⁰ Spaulding v. Evenson, 149 Fed. 913, 916. See also Stationary Engineer Pub. Co. v. Comerford, 155 Fed. 667, 670; A. R. Barnes Co. v. Berry, C. C. A., 156 Fed. 72. But see Allis-Chalmers Co. v. Iron Molders' Union, 150 Fed. 155, 183; holding that the decree did not bind the absentees or defendants, who had been represented but not served.

ties, not formally served with process, may yet be bound on the principle of representation to the fullest extent that those are bound who are their representatives in the suit. The language of the reservation is that in such cases the decree shall be without prejudice to the rights and claims of all absent parties. The rule especially is framed to allow a suit to proceed without having all the members of an association or of a class of defendants formal parties; but, while preserving the right of the absent ones to afterwards litigate for themselves the same question, it does not prohibit the whole class, when plaintiffs, from taking the benefit of a decree in favor of those who represent them, nor preclude a plaintiff who has sued the whole class by their representatives, from binding the absent parties by supplemental proceedings to bring them in when known, if necessary, and subject them to the decree, when they have had that opportunity to defend against it."¹¹

§ 116. Suits by or against one or more as representatives of a class claiming a common right. In some instances when a number of persons have a common interest in the decision of a question of fact or law, though they have no common interest in any property which is the subject of litigation, yet as they are said to claim under a common right, one or more of them have been allowed to represent the rest as plaintiffs or defendants in a suit to determine the disputed question.¹ Ordinarily, the complainant selects such defendants as he considers proper and sufficient; but he may name all of the class in the title of his bill and ask the court to select a few to defend on behalf of the rest.²

Instances where a suit of this kind has been allowed by one or more as plaintiffs in behalf of others similarly situated have usually occurred when, although the plaintiff and those represented by him had no common interest in property, yet he sought a determination of a question affecting the enjoyment of estates which, though distinct, came to him and the rest from a common source. Thus, one or more tenants or parishioners may sue a lord of a manor or parson, to establish a right of

¹¹ *Am. Steel & Wire Co. v. Wire Drawers' & Die Makers' Unions*, 90 Fed. 598, 605, per Hammond, J. son, 181, 195. See *Percy Summer Club v. Astle*, 145 Fed. 53.

² *Ayres v. Carver*, 17 How. 591.

§ 116. ¹ *West v. Randall*, 2 Ma. 15 L. ed. 179.

common,³ or of turbary.⁴ One or more telephone subscribers may sue on behalf of the rest to prevent an interruption of service.⁵ One or more owners of water rights may sue on behalf of all to enjoin an excessive use of the water supply.⁶ Two or more foreign corporations were permitted to file a bill, on behalf of themselves and all other foreign corporations similarly affected, in order to enjoin the execution of an unconstitutional statute.⁷ A few defendants have been allowed to represent a large class, not only when all of that class had some privity of estate, but also in other cases. Thus, a parson was allowed to sue a few on behalf of all his parishioners to establish a disputed right to tithes.⁸ A lord of a manor may sue some on behalf of all of his tenants to establish their duty to grind at his mill, or his right of enclosure,⁹ or to enforce a rent-charge.¹⁰ The court refused to sustain a suit by citizen of a state in behalf of all citizens of the United States to enjoin the Governor of his state from sending to the Legislature an amendment proposed to the Federal Constitution.¹¹

Bills were sustained when brought by those interested in contesting the legality of the issue of certain certificates of indebtedness, against some on behalf of all of the holders of such certificates;¹² and when brought by the purchaser to set aside a sale to him by a decedent against the executor of the vendor and some of his heirs at law, the other heirs at law being unknown.¹³ It seems that a bill can be sustained when filed by a claimant to the equitable title to a tract of land against some

³ *Anon.*, 1 Chancery Cases, 269; *Conyers v. Lord Abergavenny*, 1 Atk. 285; *Brown v. Vermuden*, 1 Ch. Cas. 272; *Smith v. Earl Brownlow*, L. R. 9 Eq. 241.

⁴ *Baker v. Rogers*, Sel. Ch. Cas. 74.

⁵ *Stephens v. Ohio State Telephone Co.*, 240 Fed. 759.

⁶ *Arizona Copper Co. v. Gillespie*, 230 U. S. 46.

⁷ *Greenwich Ins. Co. v. Carroll*, 125 Fed. 121.

⁸ *Brown v. Vermuden*, 1 Ch. Cas. 272; *Hardcastle v. Smithson*, 3 Atk. 246.

⁹ *Brown v. Vermuden*, 1 Ch. Cas. 272. Cf. *U. S. v. Dastervignes*, 118 Fed. 199; s. c., C. C. A., 122 Fed. 30.

¹⁰ *Attorney-General v. Wyburgh*, 1 P. Wms. 599; s. c., 2 Eq. Cas. Abr. 167; *Attorney-General v. Jackson*, 11 Ves. 365, 367; *Attorney-General v. Shelly*, 1 Salk. 162.

¹¹ *Ohio ex rel. Erkenbrecker v. Cox*, 257 Fed. 334.

¹² *Sheffield Water Works v. Yeomans*, L. R. 2 Ch. App. 8.

¹³ *Alger v. Anderson*, 78 Fed. 729, 733.

on behalf of all who have severally bought with notice parcels of it since his right accrued, praying that their conveyances be set aside as in fraud of his rights.¹⁴ It has been held that in a suit by a railroad company against a State Commission, to enjoin the enforcement of charges for freight, shippers of articles affected by such charges may properly be joined as defendants, as representatives of their class, upon an allegation that unless an injunction is granted against them they will attempt to enforce such rights.¹⁵

An alien was not allowed to sue on behalf of himself and all other aliens seeking work to restrain the enforcement of a State statute limiting the employment of aliens.¹⁶

"It has long been settled, that if a person has a common right against a great many of the king's subjects, inasmuch as he cannot contend with all the king's subjects, a court of equity will permit him to file a bill against some of them, taking care to bring so many persons before the court that their interests shall be such as to lead to a fair and honest support of the public interest, and when a decree has been obtained, then with respect to the individuals whose interest is so fully and honestly established, the court on the footing of the former decree will carry the benefit of it into execution against other individuals who were not parties."¹⁷ Thus, a city may file such a bill to establish its right to levy a duty;¹⁸ and it has been suggested that a suit may thus be brought by one of many persons jointly interested in a geographical trade-mark.¹⁹

Such suits cannot be brought against some of the inhabitants of a town to establish the title to property severally held by them and others;²⁰ nor by a carrier against a few shippers to

¹⁴ *Ayres v. Carver*, 17 How. 591, 15 L. ed. 179.

¹⁵ *Northern Pac. Ry. Co. v. Lee*, 199 Fed. 621. *Contra*, *St. Louis, Iron Mountain & Southern Ry. Co. v. McKnight et al.*, Railroad Commissioners of the State of Arkansas, et al., 244 U. S. 368.

¹⁶ *Raich v. Truax*, 219 Fed. 273, aff'd on another point as *Truax v. Raich*, 239 U. S. 33.

¹⁷ *Lord Eldon in Weale v. West*

Middlesex Water Works Co., 1 Jac. & Walk. 358, 369.

¹⁸ *City of London v. Perkins*, 3 Bro. Parl. Cas. 602; *Mayor of York v. Pilkington*, 1 Atk. 282.

¹⁹ *City of Carlsbad v. Tibbetts*, 51 Fed. 852, 856, per Putnam, J.

²⁰ *Priest v. Las Vegas*, 232 U. S. 604.

enjoin them and all similarly interested from suing to recover excessive freight charges.²¹

In these cases, as has been said, a decree against the defendants before the court has been held in England to bind others of the same class.²² It has been said that this would be the rule here.²³

Under the former Equity Rules,²⁴ it was said that the doctrine did not apply to members of unincorporated trades' unions.²⁵

§ 117. Omission of parties not within the jurisdiction of the court. The second exception to the general rule is that persons who cannot be subjected to the jurisdiction of a court of equity need not be joined as parties to a bill, provided that their presence is not indispensable to a decree.

"When any are absent from the jurisdiction who, if within it, would be necessary parties defendant, their presence will ordinarily be dispensed with, provided an equitable and effectual decree can be made against those who have been served with process. The former English practice was to charge in the bill the fact of the absence from the realm of any who otherwise ought to have been joined as defendants, and to pray that they might be served with process if they came within the jurisdiction. Under the modern English system this strictness is not required, and it seems to be sufficient if the excuse for not making the absent parties defendant appears on the face of the bill."¹ This rule of equity practice has been confirmed by statute in the United States.

"When there are several defendants in any suit at law or in

²¹ *St. Louis, Iron Mountain & Southern Railway Company v. McKnight et al.*, Railroad Commissioners of the State of Arkansas, et al., 244 U. S. 368.

²² *Brown v. Vermuden*, 1 Ch. Cas. 272; *Lord Eldon in Weale v. West Middlesex Water Works Co.*, 1 Jac. & Walk. 358, 369.

²³ *Wallace v. Adams*, 204 U. S. 415, 425, 51 L. ed. 547, 552; *Chisolm v. Caines*, 121 Fed. 397, 400. Cf. *U. S. v. Old Settlers*, 148 U. S. 427, 480, 37 L. ed. 509, 529.

²⁴ Eq. Rule 48, of 1842.

²⁵ See *McArthur v. Scott*, 113 U. S. 340, 395, 28 L. ed. 1015, 1032. *Am. Steel & Wire Co. v. Wire Drawers' & Dye Makers' Union*, 90 Fed. 598; *Irving v. Joint District Council, etc., of United Brotherhood of Carpenters, etc.*, 180 Fed. 896. But see *infra*, §§ 276, 284, 295.

§ 117. ¹ Judge Dwight Foster in *Palmer v. Stevens*, 100 Mass. 461, 466.

equity, and one or more of them are neither inhabitants of nor found within the district in which the suit is brought, and do not voluntarily appear, the court may entertain jurisdiction, and proceed to the trial and adjudication of the suit between the parties who are properly before it, but the judgment or decree rendered therein shall not conclude or prejudice other parties not regularly served with process nor voluntarily appearing to answer; and non-joinder of parties who are not inhabitants of, nor found within the district as aforesaid, shall not constitute matter of abatement or objection to the suit."² This statute is, however, merely declaratory, and does not enlarge the power previously possessed by courts of equity.³

The power has been extended by rule, and parties not indispensable to an equitable decree may be omitted if their joinder would oust the court of jurisdiction by placing persons of the same citizenship upon different sides of a controversy. "In all cases where it shall appear to the court that persons, who might otherwise be deemed proper parties to the suit cannot be made parties by reason of their being out of the jurisdiction of the court, or incapable otherwise of being made parties, or because their joinder would oust the jurisdiction of the court as to the parties before the court, the court may in its discretion proceed in the cause without making such persons parties; and in such cases the decree shall be without prejudice to the rights of the absent parties."⁴ "If any persons, other than those named as defendants in the bill, shall appear to be necessary or proper parties thereto, the bill shall aver the reason why they are not made parties, by showing them to be without the jurisdiction of the court, or that they cannot be joined without ousting the jurisdiction of the court as to other parties. And as to persons who are without the jurisdiction and may properly be made parties, the bill may pray that process may issue to make them parties to the bill if they should come within the jurisdiction."⁵

² U. S. R., § 737. See *Connolly v. Wells*, 33 Fed. 205; *Wall v. Thomas*, 41 Fed. 620; *Greenhall v. Carnegie Tr. Co.*, 180 Fed. 812.

³ *Shields v. Barrow*, 17 How. 130, 141, 15 L. ed. 158, 161.

⁴ Eq. Rule 39. This modifies the

language of Eq. Rule 47, of 1842, by omitting the words "necessary or" before the word "proper."

⁵ *Simms v. Guthrie*, 9 Craneh, 19, 3 L. ed. 642; *Mr. Justice Curtis in Shields v. Barrow*, 17 How. 130, 139, 15 L. ed. 158, citing *Clearwater v.*

“As has been said above, a court of equity will ordinarily seek to have before it as parties all persons in any manner interested in the subject-matter of the litigation, in order to make a decree that will prevent the necessity of a subsequent appeal to its aid.⁶ This rule, however, having been established for the promotion of justice, will be modified whenever its rigid enforcement would prevent the court from doing justice to a person invoking its protection. Accordingly it will proceed to a decree without the presence of such parties as cannot be subjected to its jurisdiction, provided it can determine the respective rights of the parties before it without affecting those of the rest. There are three classes of parties: formal parties; parties necessary to a decree which completely disposes of the controversy, so that the aid of the court need not be invoked again, but whose interests are so far separable from those of the parties before the court, that it can dispose of the controversy between the latter without affecting the interests of the former; and parties with an interest in the controversy of such a nature that a final decree cannot be made without either affecting that interest, or leaving the controversy in such a condition that its final determination may be wholly inconsistent with equity and good conscience.⁷ Of these the first two classes can always be omitted, when they are beyond the reach of the process of the court or when their joinder would oust its jurisdiction.⁸ Thus where a bill was filed

Meredith, 21 How. 489, 16 L. ed. 201.

⁶ § 110, *supra*.

⁷ Mr. Justice Curtis in *Shields v. Barrow*, How. 130, 139, 15 L. ed. 158. See *Chadbourne v. Coe*, 51 Fed. 479; *Lion Traction Co. v. Bull Traction Co.*, C. C. A., 231 Fed. 156, 160. This text was cited with approval by Killitts, J., in *Cady v. Barnes*, 208 Fed. 359, 360, 361.

⁸ *Federal Mining & Smelting Co. v. Bunker Hill & Sullivan Mining & Concentrating Co.*, 187 Fed. 474. The rule upon the subject has been well stated by Mr. Justice Bradley: “The general rule as to parties in chancery is that all ought to be

made parties who are interested in the controversy, in order that there may be an end of litigation. But there are qualifications of this rule arising out of public policy and the necessity of particular cases. The true distinction appears to be as follows: First, when a person will be directly affected by a decree he is an indispensable party, unless the parties are too numerous to be brought before the court, when the case is subject to a special rule. Secondly, when a person is interested in the controversy, but will not be directly affected by a decree made in his absence, he is not an indispensable party, but he should

for the construction of a will, an account by the executrix, and a declaration that certain heirs had abandoned their rights in a part of the estate, in the absence of one of the heirs the court took jurisdiction so as to grant all the relief prayed except that which affected him.⁹

§ 118. Formal parties who may be omitted when without the jurisdiction. Formal parties are those with a naked legal title, but no equitable interest in the subject-matter of the controversy. When the persons really interested are before the court, formal parties can always be omitted if without the jurisdiction,¹ and their joinder, no matter whether as plaintiffs or defendants, cannot oust the court of jurisdiction, as they are in reality upon neither side of the controversy.² Such are: a husband against whom no relief is sought, in a suit by his wife to enforce the trusts of a marriage settlement;³ trustees of prior railroad mortgages in a suit for the foreclosure of a subsequent mortgage and the sale of the mortgaged property subject to their liens;⁴ and parties with the naked legal title having no interest in the controversy.⁵ A person against whom an injunction is sought,

be made a party if possible, and the court will not proceed to a decree without him if he can be reached. Thirdly, when he is not interested in the controversy between the immediate litigants, but has an interest in the subject-matter, which may be conveniently settled in the suit, and thereby prevent further litigation, he may be a party or not at the option of the complainant." Williams v. Brownhead, 19 Wall. 563, 571, 22 L. ed. 184, 187. See Chadbourne v. Coe, 51 Fed. 479.

⁹ Waterman v. Canal-Louisiana Bank & Tr. Co., 215 U. S. 33, 49, 54 L. ed. 80, 86.

§ 118. ¹ Simms v. Guthrie, 9 Cranch, 19, 25, 3 L. ed. 642, 644; Wormley v. Wormley, 8 Wheat. 421, 451, 5 L. ed. 651, 659; Boon's Heirs v. Chiles, 8 Pet. 532, 8 L. ed. 1034; Union Bank of Louisiana v. Stafford, 12 How. 327, 13 L. ed. 1008;

New Orleans Canal & Banking Co. v. Stafford, 12 How. 343, 13 L. ed. 1015.

² Wormley v. Wormley, 8 Wheat. 421, 451, 5 L. ed. 651, 659; Removal Cases, 100 U. S. 457, 25 L. ed. 593; Pacific R. Co. v. Ketchum, 101 U. S. 289, 25 L. ed. 932; Walden v. Skinner, 101 U. S. 577, 25 L. ed. 963; Harter v. Kernochan, 103 U. S. 562; *supra*, § 42.

³ Wormley v. Wormley, 8 Wheat. 421, 5 L. ed. 651; Taylor v. Holmes, 14 Fed. 499. But see Watts v. Waddle, 1 McLean, 200.

⁴ Pacific R. Co. v. Ketchum, 101 U. S. 289, 298, 25 L. ed. 932, 936.

⁵ Simms v. Guthrie, 9 Cranch, 19, 25, 3 L. ed. 642, 644; Boon's Heirs v. Chiles, 8 Pet. 532, 8 L. ed. 1034; Union Bank of Louisiana v. Stafford, 12 How. 327, 13 L. ed. 1008; New Orleans Canal & Banking Co. v. Stafford, 12 How. 343, 13 L. ed.

unless he consents thereto, cannot be omitted.⁶ When a suit is brought to recover the possession of real or personal property the person in possession is not a formal party.⁷ Where policy holders sued to enforce their rights against assets transferred to insurance companies, with whom they had not contracted, and the bill also prayed relief against funds deposited by some of the corporation defendants with the State auditor; it was held that his absence would not prevent the grant of the rest of the relief which the complainants sought.⁸

§ 119. Parties whose interest is separable. The second class is not so easy to define; and it is difficult to mark the limits between this and the third class of parties who are always indispensable. It includes all having an interest in the controversy so far separable from that of those before the court that a decree can be made and enforced which disposes of the matter in dispute between the latter without affecting their rights.¹

Thus, a trustee or director or executor beyond the jurisdiction has been held properly omitted in a suit against his colleagues for a breach of trust, or for an accounting.² For a trustee's liability is joint and several.³ One of the next of kin⁴ may sue

1015; *Walden v. Skinner*, 101 U. S. 577, 588, 25 L. ed. 963, 967; *Bacon v. Rives*, 106 U. S. 99, 27 L. ed. 69; *Jackson v. Jackson*, C. C. A., 175 Fed. 710, 717.

⁶ *Ward v. Arredondo*, 1 Paine, 410; *Mills v. Hurd*, 32 Fed. 127.

⁷ *Mass. & So. Const. Co. v. Cane Creek Tp.*, 155 U. S. 283, 39 L. ed. 152.

⁸ *Watson v. National Life & Tr. Co.*, C. C. A., 162 Fed. 7.

§ 119. ¹ *Cameron v. McRoberts*, 3 Wheat. 591, 4 L. ed. 467; *Mallow v. Hinde*, 12 Wheat. 193, 6 L. ed. 599; *Gridley v. Wynant*, 23 How. 500, 16 L. ed. 411; *Horn v. Lockhart*, 17 Wall. 570, 21 L. ed. 657; *NeSmith v. Calvert*, 1 Woodb. & M. 34. This section in the fourth edition is cited with approval in *Cady v. Barnes*, 208 Fed. 350, 369-361, per *Killits, J.*

² *Parsons v. Howard*, 2 Woods, 1, 5; *Heath v. Erie Ry. Co.*, 8 Blatchf. C. C. 345; *Hazard v. Durant*, 19 Fed. 471, 476; *Plume & A. Mfg. Co. v. Baldwin*, 87 Fed. 785; *Bay State Gas Co. v. Rogers*, 147 Fed. 557, where it was not charged that the omitted trustees had shared in the money, as to which an accounting was prayed. *Williams v. Brady*, 232 Fed. 740. But see *Wall v. Thomas*, 41 Fed. 620.

³ *Parsons v. Howard*, 2 Woods, 1, 5; *Heath v. Erie Ry. Co.*, 8 Blatchf. 347.

⁴ *Payne v. Hook*, 7 Wall. 425, 19 L. ed. 260. See, however, *West v. Randall*, 2 Mason, 181; *Wisner v. Barnet*, 4 Wash. C. C. 631, 642; *Greene v. Sisson*, 2 Curtis, 171.

an administrator and his sureties; and a legatee,⁵ at least if not a residuary legatee,⁶ may sue an executor to recover his share of a decedent's estate without joining the rest of the class to which he belongs. In a suit by a legatee to enforce an order to an executor to pay a specified sum to him and to reach land which the executor had fraudulently conveyed, it was held that a co-executor was not an indispensable party.⁷ It seems that the executor of a dead debtor need not be a party to a bill brought by a creditor of the estate to obtain payment out of assets in the hands of a legatee.⁸

One of several tenants in common is not an indispensable party to a suit by another against a stranger, to establish the plaintiff's interest in the property.⁹

"In suits to execute the trusts of a will, it shall not be necessary to make the heir at law a party; but the plaintiff shall be at liberty to make the heir at law a party where he desires to have the will established against him."¹⁰

It has been held: that an heir at law, whose presence could oust the jurisdiction, may be omitted from a suit by another heir, to set aside a deed and will by their common ancestor, and to recover the plaintiff's share of the common property.¹¹ In a suit against the trustee to set aside a residuary request to him it was held that the beneficiary of the trust including a legatee whose bequest was conditioned upon the trust fund exceeding a

⁵ *Dandridge v. Washington's Ex'rs*, 2 Pet. 377, 7 L. ed. 457. See *West v. Randall*, 2 Mason, 181.

⁶ See *McArthur v. Scott*, 113 U. S. 340, 395, 28 L. ed. 1015; *Braduin v. Harpur, Ambler*, 374; *Hawly v. Harvey*, 4 Beav. 215; s. c., 5 Beav. 134.

⁷ *Fraser v. Cole*, C. C. A., 214 Fed. 556.

⁸ *Mulligan v. Milledge*, 3 Cranch, 220, 2 L. ed. 417.

⁹ *Martin v. Fort*, 83 Fed. 19, 27 C. C. A. 428; *Williams v. Crabb*, 117 Fed. 193, 54 C. C. A. 213, 59 L.R.A. 425; *North Carolina Mining Co. v. Westfeldt*, 151 Fed. 290, 296; *Allred v. Smith*, 135 N. C. 443, 452,

47 S. E. 597, 65 L.R.A. 924; *Browne v. Browne*, Fed. Cas. No. 2,035 (1 Wash. C. C. 429).

¹⁰ Eq. Rule 41, copied from Eq. Rule 50 of 1842. It has been held: that the heirs of a decedent, who hold a beneficial life interest in, and a power of testamentary appointment over, certain property, are not indispensable parties to a suit against the representatives of the trustees to enforce the rights of the complainants to the same. *Martin v. Fort*, 83 Fed. 19, 27 C. C. A. 428.

¹¹ *Williams v. Crabb*, 117 Fed. 193, 54 C. C. A. 213, 59 L.R.A. 425. See *Jennings v. Smith*, 242 Fed. 561.

certain sum, were proper but not indispensable parties.¹² The mortgagor is not an indispensable, although he is a proper, party to a bill to collect a mortgage from a purchaser who has assumed it, when, before the bill is filed, the mortgaged property was sold upon the foreclosure of a prior mortgage;¹³ nor are the heirs of the mortgagor indispensable parties to a foreclosure suit, when the bill and answer show that the entire interest in the premises has passed to the defendant; although the bill alleges that it passed by descent at the death of the mortgagor, and the answer that the defendant had acquired it by purchase.¹⁴ Subsequent lienors are not indispensable parties to a foreclosure.¹⁵ Where the title to part of the mortgaged premises had passed to a sovereign, who could not be sued, and all the other parties in interest were joined; it was held, that the court could except the land so conveyed, decree a sale of the balance and enter a deficiency judgment, if the proceeds of the sale were insufficient.¹⁶ Persons in possession of the property, as agents of a defendant, are not indispensable parties to a foreclosure suit.¹⁷

It has been held: that the pledgee of corporate stock is not an indispensable party to a suit to determine the title to the same; provided that its citizenship would defeat the jurisdiction; and that the court may, in its decree, protect the interests of the pledgee, by declaring the stock to be subject to the same lien, if any, that it had at the beginning of the suit.¹⁸ It has been held: that neither a State, nor any of its officers, is a necessary party to a suit by an executor to compel a corporation to transfer to him stock standing in the testator's name, with a claim for

¹² *Atwood v. Rhode Island Hospital Trust Co.*, 255 Fed. 162.

¹³ *Kelly v. Ashford*, 133 Fed. 610, 626. But see *Skinner v. Harker*, 23 Colo. 333. *Supra*, § 112.

¹⁴ *Cooper v. Johnson*, 157 Fed. 104.

¹⁵ *Brewster v. Wakefield*, 22 How. 118, 129, 16 L. ed. 301; *Union Bank of Louisiana v. Stafford*, 12 How. 327, 13 L. ed. 1008; *New Orleans C. & B. Co. v. Stafford*, 12 How. 343, 13 L. Ed. 1015; *Howard v. Rail-*

way Co., 101 U. S. 837, 25 L. ed. 1081; *Nalle v. Young*, 160 U. S. 624, 40 L. ed. 560. See *supra*, § 112; *Continental & C. T. & S. Bank v. Corey Bros. Const. Co.*, C. C. A., 208 Fed. 976.

¹⁶ *Kawananakoa v. Polyblank*, 205 U. S. 349.

¹⁷ *Golden Cross Min. & Mill. Co. v. Free Gold Min. Co.*, C. C. A., 154 Fed. 441.

¹⁸ *Edwards v. Mercantile Trust Co.*, 124 Fed. 381, 389.

damages because of the delay, although the stock is subject to a lien for an inheritance tax.¹⁹

It has been held that the mortgagor is not an indispensable party to a suit by the mortgagee to enjoin the enforcement against the mortgaged property of unconstitutional legislation,²⁰ or to enjoin a municipality from repealing a mortgage franchise,²¹ or to a suit by the mortgagee,²² or by the bondholders,²³ to enjoin trespasses on the mortgaged property by striking employees of the mortgagor, and even that such bondholders need not allege a previous demand for the institution of such a suit by the mortgagor or by their trustee.²⁴ To a bill to enjoin trespass upon land, the person under a contract with whom the trespassers claim the right to use the land is not an indispensable party.²⁵

The early English cases hold: that in a suit against a firm, by strangers, a partner beyond the jurisdiction may be omitted if no injustice will be done him by a decree in his absence;²⁶ but the American authorities do not support this in all cases.²⁷ It has been held that in a suit by one partner against another for an account of money received by the defendant in excess of his share of the firm assets, partners beyond the jurisdiction may be omitted if it appears that each has received his full share of the joint property,²⁸ and that a partner, whose sole interest is

¹⁹ Jessup v. Chicago & N. W. Ry. Co., 188 Fed. 931.

²⁰ Knickerbocker Tr. Co. v. City of Kalamazoo, 182 Fed. 865; City and County of Denver v. N. Y. Tr. Co., C. C. A., 187 Fed. 890.

²¹ Denver v. Mercantile Trust Co., C. C. A., 201 Fed. 790. But see Consol. Water Co. v. City of San Diego, 89 Fed. 272; s. c., C. C. A., 93 Fed. 849.

²² Ban v. Columbian Southern Ry. Co., C. C. A., 117 Fed. 21; *ex parte* Haggerty, 124 Fed. 441, *infra*, § 276.

²³ Carter v. Fortney, 170 Fed. 463, where the trustee does not seem to have been a party, although the objection for not joining him appears not to have been raised.

²⁴ Carter v. Fortney, 170 Fed. 463.

²⁵ Paint Creek Co. v. Gallego Coal & Land Co., C. C. A., 166 Fed. 62.

²⁶ Cowslad v. Cely, Prec. Ch. 83; Darwent v. Walton, 2 Atk. 510; Calvert on Parties, Book III, ch. xxiii; Smith v. Consumers' Cotton-Oil Co., 86 Fed. 359; Vose v. Philbrook, 3 Story C. C. 335. *Cf.* Perkins v. Hendryx, 127 Fed. 448; s. c., 149 Fed. 526, 529; Lawrence v. Rokes, 53 Maine, 110.

²⁷ Raphael v. Trask, 194 U. S. 272, 48 L. ed. 973; Parsons v. Howard, 2 Woods, 1; Bell v. Donoughue, 17 Fed. 710; Mudgett v. Gager, 52 Maine, 541. See § 120, *infra*.

²⁸ Towle v. Pierce, 21 Met. (Mass.) 329; Kilbourn v. Sunder-

a share of the joint profits of a contract, is not an indispensable party to a suit by another member of the firm, to foreclose a mechanic's lien for the gross amount due.²⁹

A subcontractor who has fraudulently collected money from the United States may be sued at law to recover this without the joinder of the contractor, although the latter at the former's instigation made the fraudulent representations.³⁰ "The owners of partial interests in contracts for land, acquired subsequently to their execution, are not necessary parties to bills for their enforcement. The original parties on one side are not to be mixed up in controversies between the parties on the other side, in which they have no concern."³¹ An heir may file a bill for the specific performance of a contract entitling his ancestor to purchase land without bringing in the personal representative of his ancestor, provided that he offers himself to provide for the payment of the purchase-money.³² Specific performance of a contract for the sale of land may be enforced against one of several joint tenants without joining the others with him as defendants.³³

land, 130 U. S. 505, 32 L. ed. 1005. But see § 120, *infra*.

²⁹ *Ex parte Haggerty*, 124 Fed. 441. Where the business of the firm was conducted by two houses, and those who managed one house had assigned their interest to the managers of the other; it was held: that the former, who filed a disclaimer, might be made defendants, and that their citizenship, which was the same as that of the principal defendant, did not defeat the jurisdiction. *Poole v. West Point Butter & Cheese Ass'n*, 30 Fed. 513.

³⁰ *U. S. v. Salisbury*, 157 U. S. 121, 39 L. ed. 642.

³¹ *Mr. Justice Field in Willard v. Tayloe*, 8 Wall. 557, 571, 19 L. ed. 501, 505. But see *Hoxie v. Carr*, 1 Sumner, 173. It has been held: that, to a suit by an assignee of part of the rights under a contract to compel specific performance of

the same, the owners of the other parts are necessary parties under the old Chancery rule; but not indispensable parties under the rule of the Federal courts, *Rogers v. Penobscot Min. Co.*, C. C. A., 154 Fed. 606, 616. A party to a contract, who has received a release, *Dodge v. Frank Waterhouse & Co.*, 156 Fed. 57; or one who has released his interest, *Canal Co. v. Gordon*, 6 Wall. 561, 18 L. ed. 894, is not an indispensable party to a suit to enforce the same.

³² *Prout v. Roby*, 15 Wall. 471, 21 L. ed. 58.

³³ *Stephen v. Beall*, 22 Wall. 329, 22 L. ed. 786. It has been held, that a corporation, which is not a party to a contract for the conveyance of certain property thereto, is not an indispensable party to a suit to compel specific performance, *Rogers v. Penobscot Min. Co.*, C. C.

It was held that to a bill to set aside a deed and power of attorney for the sale of land, a purchaser of part of the land from one of the defendants was not an indispensable party.³⁴

The assignor of a claim is not a necessary party to a suit upon it by his assignee,³⁵ unless the assignment be executory,³⁶ or, the assignor has an equitable interest in the claim.³⁷

Where a contract is joint and several, all parties to the same are not indispensable to a suit to enforce it.³⁸ Ordinarily all the parties to a contract which is not joint and several are indispensable parties to a suit for its enforcement.³⁹ In an action at common law to recover damages for breach of a contract by which two are jointly bound, both the obligees are not indispensable parties when the joinder of one of them would oust the jurisdiction.⁴⁰ A party to a contract with a trustee, which has been released, is not an indispensable party to a suit

A., 154 Fed. 606, 616; and that corporations are not indispensable parties to a suit for specific performance of a contract to convey land owned by them, which was made on their behalf by a corporation which held the control of their stock, *Texas Co. v. Central Fuel Oil Co.*, C. C. A., 194 Fed. 1. A railway company is not an indispensable party to a bill against its receiver to enforce specific performance of a contract made by it, *Express Co. v. Railroad Co.*, 99 U. S. 191, 25 L. ed. 319. To a bill to enjoin the execution of a judgment of ejectment and to decree a conveyance of lands, when the plaintiffs had an equitable title only, the persons whose legal title the complainants asserted were held properly omitted, when no relief was prayed against them, and their joinder would have ousted a court of jurisdiction, *Simms v. Guthrie*, 9 Cranch, 19, 25, 3 L. ed. 642, 644. See also *Boon's Heirs v. Chiles*, 8 Pet. 532, 8 L. ed. 1034. But compare *Mallow v. Hinde*, 12 Wheat.

193, 6 L. ed. 599. A border case is *Elmendorf v. Taylor*, 10 Wheat. 152, 6 L. ed. 289.

³⁴ *Billings v. Aspen M. & S. Co.*, 51 Fed. 338, 350. See *Hicklin v. Marco*, 56 Fed. 549.

³⁵ *Batesville Inst. v. Kauffman*, 18 Wall. 151, 21 L. ed. 775; *Trecothick v. Austin*, 4 Mason, 16; *Rogers v. Penobscot Min. Co.*, C. C. A., 154 Fed. 606.

³⁶ *Land Co. v. Elkins*, 20 Fed. 545.

³⁷ *Western Nat. Bank v. Armstrong*, 152 U. S. 346, 38 L. ed. 470; *Hubbard v. Manhattan Tr. Co.*, C. C. A., 87 Fed. 51, 57.

³⁸ *Richmond Cedar Works v. Buckner*, 181 Fed. 424. Under the Iowa Code of 1897, § 3465, a surety may be sued without joining the principal upon the bond. *Kaus v. Am. Surety Co.*, 199 Fed. 972.

³⁹ *Cristin v. Leonard*, C. C. A., 209 Fed. 49. See § 120, *infra*.

⁴⁰ *Camp v. Gress*, 250 U. S. 308. See also *Clearwater v. Meredith*, 21 How. 489; *Ostrander v. Blandin*, 211 Fed. 733.

by the *cestui que trust* to compel such trustee to account for the loss the plaintiff has thereby sustained.⁴¹

It has been held: that a State is not an indispensable party to a bill, by the United States against a private individual, to cancel a contract between him and the State for the purchase of land obtained by the State from the National Government through mistake or fraud.⁴² In a suit by the United States to collect a bond such as the bond of a referee in bankruptcy⁴³ or a contractor's bond⁴⁴ or the bond of a postal clerk⁴⁵ for the benefit of individuals interested, the other parties interested in the recovery need not be joined. It has been held that a corporation, whose citizenship will defeat the jurisdiction, is not an indispensable party: to a suit by a stockholder to recover damage to his shares;⁴⁶ to a suit by a minority stockholder to compel the majority to account to the complainants for their share of the property, which such majority have misappropriated,⁴⁷ nor to a suit in equity by bondholders against directors, to compel them to make good fraudulent representations recited in their mortgage.⁴⁸ That an officer of a corporation, who has deposited with the defendants money, which it is charged he embezzled from the company, is not an indispensable party to a suit to establish a trust in the same.⁴⁹ The holder of a certificate of stock in a corporation, which has been cancelled by a decree in another court, is not an indispensable party to a bill to compel the issue to the complainant of a new certificate for the same stock.⁵⁰ Stockholders and creditors are not necessary parties to a suit to foreclose a lien.⁵¹ Where a bill does not disclose that any of them except the defendants are within the jurisdiction of the court, other stockholders in a similar position are not indispensable parties to a creditors' bill to re-

⁴¹ Frank Waterhouse & Co. v. Dodge, C. C. A., 162 Fed. 1.

⁴² Williams v. U. S., 138 U. S. 514, 516, 34 L. ed. 1026, 1028.

⁴³ U. S. v. Ward, C. C. A., 257 Fed. 372.

⁴⁴ See *supra*, § 5a.

⁴⁵ U. S. v. U. S. Fidelity & Guaranty Co., C. C. A., 242 Fed. 16.

⁴⁶ Bogert v. Southern Pac. Co., 215 Fed. 218.

⁴⁷ Kuchler v. Greene, 163 Fed. 91.

⁴⁸ Slater Tr. Co. v. Randolph-Macon Coal Co., 166 Fed. 171.

⁴⁹ White Swan Mines Co. v. Ballet, 134 Fed. 1004.

⁵⁰ Citizens Sav. & L. Ass'n v. Belleville & S. I. R. Co., C. C. A., 117 Fed. 109.

⁵¹ Godchaux v. Morris, C. C. A., 121 Fed. 482.

cover the balance due upon stock issued at less than par.⁵² Members of the board of trustees of an unincorporated association who have no power to sue or be sued in its behalf and a subsidiary incorporation the stock of which is owned by the defendant association are not indispensable parties to a suit to recover its property and its control.⁵³ It has been held: that to a bill to restrain the directors of a corporation from negotiating a fraudulent sale of its property, the person to whom the sale is about to be made is not an indispensable party if no contract has been made with him;⁵⁴ that a party, whose presence will defeat the jurisdiction, is not an indispensable party to a suit to enjoin the making of a contract with him;⁵⁵ that contractors with a city are not indispensable parties to a suit to enjoin the municipal corporation from creating a debt beyond the constitutional limit, by carrying out its contract with them,⁵⁶ and that a non-resident is not an indispensable party to a bill to enjoin the transfer of property to it.⁵⁷ That after affirmance of a judgment against him the defendant is not a necessary party to a suit by the surety on his supersedeas bond to enjoin the prosecution of an action upon the bond.⁵⁸ That the widower is not an indispensable party to a suit by his wife's administrator to set aside a deed given to him and her.⁵⁹ In proceedings under section 18 of the Interstate Commerce Act against a railroad company to enforce an order of the commission, it is not necessary that another carrier making the forbidden rate jointly with the defendant be made a party when it is without the jurisdiction.⁶⁰

⁵² Second Nat. Bank v. Georger, 246 Fed. 517.

⁵³ Helm v. Zarecor, 213 Fed. 648.

⁵⁴ Abbot v. American H. R. Co., 4 Blatchf. C. C. 489; Wallace v. Holmes, 99 Blatchf. C. C. 65; General Inv. Co. v. Lake Shore & M. S. Ry. Co., C. C. A., 205 Fed. 160.

⁵⁵ Cherokee Nation v. Hitchcock, 187 U. S. 294, 47 L. ed. 183; Wilson v. Am. Palace Car Co., 67 N. J. Eq. 262, 58 Atl. 195; Gen. Inv. Co. v. Lake Shore & M. S. Ry. Co., C. C. A., 250 Fed. 160, 177, see *infra*, § 120.

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⁵⁶ City Water Supply Co. v. Ottumwa, 120 Fed. 309. But see *infra*, § 120.

⁵⁷ Wilson v. Am. Palace Car. Co., 67 N. J. Eq. 262, 58 Atl. 195. See City Water Supply Co. v. Ottumwa, 120 Fed. 309.

⁵⁸ Maryland Casualty Co. v. Repass, C. C. A., 253 Fed. 328.

⁵⁹ Grigsby v. Miller, 231 Fed. 521.

⁶⁰ Interstate Com. Com'n v. Texas & P. Ry. Co., 52 Fed. 187; s. o. as T. & P. Ry. Co. v. Interstate Com. Com'n, 162 U. S. 197, 265, 40 L. ed. 940.

To a suit by one indorser of a bill of exchange to restrain the collection of a judgment against him upon the ground that the bill has been paid by another indorser, the latter is not a necessary party.⁶¹ To a bill by a creditor to satisfy a judgment out of land in a debtor's possession, but fraudulently conveyed by him to a person beyond the jurisdiction of the court, the person in whose name the land stood was held not to be an indispensable party.⁶²

It has been held that a tenant in common of a water-right may sue to enjoin an injury to the property without making his co-tenant a party;⁶³ but that where the complainant seeks an injunction against interference by owners of the upland with his right to divert the water for irrigation, all persons who claim any right to use the waters of the stream are indispensable parties, although their joinder would defeat the jurisdiction.⁶⁴

It has been said that, to a bill by a private individual to enjoin the maintenance of a public nuisance, neither persons jointly interested with him nor those jointly guilty with the defendant are indispensable parties.⁶⁵ It has been held that the holder of a stumpage contract is not a necessary party to a suit to recover the timber on the land.⁶⁶ It has been suggested that the absence of one person guilty of a joint fraud might not prevent the court from taking jurisdiction over the others.⁶⁷ And in general to an action for damages for a tort⁶⁸ or for an

⁶¹ *Atkins v. Dick*, 14 Pet. 114, 10 L. ed. 878.

⁶² *McCoy v. Rhodes*, 11 How. 131, 141, 13 L. ed. 634, 638. But see *Billings v. Aspen M. & S. Co.*, 51 Fed. 338.

⁶³ *Union M. & M. Co. v. Dangberg*, 81 Fed. 73, 87; *Washington State Sugar Co. v. Sheppard*, 186 Fed. 233.

⁶⁴ *Washington State Sugar Co. v. Sheppard*, 186 Fed. 233. *Contra*, in view of the water code of Oregon, Act of February 24, 1909, L. 1909, p. 319, it was held that, where a suit was there brought to enjoin the defendants from using the waters of a stream, the Federal court should require the parties

either to proceed under the statute or to bring in all other persons in interest. *Pacific Live Stock Co. v. Silvies River Irr. Co.*, 200 Fed. 487.

⁶⁵ *Miss. & Mo. R. Co. v. Ward*, 2 Black, 485; 17 L. ed. 311.

⁶⁶ *Keith Lumber Co. v. Houston Oil Co.*, C. C. A.; 257 Fed. 1.

⁶⁷ Judge Dwight Foster in *Palmer v. Stevens*, 100 Mass. 461, 466. See also *Heath v. Erie Ry. Co.*, 8 Blatchf. C. C. 347 and note 2 *supra*.

⁶⁸ *Rouiller v. A. & B. Schuster Co.*, 212 Fed. 348; *Seattle v. Gr. Northern Ry. Co.*, 239 Fed. 1009, *infra*, §§ 540, 541. But see *Bell v. Donohoe*, 17 Fed. 710; *Wall v. Thomas*, 41 Fed. 620.

injunction against a tort,⁶⁹ not committed under color of a contract right, or against the infringement of a patent when no accounting is prayed,⁷⁰ or even in case of the conversion of mining ore in a suit for an accounting,⁷¹ one or more of the joint wrong-doers may be omitted. The proper remedy by a creditor of a corporation to enforce the individual liability of its directors⁷² or stockholders, or to collect unpaid assessments or subscriptions from the latter⁷³ are previously discussed.

The United States are not indispensable parties to a suit to declare that a land patent wrongfully obtained from them is held in trust for the complainant.⁷⁴ The United States are not indispensable parties to a suit to enjoin a marshal from executing a judgment in their favor which was entered without jurisdiction;⁷⁵ but it has been held that an Indian agent is a proper, although not an indispensable, party to a suit to determine rights under leases of Indian lands.⁷⁶

⁶⁹ *Miss. & Mo. R. Co. v. Ward*, 2 Black, 485, 17 L. ed. 311; *Cole Silver Min. Co. v. Virginia & Gold Hill Water Co.*, Fed. Cas. No. 2,989 (1 Sawy. 470). The directors of a corporation are not indispensable parties to a suit by a stockholder to restrain it from acting in violation of his rights fraudulently or *ultra vires*, *Geer v. Mathieson Alkali Works*, 190 U. S. 428, 436, 47 L. ed. 1122, 1126; *Hatch v. Chicago, Rock Island & Pac. R. R. Co.*, 6 Blatchf. 105, 114; *Sidway v. Missouri L'd & L. S. Co.*, 116 Fed. 381; *Witherbee v. Bowles*, 201 N. Y. 427. A corporation, the entire capital stock of which is owned by another company, is not an indispensable party to a suit by a stockholder of the latter, to restrain the latter from leasing the former's railroad. *Sabre v. United Tr. & El. Co.*, 156 Fed. 79, 81.

⁷⁰ *American B.-Mach. Co. v. Crossman*, 57 Fed. 1021 (partners). The officers, agents and stockholders of a corporation may be enjoined from infringing a patent while acting for

the company when the corporation itself is not a party and is beyond the jurisdiction. *Edison El. L. Co. v. Packard El. L. Co.*, 61 Fed. 1002.

⁷¹ *Silver King Coalition Mines Co. v. Silver King Consol. Min. Co.*, C. C. A., 204 Fed. 166.

⁷² *Supra*, § 81a. See *Horner v. Henning*, 93 U. S. 228, 23 L. ed. 879; *Terry v. Little*, 101 U. S. 216, 25 L. ed. 864; *Terry v. Tubman*, 92 U. S. 156, 23 L. ed. 537; *Pollard v. Bailey*, 20 Wall. 526, 22 L. ed. 378; *Welles v. Graves*, 41 Fed. 459; *First Nat. Bank v. Peavey*, 75 Fed. 154. But see *Alderson v. Doyle*, C. C. A., 74 Fed. 29.

⁷³ *Supra*, § 82. See *Ogilvie v. Knox Ins. Co.*, 22 How. 380, 16 L. ed. 349; *Hatch v. Dana*, 101 U. S. 205, 25 L. ed. 885; *Manufacturing Co. v. Bradley*, 105 U. S. 175, 26 L. ed. 1034.

⁷⁴ *Daniels v. Wagner*, 237 U. S. 547.

⁷⁵ *Buckley v. U. S.*, 196 Fed. 429.

⁷⁶ *Texas Co. v. Central Fuel Oil Co.*, C. C. A., 194 Fed. 1.

A State is not an indispensable party to a bill seeking to restrain its officers from levying for its benefit an illegal tax,⁷⁷ nor, it has been held, to a bill to prevent their illegal issue of land warrants for property which it had agreed to convey to the plaintiff;⁷⁸ nor to a bill to restrain their unlawful issue of bonds which would diminish the value of bonds held by the complainant.⁷⁹ To such bills the persons to whom the unlawful issue of bonds or land warrants is about to be made, are not indispensable parties.⁸⁰

It has been said, that, in proceedings to establish claims against decedents estates, the Federal courts should follow the local law, and that no persons are indispensable parties who would not be such were the proceedings instituted in a State court.⁸¹

§ 120. Parties indispensable to a decree. No suit, however, can proceed unless the court have before it as parties all persons who will be directly affected by the decree sought, or whose obedience is necessary to its enforcement, when it does not appear that they consent thereto.¹ A person is affected by a decree when his rights against, or liability to, any of the parties to the suit is thereby determined. If a decree in favor of the complainant would cast a cloud upon another's title, that person, it seems, is thereby directly affected.² To a bill by a legatee against the husband of a residuary legatee or devisee to obtain payment of the complainant's legacy from assets in the defendant's possession, the residuary legatee herself, or, if she be dead,

⁷⁷ *Osborn v. Bank of U. S.*, 9 Wheat. 738, 6 L. ed. 204; *Dodge v. Woolsey*, 18 How. 331, 15 L. ed. 401.

⁷⁸ *Davis v. Gray*, 16 Wall. 203, 21 L. ed. 447; *Hancock v. Walsh*, 3 Woods, 351. But see *Cunningham v. Macon & B. R. Co.*, 109 U. S. 446, 453, 27 L. ed. 992, 994.

⁷⁹ *Board of Liquidation v. McComb*, 92 U. S. 531, 23 L. ed. 623; *supra*, § 105b.

⁸⁰ *Davis v. Gray*, 16 Wall. 203, 233, 21 L. ed. 447, 457; *Cherokee Nation v. Hitchcock*, 187 U. S. 294, 47 L. ed. 183.

⁸¹ *Farmers' Bank of Cuba City, Wis. v. Wright*, 158 Fed. 841.

§ 120. ¹ See *infra*, § 122. But see *Eagle Mfg. Co. v. Miller*, 41 Fed. 351.

² *Young v. Cushing*, 4 Biss. 456; *California v. Southern Pac. R. Co.*, 157 U. S. 229, 395 L. ed. 683. But see *Hicklin v. Marco*, 56 Fed. 549. It was held improper to compel defendant to make a deed confirming complainant's title to land conveyed by the latter's grantors when such grantors were not parties. *Zenbrugg v. Reed* (N. J. Ch., 1896), 35 Atl. 298.

her personal representative, is a necessary party,³ at least when it does not appear that she or her personal representative is without the jurisdiction of the court. All tenants in common of land are necessary parties to an action for trespass upon the same.⁴

It has been held that the several lessors of lands are indispensable parties to a suit between their respective lessees, when the validity of their title is in question.⁵

The United States are necessary parties to a suit brought by a State against the Secretary of the Interior to establish the title to, and to prevent the other disposition of, lands which the National Government claims to own.⁶

A State is an indispensable party to a bill against its officers to compel specific performance by them for it of its contract for the sale of land;⁷ or to establish a claim to property held by its officers claiming a title in the State thereto;⁸ or a claim to corporate stock registered in its name, the certificates of which are held by its officers;⁹ or to compel the removal of a nuisance from State land;¹⁰ but not, it has been held, to a bill by the United States against a private individual to cancel a contract between him and the State for the purchase of land obtained by the State from the plaintiff through mistake or fraud.¹¹

All attaching creditors are indispensable parties to a suit to obtain the possession of assets, which have been seized by the sheriff under attachments issued at their application.¹²

The trustee of an active trust is a necessary party to a suit affecting the trust estate,¹³ but the legal representative of a

³ *Levis v. Dart*, 6 How. 1; *Hill v. Wilson*, C. C. A., 210 Fed. 200.

⁴ *Cochran v. Brannan*, 196 Fed. 219.

⁵ *South Penn Oil Co. v. Miller*, C. C. A., 175 Fed. 729, 736.

⁶ *State of Louisiana v. Garfield*, 211 U. S. 70, 53 L. ed. 92.

⁷ *Preston v. Walsh*, 10 Fed. 315. See also *Walsh v. Preston*, 109 U. S. 297, 27 L. ed. 940.

⁸ See §§ 103, 104, 105b, *supra*.

⁹ *Cunningham v. Macon & B. R. Co.*, 109 U. S. 446, 27 L. ed. 992; *supra*, § 37. *Christian v. Atlantic &*

N. C. R. Co., 133 U. S. 233, 33 L. ed. 589; *supra*, §§ 104, 105b.

¹⁰ *Hopkins v. Clemson Agricultural College of South Carolina*, 221 U. S. 636, 55 L. ed. 890.

¹¹ *Williams v. U. S.*, 138 U. S. 514, 516, 34 L. ed. 1026.

¹² *De Galard v. Safe Deposit & Trust Co. of Baltimore*, 196 Fed. 981.

¹³ *McRea v. Branch Bank of Alabama*, 19 How. 376, 15 L. ed. 688; *O'Hara v. MacConnell*, 93 U. S. 150, 23 L. ed. 840; *Thayer v. Life Ass'n*, 112 U. S. 717, 28 L. ed. 864; *Ameri-*

trustee is not an indispensable party to a suit by a *cestui que trust* to enforce a contract concerning the trust property made by the former with the consent of the latter.¹⁴

Every party to a contract, whether of sale or for another purpose, except one who has released,¹⁵ or assigned,¹⁶ his interest, or who has been released,¹⁷ or an agent through whom the title has passed;¹⁸ is ordinarily a necessary party to a suit to enforce it;¹⁹ or to set it aside;²⁰ or unless its performance

can B. S. v. Price, 110 U. S. 61, 28 L. ed. 70; Black v. Foreman Brox. Banking Co., 218 Fed. 264; Hamer v. N. Y. Bys. Co., 244 U. S. 266; Billings v. Aspen M. & S. Co., 51 Fed. 338, 350; s. c. in C. C. A., 52 Fed. 250. But see New Chester Water Co. v. Holly Mfg. Co., C. C. A., 53 Fed. 19; *supra*, §§ 113, 119.

¹⁴ Sage Land & Improvement Co. v. Ripley, C. C. A., 192 Fed. 785, where no such representative had been appointed.

¹⁵ Canal Co. v. Gordon, 6 Wall. 561, 18 L. ed. 894.

¹⁶ Northern Pac. Ry. Co. v. Kindred, 14 Fed. 77; Mackay v. Gabel, 117 Fed. 873; U. S. v. Clark, 129 Fed. 241; O'Shaughnessy v. Humes, 129 Fed. 953.

¹⁷ Dodge v. Frank Waterhouse & Co., 156 Fed. 57.

¹⁸ Donovan v. Campion, 85 Fed. 71; Gross v. George W. Scott Mfg. Co., 48 Fed. 35; Hamilton v. Savannah, F. & W. Ry. Co., 49 Fed. 412; Mackay v. Gabel, 117 Fed. 873. But see California v. So. Pac. Co., 157 U. S. 229, 39 L. ed. 683.

¹⁹ Mallow v. Hinde, 12 Wheat. 193, 6 L. ed. 599; Shields v. Barrow, 17 How. 130, 15 L. ed. 158; Gregory v. Stetson, 133 U. S. 579, 33 L. ed. 792; Perin v. Megibben, 53 Fed. 86; Rollins Inv. Co. v. George, 48 Fed. 776; Farni v. Tesson, 1 Black, 309, 17 L. ed. 67; Judson v. Courier Co.,

15 Fed. 541. McAulay v. Moody, 185 Fed. 144; Cristin v. Leonard, C. C. A., 209 Fed. 49. See § 119, *supra*.

²⁰ Shields v. Barrow, 17 How. 130, 15 L. ed. 158; Coiron v. Millaudon, 19 How. 113, 15 L. ed. 575; Gaylords v. Kelshaw, 1 Wall. 81, 17 L. ed. 612; Ribon v. Railroad Cos., 16 Wall. 446, 21 L. ed. 367; Lawrence v. Wirtz, 1 Wash. C. C. 417; Tobin v. Walkinshaw, 1 McAll, 26; Bell v. Donohoe, 17 Fed. 710; Florence S. Mach. Co. v. Singer Mfg. Co., 4 Fisher's Pat. Cas. 329; s. c., 8 Blatchf. C. C. 113; Chadbourne v. Coe, 45 Fed. 822; Empire C. & T. Co. v. Empire C. & M. Co., 150 U. S. 159, 37 L. ed. 1037; New Orleans W. Co. v. New Orleans, 164 U. S. 471, 41 L. ed. 518; s. c. in C. C. A., 51 Fed. 479; Clark v. Great Northern Ry. Co., 81 Fed. 282; U. S. v. No. Pac. R. Co., 134 Fed. 715; Beswick v. Dorris, 174 Fed. 502; Collins v. Penn-Wyoming Copper Co., 203 Fed. 726; Hayden v. Perfection Cooler Co., 217 Fed. 171; Am. Surety Co. of N. Y. v. Conway, 222 Fed. 140; Hawes v. First Nat. Bank, C. C. A., 229 Fed. 51; Am. Surety Co. v. Conway, 223 Fed. 140. Eq. Pl., § 101, and cases there cited *Cf.* Sperry & Hutchinson Co. v. Pommer, 199 Fed. 309. But see French v. Shoemaker, 14 Wall. 314, 20 L. ed. 852; West v. Duncan, 42

would amount to a nuisance,³¹ or other tort unconnected with contract,³² to enjoin a person from carrying it into effect; even, it has been held, in a case at circuit, when the other parties are co-trustees beyond the jurisdiction of the court.³³

But it has been held that a judgment debtor is not an indispensable party to a suit by the judgment creditor to set aside the conveyance which he has made.³⁴ The United States may sue to set aside conveyances, made by Indians, of allotted lands within the statutory period of restriction, without joining such allottees.³⁵

The lessee by a railroad company of the right to remove culm from land which the company had formerly occupied as a right of way was held to be an indispensable party to a suit for an injunction against trespass by the company upon the land.³⁶ A railway company is an indispensable party to a suit to enjoin another railway company from constructing a road under a lease by it.³⁷ In a suit to enjoin the persuasion and assistance of contractors with plaintiff to violate their obligations, it was held that such contractors were indispensable parties.³⁸ It seems that an entryman who has bought and paid for Government land is an indispensable party to a suit to enjoin the issue of a patent to him.³⁹ Purchasers at a tax sale are indispensable parties to a suit by the United States to enjoin

Fed. 430; *Smith v. Lee*, 77 Fed. 779. But see *Grigsby v. Miller*, 231 Fed. 521.

³¹ *Miss. & Mo. R. Co. v. Ward*, 2 Black, 485, 17 L. ed. 311.

³² *Cole Silver Min. Co. v. Virginia & Gold Hill Water Co.*, Fed. Cas. No. 2,989 (1 Sawy. 470). But see *Anderson et al. v. Bassman et al.*, 140 Fed. 10.

³³ *Northern Ind. R. Co. v. Michigan C. R. Co.*, 15 How. 233, 14 L. ed. 674; *Raphael v. Trask*, 194 U. S. 272, 48 L. ed. 973. But see *Heriot v. Davis*, 2 Woodb. & M. 229; *Boon's Heir v. Chiles*, 8 Pet. 532, 8 L. ed. 1034; *McConnell v. Dennis*, C. C. A., 153 Fed. 547; U. S. v.

Bean, C. C. A., 253 Fed. 1; *Wall v. Thomas*, 41 Fed. 620; *Veitia v. Fortuna Estates*, C. C. A., 240 Fed. 256.

³⁴ *Bank of Commerce & Trust Co. v. McArthur*, C. C. A., 256 Fed. 84, reversing 248 Fed. 138.

³⁵ *Heckman v. U. S.*, 224 U. S. 413, 56 L. ed. 820.

³⁶ *Patterson v. Delaware & Hudson Co.*, C. C. A., 251 Fed. 255.

³⁷ *Northern Ind. R. Co. v. Mich. C. R. Co.*, 15 How. 233, 14 L. ed. 674.

³⁸ *Sperry & Hutchinson Co. v. Pommer*, 199 Fed. 309.

³⁹ *New Mexico v. Lane*, 243 U. S. 52, 58.

a conveyance to them;³⁰ but it was held that the assignors and mesne assignees of a patent for an invention are not necessary parties to a bill against the Commissioner to expunge it from the records of the Patent Office.³¹ To a bill in equity by a State, to enjoin a corporation from acquiring a majority of the stock of two competing railroad companies, chartered by such State, and thus obtaining and exercising ownership and control over their railroads; these railway companies, are indispensable parties.³² A city is an indispensable party to a suit by a company claiming a street railroad franchise, to enjoin another railroad company from occupying the street.^{32a} To a bill to set aside a decree, the party in whose favor the decree was made is an indispensable party. This rule applies to a judgment in favor of the United States which is voidable, but not void.³³

To a bill against the administrator with the will annexed of Kosciuszko, claiming a legacy under an alleged codicil to the will, foreigners claiming the assets of the deceased as heirs at law were held necessary parties.³⁴ To a bill between partners for an accounting, all the surviving partners and the representatives of a deceased partner, even when alleged to be insolvent, are, it seems, indispensable parties,³⁵ unless it can be shown that each of those omitted has received his full share of the assets, and that no claim is made against him.³⁶ All the partners must be joined as plaintiffs and defendants in a suit to recover money due the firm,³⁷ or, it seems, to prevent the disposition of a fund

³⁰ U. S. v. Bean, C. C. A., 253 Fed. 1.

³¹ Backus P. S. H. Co. v. Simonds, 2 App. D. C. 290.

³² Minnesota v. Northern Securities Co., 184 U. S. 199, 46 L. ed. 499.

^{32a} Tacoma Ry. & Power Co. v. Pacific Traction Co., 155 Fed. 259; Hoe v. Wilson, 9 Wall. 501, 19 L. ed. 762; Harwood v. Railroad Co., 17 Wall. 78, 21 L. ed. 558; Johnson v. Hunter, 127 Fed. 219. For a case where, upon a petition of intervention, a sale was set aside and a prior lien upon the property enforced, although the vendor, a trustee,

residing beyond the jurisdiction, was not before the court; see Anthony v. Campbell, C. C. A., 112 Fed. 212.

³³ Buckley v. U. S., 196 Fed. 429.

³⁴ Armstrong v. Lear, 8 Pet. 52, 8 L. ed. 863.

³⁵ Bank v. Carrollton R. Co., 11 Wall. 624, 20 L. ed. 82; Bartle v. Coleman, 3 Cranch, C. C. 283; Gray v. Larrimore, 2 Abb. C. C. 542; Brew v. Cochran, 141 Fed. 459.

³⁶ Towle v. Pierce, 12 Met. (Mass.) 329; Kilbourn v. Sunderland, 130 U. S. 505, 32 L. ed. 1005.

³⁷ Edgell v. Felder, 84 Fed. 69. Where the business of the firm was

held by the firm.³⁸ To a partition suit all of the tenants in common are indispensable parties.³⁹ A person in possession under a claim of a title or interest in property is a necessary party to a suit affecting it.⁴⁰ The mortgagor is a necessary party to a suit by the mortgagee against a third person to remove a cloud upon the title;⁴¹ or to prevent an injury to the property when the decree must necessarily adjudicate unsettled rights of the mortgagor;⁴² or to a suit where personal judgment is prayed against him.⁴³ The owner of the equity of redemption is an indispensable party to a foreclosure suit,⁴⁴ or to enforce an equitable lien upon the property⁴⁵ or to a suit to remove the trustee of the mortgage.⁴⁶ There is a dictum to the effect that the owner of the equity of redemption is not an indispensable party to the foreclosure of a mortgage.⁴⁷

The owner of the debts secured by the mortgage is not an indispensable party if he does not own the equity of redemption.⁴⁸

It has been held that the trustee of a mortgage is not an indispensable party to a foreclosure suit by a bondholder.⁴⁹

It is the safer practice to join the mortgagor as a party defendant to a bill by the mortgagee of a patent seeking an

conducted by two houses, and those who managed one house had assigned their interest to the managers of the other; it was held: that the former, who filed a disclaimer, might be made defendants; and that their citizenship, which was the same as that of the principal defendant, did not defeat the jurisdiction. *Poole v. West Point Butter & Cheese Ass'n*, 30 Fed. 513.

³⁸ *Raphael v. Trask*, 194 U. S. 272, 48 L. ed. 973. *Cf. supra*, § 119.

³⁹ *Barney v. Baltimore*, 6 Wall. 280, 18 L. ed. 825.

⁴⁰ *Williams v. Bankhead*, 19 Wall. 563, 22 L. ed. 184; *Young v. Cushing*, 4 Biss. 456. But see *Ringo v. Binns*, 10 Pet. 269, 281, 9 L. ed. 420, 425; *Hicklin v. Marco*, C. C. A., 56 Fed. 549; *Patterson v. Delaware*

& Hudson Co., C. C. A., 251 Fed. 255.

⁴¹ *Betts v. Dana*, 2 Sumner, 383; *Hicklin v. Marco*, C. C. A., 56 Fed. 549.

⁴² *Consol. Water Co. v. San Diego*, 84 Fed. 369.

⁴³ *Re Saltman*, C. C. A., 249 Fed. 455.

⁴⁴ *Re Saltman*, C. C. A., 249 Fed. 455.

⁴⁵ *Ex Parte Equitable Trust Co.* C. C. A., 231 Fed. 572.

⁴⁶ *Hidden v. Washington-Oregon Corporation*, 217 Fed. 303.

⁴⁷ *Brown v. Crawford*, 252 Fed. 248, 253.

⁴⁸ *Cady v. Barnes*, 208 Fed. 359.

⁴⁹ *Lowenthal v. Georgia Coast & P. R. Co.*, 233 Fed. 1010.

injunction against its infringement with damages or an account of profits.⁵⁰ It has been held: that all the devisees, who are joint tenants of land, are indispensable parties to a suit to foreclose a mortgage upon the same, given by an executor under a power in the will.⁵¹ It was held that in a suit to compel the execution and foreclosure of a mortgage, prior incumbrancers and others claiming an interest in the mortgaged property were necessary parties, when it did not appear that their joinder was impossible or would oust the jurisdiction.⁵²

To a bill to enforce specific performance of a contract, providing for the sale of land the title to which was in one party, and its distribution between both parties to the contract; when filed, after the death of each by the personal representatives of the one as complainants against the heirs-at-law of the other as defendants: the executors of the defendants' ancestor are necessary if not indispensable parties defendant, and the heirs-at-law of the complainant's decedent are not.⁵³

All a decedent's heirs-at-law are indispensable parties to a bill by one of them to set aside a sale of the ancestor's property under a decree; and to such a bill the party to the former suit at whose instance the sale was made is also an indispensable party.⁵⁴ All a woman's heirs have been held necessary parties to a bill to set aside a marriage settlement.⁵⁵ To a bill by a stockholder to set aside the foreclosure of a railroad mortgage, the trustees of the mortgage foreclosed, the mortgagor, the purchaser, and enough of such of the stockholders and bondholders as consented to the foreclosure to represent the remainder, are indispensable parties.⁵⁶ So, it has been said, are the trustees of a mortgage by the purchaser, and a corporation holding all the stock of the purchaser.⁵⁷

⁵⁰ *Waterman v. Mackenzie*, 138 U. S. 252, 261, 34 L. ed. 923, 927; quoted *supra*, § 112.

⁵¹ *Detweiler v. Holderbaum*, 42 —.

⁵² *Metropolitan Bank v. St. Louis Dispatch Co.*, 149 U. S. 436, 450, 37 L. ed. 799, 804.

⁵³ *Seymour v. Freer*, 8 Wall. 202, 218, 19 L. ed. 311. See *Prout v. Roby*, 15 Wall. 471, 21 L. ed. 58.

⁵⁴ *Hoe v. Wilson*, 9 Wall. 501, 19 L. ed. 762; *Harwood v. Railroad Co.*, 17 Wall. 78, 21 L. ed. 558. But see *Alger v. Anderson*, 78 Fed. 729.

⁵⁵ *McDonnell v. Eaton*, 18 Fed. 710.

⁵⁶ *Ribon v. Railroad Cos.*, 16 Wall. 446, 21 L. ed. 367.

⁵⁷ *Wenger v. Chicago & E. R. Co.*, C. C. A., 114 Fed. 34.

A corporation or its receiver,⁵⁸ must be a party to a suit to enforce a right against a third person, which the corporation refuses to assert,⁵⁹ or to prevent the waste of corporate assets.⁶⁰ If a receiver has been appointed he is an indispensable party to such a suit, even although the State court which appointed him refuses to authorize the suit against him.⁶¹ Where a corporation had been dissolved and its receiver discharged; it was held: that neither of them was an indispensable party to a suit by its creditors against a former director and treasurer of the company, to enforce his promise to pay all its debts in case he should be allowed to buy its property at a judicial sale.⁶² A county is an indispensable party to a suit to set aside its bonds or warrants as fraudulently issued.⁶³

The trustees and treasurer of an Iowa township are necessary parties to a suit by a taxpayer to prevent payment to the holder of bonds claimed to be invalid.⁶⁴ It has been said that to a bill by the receiver of a water company to establish his right to fix the water rates, all consumers of the water must be made parties.⁶⁵ To a bill for an injunction against interference by riparian owners with complainant's right to divert the waters for irrigation, all persons who claim any right to use the waters are indispensable parties.⁶⁶

It seems that the principal debtor, or his assignee in bank-

⁵⁸ *Porter v. Sabin*, 149 U. S. 473, 37 L. ed. 815.

⁵⁹ *Davenport v. Dows*, 18 Wall. 626, 21 L. ed. 938; *New Jersey Central R. Co. v. Mills*, 113 U. S. 249, 256, 28 L. ed. 949, 951; *Bell v. Donohue*, 17 Fed. 710; *Swan L. & C. Co. v. Frank*, 148 U. S. 603, 37 L. ed. 577; *Kelly v. Mississippi River Coal-ing Co.*, 175 Fed. 482; *Snead v. Scheble*, C. C. A., 175 Fed. 570; *Lawrence v. Southern Pac. Co.*, 180 Fed. 822.

⁶⁰ *Putnam v. Rich*, 56 Fed. 416.

⁶¹ *Porter v. Sabin*, 149 U. S. 473.

⁶² *Lilienthal v. Bets*, 185 N. Y. 153, 7 Ann. Cas. 41.

⁶³ *Continental Trust Co. v. Butts County*, 242 Fed. 539.

⁶⁴ *Sully v. Drennan*, 113 U. S. 287, 28 L. ed. 1007. Compare *Harter v. Kernochan*, 103 U. S. 562, 26 L. ed. 411. In a suit by citizens to restrain the erection of a schoolhouse on land dedicated for a public park, it was held error to refuse to allow an amendment to the bill making the original donors of the land parties complainant. *Rowzee v. Pierce*, 75 Miss. 846; s. c., 23 S. R. 307; s. c., 40 L.R.A. 402, 65 Am. St. Rep. 625.

⁶⁵ *Ward v. San Diego L. & W. Co.*, 79 Fed. 656, 667, s. c. in C. C. A., 94 Fed. 849. But see *Clyde v. Richmond & D. R. Co.*, 57 Fed. 436.

⁶⁶ *Washington State Sugar Co. v. Sheppard*, 186 Fed. 233.

ruptcy or insolvency, is a necessary party to a suit against a surety.⁶⁷

Unless the bill is expressly filed on their behalf, all creditors of a corporation are indispensable parties to a suit by one of them to collect unpaid stock subscription.⁶⁸

To a suit by a creditor to enforce a lien upon property through a trust-deed made for the benefit of a surety, both the trustee and his beneficiary are indispensable parties, although the property is in the possession of neither of them; but if filed in a double aspect, either for the complainant's individual benefit, or on behalf of the other creditors of the principal debtor, to set aside a subsequent sale, relief may be had without having the surety or his trustee before the court.⁶⁹ So, a debtor, or if a bankrupt or insolvent, his assignee, is a necessary party to a creditor's suit to enforce a lien⁷⁰ or to levy⁷¹ upon property in which the debtor has an interest, or to collect⁷² a debt due the debtor. A corporation must be joined as a defendant: to a bill for a receiver;⁷³ to a bill filed by a creditor to apply to the payment of its indebtedness money due it from its stockholders,⁷⁴ or to enforce the individual liability of its stockholders.⁷⁵ To a bill to compel a transfer upon its books of stock

⁶⁷ *Robertson v. Carson*, 19 Wall. 94, 22 L. ed. 178. See also *Russell v. Clark*, 7 Cranch, 69, 3 L. ed. 271. But see Eq. Rule 42.

⁶⁸ *George W. Signor Tie Co. v. Monett & S. W. Const. Co.*, 198 Fed. 412.

⁶⁹ *McRea v. Branch Bank of Alabama*, 19 How. 376, 15 L. ed. 688.

⁷⁰ *Russell v. Clark*, 7 Cranch, 69, 3 L. ed. 271; *Robertson v. Carson*, 19 Wall. 94, 22 L. ed. 178. But see *Heriot v. Davis*, 2 W. & M. 229. It was held that in a suit against a bank for money deposited by complainant's agent, and applied by the bank to debts due from the agent, the latter was a proper and necessary party; but on a decree for complainant, without there appearing any right or liability for or against

the agent, it is proper then to dismiss him. *Union Stock Yards Nat. Bank v. Moore*, C. C. A., 79 Fed. 705.

⁷¹ *Wilson v. City Bank*, 3 Sumner, 422.

⁷² *U. S. v. Howland*, 4 Wheat. 108, 4 L. ed. 526.

⁷³ *Elkhart Nat. Bank v. Northwestern G. L. Co.*, 84 Fed. 76.

⁷⁴ *Bingham v. Luddington*, 12 Blatchf. C. C. 237; *First Nat. Bank v. Smith*, 6 Fed. 215; *Dormitzer v. Illinois & St. L. Bridge Co.*, 6 Fed. 217; *Walsh v. Memphis, C. & N. W. R. Co.*, 6 Fed. 797; *Continental Adjustment Co. v. Cook*, 152 Fed. 652; *Clinton Min. & Mineral Co. v. Cochran*, C. C. A., 247 Fed. 449.

⁷⁵ *Elkhart Nat. Bank v. Northwestern E. L. Co.*, 84 Fed. 76.

which stands in the name of another than the complainant.⁷⁶ To a bill by the stockholder of another company which is in control of a majority of its stock to enjoin such other company from voting upon such stock and from electing upon its board of directors anyone who is a director or officer of the defendant company.⁷⁷ To a bill to enjoin its officers from an infringement or another tort committed in the transaction of its business.⁷⁸ So must be an unincorporated association to a bill to foreclose a mortgage upon a certificate of membership which cannot be transferred without its consent.⁷⁹

To a bill for the dissolution of a corporation and an accounting filed for the benefit of a single stockholder, not on behalf of the rest, the other stockholders or their representatives must be made defendants.⁸⁰ A stockholder is an indispensable party to a bill to enjoin his corporation from permitting his stock to be voted,⁸¹ although the owner is a corporation, with the same directors as those of the company the stock in which he

⁷⁶ *Kendig v. Dean*, 97 U. S. 423, 24 L. ed. 1061; *St. Louis & S. F. Ry. Co. v. Wilson*, 114 U. S. 60, 29 L. ed. 66; *Rogers v. Nortwick*, 45 Fed. 513; *Patterson v. Farmington St. Ry. Co.*, 111 Fed. 262. See *Wilson v. Oswego Township*, 151 U. S. 56, 38 L. ed. 70; and cases cited; *supra*, §§ 40-43; *infra*, § 541. But it has been said that in a suit by the holder of a certificate of stock, duly endorsed, to compel a transfer of the same by the corporation, the owner of the legal title is not an indispensable party, although he has disputed the validity of the transfer. *O'Neil v. Wolcott Mining Co.*, C. C. A., 174 Fed. 527, 536; see *Gould v. Head*, 41 Fed. 240, 248; *Williamson v. Krohn*, 66 Fed. 655.

⁷⁷ *Hyams v. Old Dominion Co.*, 204 Fed. 681, *aff'd* C. C. A. 209 Fed. 808.

⁷⁸ *Wm. A. Rogers Co. v. Nichols*, C. C. A., 224 Fed. 415.

⁷⁹ *Metropolitan Nat. Bank v. St. Louis Dispatch Co.*, 149 U. S. 436, 37 L. ed. 799.

⁸⁰ *Watson v. U. S. Sugar Refinery Co.*, 68 Fed. 769. Where a corporation had been required to deposit moneys with the treasurer of the Commonwealth to indemnify those who should sustain damage by the construction of a canal, and the fund was insufficient to pay all claims, it was held that a bill to have certain damages paid therefrom should make parties to the suit all interested in the funds. *Cowell v. Cape Cod Ship Canal Co.*, 41 N. E. R. 290, 164 Mass. 235. Similar is *Childs v. N. B. Carstein Co.*, 76 Fed. 86. But see *Bickford v. McComb*, 88 Fed. 428.

⁸¹ *Talbot J. Taylor & Co. v. Southern Pac. Ry. Co.*, 122 Fed. 147. See *Minnesota v. Northern Securities Co.*, 184 U. S. 199, 46 L. ed. 499,

owns.⁸² A stockholder is an indispensable party to a suit against a collector of Internal Revenue and others to have income taxes declared an equitable lien upon dividends which a lessee of his corporation has covenanted to pay directly to such stockholders.⁸³

To a bill by alleged heirs, to set aside the probate of a will, persons who appeared in the probate court, claiming adversely to the plaintiffs that they are the true heirs at law; are indispensable parties.⁸⁴ In a suit to compel the execution and foreclosure of a mortgage, it was held; that prior incumbrancers and others, claiming an interest in the mortgaged property, were necessary parties, when it did not appear that their joinder was impossible or would oust the jurisdiction.⁸⁵ In one case, where a bill was filed to stay proceedings in ejectment, the court required the nominal defendant at law to be joined as a co-plaintiff with the real person interested, although it did not appear what citizenship he had.⁸⁶

§ 121. When numerous interests have been created for the purpose of preventing the plaintiff from obtaining equitable relief. When numerous interests had been created for the purpose of preventing a person from obtaining equitable relief, the English courts allowed the persons to whom these interests were thus conveyed to be omitted from the bill, if the original owner of the property thus divided were made a defendant.¹ The rule and the reasons for it are thus stated by Calvert in his valuable work on Parties: "If a party has divided an interest amongst a number of persons for this purpose, the court, in order that the contrivance may be frustrated, and the equitable relief may be obtained, allows the suit to proceed in their absence. Such a division is in reality a fraud, an attempt to defeat

⁸² Gen. Inv. Co. v. Lake Shore & M. S. Ry. Co., 250 Fed. 160, 171.

⁸³ Rensselaer & Saratoga R. Co. v. Irwin, 252 Fed. 921.

⁸⁴ Carran v. O'Calligan, C. C. A., 125 Fed. 657.

⁸⁵ Caldwell v. Taggart, 4 Peters, 190, 7 L. ed. 828.

⁸⁶ Hyde v. Folger, 4 McLean, 255. In connection with this topic, the section 541 on Separable Controver-

sies in the chapter XXXII on Removal of Causes, *infra*, should be consulted.

§ 121. ¹ Calvert on Parties (2d ed.), Book I, ch. iv, p. 61; Yates v. Hambly, 2 Atk. 237. See, also, Union Bank of Louisiana v. Stafford, 12 How. 327, 13 L. ed. 1008; New Orleans Canal & Banking Co. v. Stafford, 12 How. 343, 13 L. ed. 1015.

justice by converting the general rule of the court into an obstruction to the ordinary proceedings. The court defeats the fraud by refusing to enforce the general rule."² Lord Hardwicke said upon this subject: "Where a mortgagee who has a plain redeemable interest makes several conveyances upon trust, in order to entangle the affair, and to render it difficult for a mortgagor or his representatives to redeem, there it is not necessary that the plaintiff should trace out all the persons who have an interest in such trust, to make them parties."³ This rule might, perhaps, be extended to a case, where an attempt had been made to defeat the jurisdiction of the Federal court by a merely colorable conveyance to a person of the same citizenship as the complainant.⁴

§ 122. When a person consents to the relief sought. A person who consents to the relief sought, when it is so stated in the bill, need not be joined as a defendant with the other parties interested, unless his presence is indispensable for their protection.¹ Sometimes the plaintiff is required to execute a satisfactory undertaking that the party omitted will conform to the decree.² Similarly, a person who disclaims all interest in the subject-matter may also be omitted, unless his joinder is essential to the protection of the rights of the other defendants.³ An agreement between two persons that one shall represent the other as plaintiff, when the former would otherwise have no right to the relief sought, will not be sanctioned by the court.⁴

§ 123. When the plaintiff waives his right against a person. "Where a plaintiff," says Lord Hardwicke, "is only concerned in interest, there he may waive his demand, and omit making

² Calvert on Parties (2d ed.), 61.

³ Yates v. Hambly, 2 Atk. 237, 238.

⁴ See Union Bank of Louisiana v. Stafford, 12 How. 327, 13 L. ed. —; New Orleans Canal & Banking Co. v. Stafford, 12 How. 343, 13 L. ed. 1015; Leather Manufacturers' Bank v. Cooper, 120 U. S. 778, 781, 30 L. ed. 816, 818.

§ 122. ¹ Mechanics' Bank v. Seton, 1 Pet. 299, 306, 7 L. ed. 152, 155; Calvert on Parties (2d. ed.),

Book I, ch. V., 69, 84; Gas Securities Co. v. Antero & Lost Park Reservoir Co., C. C. A., 259 Fed. 423.

² Calvert on Parties (2d ed.), Book I, ch. 69; Kirk v. Clarke, Prec. in ch. 275; Harvey v. Corrie, 4 Russ. 35, 55; Bawtree v. Watson, 3 M. & K. 339, 340.

³ Vattier v. Hinde, 7 Pet. 252, 258, 8 L. ed. 675, 677.

⁴ Rylands v. Latouche, 2 Bligh. 579.

the party a defendant to his bill.”¹ In accordance with this practice, the equity rules provide that “in suits to execute the trusts of a will, it shall not be necessary to make the heir-at-law a party but the plaintiff shall be at liberty to make the heir-at-law a party when he desires to have the will established against him.”² Such a waiver cannot, however, be made unless it can be without prejudice to those against whom the bill is filed.³

§ 124. When the interest of an absent person is evidently very small. In England it has been held, in accordance with the maxim *de minimis non curat lex*, that when the interest of an absent person is evidently very small the court will dispense with his presence in the suit.¹ This view seems to be sanctioned by two decisions of the Supreme Court of the United States.²

§ 125. When the absent persons are unknown. When the absent persons are unknown and it is so stated in the bill, their omission is no defect in the suit until they are discovered, at least when parties with similar rights are parties who may defend in their interest.¹

§ 126. When the right of administration is in dispute. The English rule was, that when there was a contest in the Ecclesiastical Court over the right of administration upon a decedent's estate, the omission in a bill affecting that estate of an administrator might be excused if special circumstances were shown.¹ If, however, no proceeding in the Ecclesiastical Court were pending, one must be instituted before the bill could be filed.²

§ 123. ¹Williams v. Williams, 9 Mod. 299. See also Wilson v. Todd, 1 M. & C. 42, 46; Mechanics' Bank v. Seton, 1 Pet. 299, 306, 7 L. ed. 152, 155; Calvert on Parties (2d ed.), 83, and cases cited.

²Rule 50, copied from the 31st Order in Chancery of August, 1841.

³Anon., 2 Eq. Cas. Abr. 166, pl. 6; Story's Eq. Pl., § 139; Poole v. West Point Butter & Cheese Ass'n, 30 Fed. 513.

§ 124. ¹Calvert on Parties (2d ed.), Book I, ch. V, p. 70; Daws v. Benn, 1 J. & W. 513; Attorney-

General v. Goddard, 1 T. & R. 348, 350. See also Faulkner v. Daniel, 3 Hare, 199, 213.

²Union Bank v. Stafford, 12 How. 327, 13 L. ed. 1008; New Orleans C. & B. Co. v. Stafford, 12 How. 343, 13 L. ed. 1015.

§ 125. ¹Alger v. Anderson, 78 Fed. 729, 734.

§ 126. ¹Plunket v. Penson, 2 Atk. 51; Penny v. Watts, 2 Phillips, 149, 154; Calvert on Parties (2d ed.), Book I, ch. V, p. 70.

²Penny v. Watts, 2 Phillips, 149, 154; Calvert on Parties (2d ed.),

§ 127. **Relaxation of rule as to parties in special cases.** The rules upon the subject of parties are, however, very loose, and the questions arising under them are decided largely in the discretion of the court.¹ "The necessity for the relaxation of the rule is more especially apparent in the courts of the United States, where, oftentimes, the enforcement of the rule would oust them of their jurisdiction, and deprive parties entitled to the interposition of a court of equity of any remedy whatever."² A court of equity adapts its decrees to the necessities of each case; and should a suit brought by a single complainant concerning a matter in which others as well as himself were interested terminate in a decree against the defendants, it is easy to do substantial justice to all the parties in interest, and prevent a multiplicity of suits, by allowing the other persons similarly situated with the plaintiff, "either through a reference to a master, or by some other proper proceeding, to come in and share in the benefit of the litigation."³ The discretion as to the joinder or omission of the parties is, however, one which, when properly raised, is subject to review upon appeal.⁴ An act of Congress relaxing or extending the rules as to parties in a particular case is constitutional.⁵

§ 128. **Restatement of the rules as to parties.** The rules upon the subject may be summarily though roughly stated thus:—

I. All persons, not too numerous, whose joinder will not oust the jurisdiction of the court, and who have any direct interest

Book I, ch. V. See *Reed v. Bennett*, 55 N. J. Eq. 587, 37 Atl. 75; *supra*, § 113.

§ 127. ¹*Cameron v. McRoberts*, 3 Wheat. 591, 4 L. ed. 467; *Elmendorf v. Taylor*, 10 Wheat. 152, 6 L. ed. 289; *Lewis v. Darling*, 16 How. 1, 14 L. ed. 819; *Barney v. Baltimore*, 6 Wall. 280, 18 L. ed. 825; *Payne v. Hook*, 7 Wall. 425, 19 L. ed. 260; *Barney v. Latham*, 103 U. S. 205, 26 L. ed. 514; *Greene v. Sisson*, 2 Curtis, 171; *West v. Randall*, 2 Mason, 181; *Parsons v. Howard*, 2 Woods, 1; *Winter v. Ludlow*, 3 Phila. (Pa.) 464.

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² Mr. Justice Davis in *Payne v. Hook*, 7 Wall. 425, 432, 19 L. ed. 260, 262.

³ Mr. Justice Davis in *Payne v. Hook*, 7 Wall. 425, 432, 19 L. ed. 260, 262. See s. c. as *Hook v. Payne*, 14 Wall. 252, 20 L. ed. 887; *infra*, § 258.

⁴ *Caldwell v. Taggart*, 4 Pet. 190, 7 L. ed. 828; *Robertson v. Carson*, 19 Wall. 94, 22 L. ed. 178; *Hoe v. Wilson*, 9 Wall. 501, 19 L. ed. 762; *Railroad Co. v. Orr*, 18 Wall. 471, 21 L. ed. 810.

⁵ *U. S. v. Union Pacific R. Co.*, 98 U. S. 569, 25 L. ed. 143.

in obtaining or resisting the relief prayed for in a bill, or granted in a decree which so disposes of the controversy as to prevent any future litigation concerning the same, must be parties to a suit in equity.¹

II. No person without an interest in the contest or its settlement can be joined as a party, except perhaps the officer or member of a corporation, who according to some authorities may be made a defendant to a bill praying relief against it, in order to compel from him a discovery of facts of which he acquired knowledge in his official capacity.²

III. If the persons having a common interest in the subject of the controversy or the question to be decided therein are numerous, they may in certain cases be represented, as plaintiffs or defendants, by others who hold the legal title in trust for them, or by one or more of their number suing, or more rarely being sued, in their behalf.³

IV. Persons having a merely formal interest, or an interest so far separable from that of the principal parties that a decree disposing of the controversy as between the latter can be made and enforced without affecting their rights, may always be omitted, when, by reason of their residence or citizenship, not within the jurisdiction of the court.⁴

V. All persons who have such an interest in the controversy that a decree cannot be enforced without directly affecting their rights, must be joined as parties; except possibly when they are unknown to the complainants, or when their interest is very small, or has been created for the purpose of depriving the court of jurisdiction.⁵

VI. There is no need of joining as parties any against whom the plaintiffs waive their rights, or who are willing to allow the relief prayed for in the bill, unless their presence is necessary for the protection of those who have been made defendants.⁶

VII. The necessity of the joinder of parties is always in the sound discretion of the court, which adapts itself to the facts of each particular case.⁷

§ 128. 1 §§ 110, 120.

2 §§ 110, 111.

3 §§ 113-116.

4 §§ 42, 118, 119.

5 §§ 120, 121, 124.

6 §§ 122, 123, 124.

7 § 127.

§ 129. Objections for want of parties. An objection for want of parties may be taken by motion to dismiss¹ or by answer,² or at the hearing,³ and if the absent persons are indispensable parties, even for the first time upon appeal,⁴ although not if a decree has been made which cannot prejudice their interests.⁵ Unless the defect is jurisdictional or the omitted parties are indispensable, it is waived if not specifically raised in the court of first instance.⁶ If the parties omitted are indispensable the court even upon appeal may dismiss the bill of its own motion.⁷

The objection should specify by name or description the omitted parties.⁸ It should state the names, if known, of all the persons for whose omission the defendant claims that the bill is defective,⁹ and the reasons why their presence is required in the suit.¹⁰ It should also state that they are living, and, unless they are in every aspect of the bill indispensable parties thereto, that they are within the jurisdiction of the court.¹¹

"If a defendant shall, at the hearing of a cause, object that a suit is defective for want of parties, not having by motion or answer taken the objection and therein specified by name or description the parties to whom the objection applies, the court shall be at liberty to make a decree saving the rights of the absent parties."¹² "Where the defendant shall by his

¹ Eq. Rules 29, 44. Hyams v. Old Dominion Co., 204 Fed. 681.

² Eq. Rules 29, 44.

³ Eq. Rule 44.

⁴ Hoe v. Wilson, 9 Wall. 501, 19 L. ed. 762. It has been held that, at common law, a defendant may, under a plea of the general issue, raise the objection that a necessary party has not been joined. Cochran v. Brannan, 196 Fed. 219. But see Iron Molders' Union No. 125 of Milwaukee, Wis. v. Allis-Chalmers Co., C. C. A., 20 L.R.A.(N.S.) 315, 166 Fed. 45.

⁵ See Eq. Rule 39. Keller v. Ashford, 133 U. S. 610, 626, 33 L. ed. 667, 674.

⁶ International News Service v. Associated Press, 248 U. S. 215.

⁷ Hawes v. First Nat. Bank, C. C. A., 229 Fed. 55; U. S. v. Bean, C. C. A., 253 Fed. 1.

⁸ Eq. Rule 44.

⁹ Attorney General v. Jackson, 11 Ves. 367, 369; Cook v. Mancius, 3 Johns Ch. (N. Y.) 427; Dwight v. Central Vt. R. Co., 9 Fed. 785; Campbell v. James, 2 Fed. 338, 348. See Helm v. Zarecor, 222 U. S. 32, 35, 56 L. ed. 77.

¹⁰ Sheffield v. Newman, 77 Fed. 789.

¹¹ Goodyear v. Toby, 6 Blatchf. 138.

¹² Eq. Rule 44; copied in substance from Eq. Rule 53, of 1842. See David v. M'Rae, 183 Fed. 812, 814.

answer suggest that the bill of complaint is defective for want of parties, the plaintiff may, within fourteen days after answer filed, set down the cause for argument as a motion upon that objection only; and where the plaintiff shall not so set down his cause, but shall proceed therewith to a hearing, notwithstanding an objection for want of parties taken by the answer, he shall not at the hearing of the cause, if the defendant's objection shall then be allowed, be entitled as of course to an order to amend his bill by adding parties; but the court shall be at liberty to dismiss the bill, or to allow an amendment on such terms as justice may require."¹³ Where evidence is required to prove that a defect in parties exists the court will ordinarily not determine the question until after a hearing upon all the issues in the case.¹⁴ An objection to the whole bill for want of parties will be overruled if, in any aspect of the bill, the parties therein named would not be necessary;¹⁵ but only so much of the relief prayed will be granted as cannot injuriously affect those who are omitted.¹⁶ Where a defendant in a suit in equity for the infringement of a patent made objection for the first time at the argument upon final hearing, that there was a defect of parties, because a person holding an equitable title to the patent was not a party; and it appeared that no such issue was made by the pleadings, and that during the taking of the testimony the defendant's counsel admitted that the title to the patent was in the complainant; it was held that the objection was made too late and it was overruled.¹⁷ The usual practice is for the court, if it considers the objection good, to allow the cause to stand over until the plaintiff shall amend his bill by bringing in the additional parties needed.¹⁸ This may be done upon appeal.¹⁹

By the former practice, after a plea for want of parties had

¹³ Eq. Rule 43; copied in part from Eq. Rule 52, of 1842.

¹⁴ *Bogert v. Southern Pacific Co.*, 211 Fed. 776.

¹⁵ *Homan v. Shiel*, 2 Jones 164; *Gen. Inv. Co. v. Lake Shore & M. S. Ry. Co.* C. C. A., 250 Fed. 160, 171.

¹⁶ *Gen. Inv. Co. v. Lake Shore & M. S. Ry. Co.*, C. C. A., 250 Fed. 160, 171.

¹⁷ *California El. Works v. Finck*, 47 Fed. 583. See also *Hills v. Putnam*, 152 Mass. 123.

¹⁸ *Hunt v. Wickliffe*, 2 Pet. 2d. 215, 7 L. ed. 397, 402.

¹⁹ *Brown v. Fletcher*, C. C. A., 231 Fed. 491.

been sustained and the bill amended by adding thereto the parties named in the plea, a second plea further objecting to the bill for the omission of other parties not named in the first plea could not be filed.³⁰ If the omitted parties on account of their citizenship cannot be brought in, the court may retain the bill, and perhaps continue an injunction in accordance with its prayer until the complainants have had a reasonable time to litigate the matters in controversy between themselves and the omitted parties in a court of competent jurisdiction; and if it should then appear by the judgment of such a court that the complainants have in equity a superior title to the omitted parties, proceed to a determination of the rights between the parties to the bill.³¹ If, however, the complainant does not within a reasonable time amend his bill, or, if so allowed by the court, proceed against the omitted parties, the court may dismiss his bill; but such dismissal must be without prejudice.³²

A lack of proper parties is not a jurisdictional defect.³³ It will not support an objection to the jurisdiction, that may be certified to the Supreme Court;³⁴ and if, pending the decision upon an objection for the omission of a party whose presence would oust the District Court of jurisdiction, he dies, or his interest ceases, and the defect is thereby cured, the bill will be retained.³⁵ It was held, where a defendant had removed a case, that he could not object to the absence of a party whose joinder would deprive the Federal court of jurisdiction.³⁶ A dismissal for want of proper parties should be without prejudice.³⁷

³⁰ *Rawlins v. Dalton*, 3 Y. & Coll. 447.

³¹ *Mallow v. Hinde*, 12 Wheat. 193, 198, 199, 6 L. ed. 599, 600, 601.

³² *Mallow v. Hinde* 12 Wheat. 193, 199, 6 L. ed. 599, 601; *Hunt v. Wickliffe*, 2 Pet. 201, 215, 7 L. ed. 397, 402.

³³ *Harrison v. Rowan*, 4 Wash. C. 202, 208; *Helm v. Zarecor*, 222 U. S. 32, 35, 56 L. ed. 77, 79; *Hinchman v. Paterson H. R. Co.*, 17 N. J. Eq. 76, 86 Am. Dec. 252.

³⁴ *Helm v. Zarecor*, 222 U. S. 32, 35, 56 L. ed. 77, 79.

³⁵ *Harrison v. Rowan*, 4 Wash. C. C. 202, 208; *Hinchman v. Paterson H. R. Co.*, 17 N. J. Eq. 76, 86 Am. Dec. 252.

³⁶ *Fisher v. Shropshire*, 147, U. S. 133, 145, 37 L. ed. 109, 115.

³⁷ *Hayden v. Perfection Cooler Co.*, 217 Fed. 171.

§ 130. **Objections for joinder of improper parties.** An objection that improper parties have been joined may be raised by motion to dismiss or by answer.¹

If persons are improperly joined as plaintiffs, all the defendants may take the objection.² If a person is joined as a plaintiff without his consent, he may on motion, or petition, upon notice to all parties, have his name stricken out, with costs to be paid by the plaintiff who has improperly brought him into the suit.³ Such relief has been granted upon petition after a decree for costs against the petitioners and the other persons named as complainants.⁴ Where several complainants with a similarity but not a community of interest had joined in a bill, and the presence of some of them deprived the Federal court of jurisdiction, the one which had the right to sue the defendants there was allowed to amend the bill so as to make the other complainants additional defendants.⁵ Where one of several complainants whose interest is opposed to the others, attempts to delay, harass, or impede the orderly progress of the cause, the court may order that he be made a defendant.⁶

If a person having no interest in the controversy be improperly joined as defendant, he alone can raise the objection;⁷ except, perhaps, when the bill is multifarious,⁸ or he was joined through collusion in order to make out a case of difference of citizenship;⁹ and no notice of his objection need be given to

§ 130. 1 Eq. Rule 29.

² Cuff v. Platell, 4 Russ. 242. King of Spain v. Machado, 4 Russ. 225; Story's Eq. Pl., § 544.

³ Calvert on Parties (2d ed.), 430; Keppell v. Bailey, 2 M. & K. 517; Titterton v. Osborne, 1 Dickens, 350; Wilson v. Wilson, 1 J. & W. 459. It was held that a motion to dismiss the bill upon that ground should be denied. Southern Life Ins. Co. v. Lanier, 5 Fla. 110, 58 Am. Dec. 448.

⁴ McGeorge v. Bigstone Gap Imp. Co., 86 Fed. 599.

⁵ Insurance Co. of N. A. v. Svendsen, 74 Fed. 346. See Aylwus v.

Bray, 2 Y. & Jer. 518, note.

⁶ Lalance & G. Mfg. Co. v. Haberman Mfg. Co. 93 Fed. 197, 199. As to the change of a defendant to a plaintiff, see Guinn v. Lee, 6 Pa. Super. Ct. 646.

⁷ Whitbeck v. Edgar, 2 Barb. Ch. (N. Y.) 106; Seymour v. Freer, 8 Wall. 202, 218; Buerk v. Imhaeuser, 8 Fed. 457; Mitzhener v. Robins (Miss.) 19 S. R. 103.

⁸ Cherry v. Monro, 2 Barb. Ch. 618; *infra*, § 141. But see Missouri Broom Mfg. Co. et al. v. Guymon, 115 Fed. 112.

⁹ Helm v. Zarecor, 222 U. S. 32, 35, 56 L. ed. 77, 79.

the other defendants, except in special cases, where it is clearly for the latter's interest to detain him in the suit.¹⁰

If a misjoinder is apparent on the face of the bill, it is more prudent to raise the objection specifically by motion or answer, stating the names of the parties improperly joined.¹¹ If the objection is not made until the hearing, the court may disregard it.¹² It cannot be raised for the first time upon appeal.¹³ When an objection that defendants have been improperly joined, as having no interest in the controversy, has been sustained, the plaintiff will always be allowed to amend by striking out their names.¹⁴ In such a case, the dismissal does not affect the suit as against the remaining defendants.¹⁵ Where a defendant is not an indispensable party, a dismissal as to him upon any ground does not necessitate a dismissal as to other defendants properly before the court.¹⁶ If a bill is dismissed for a misjoinder of complainants and one of them appears to have a good cause for equitable relief, the dismissal must be without prejudice.¹⁷ The subject of misjoinder is discussed in the next chapter under the head of "Multifariousness."¹⁸

¹⁰ *Anon.*, 9 Ves. 512; *Hodson v. Pratt*, 147 U. S. 557, 570, 37 L. ed. Ball, 11 Simons, 459; *Calvert on Parties* (2d. ed.), 430.

¹¹ *Helm v. Zarecor*, 222 U. S. 32, 35, 56 L. ed. 77, 79.

¹² *Story v. Livingston*, 13 Pet. 359, 10 L. ed. 200; *Eades v. Harris*, 1 Y. & C. N. R. 235; *Raffety v. King*, 1 Keen, 601; *Mosley v. Taylor*, cited in 1 Keen, 601; s. c., 2 Y. & J. 520; *Calvert on Parties* (2d ed.), 156; *Story's Eq. Pl.*, § 544.

¹³ *Livingston v. Woodworth*, 15 How. 546, 14 L. ed. 809; *Hayes v.*

Pratt, 147 U. S. 557, 570, 37 L. ed. 279, 284.

¹⁴ *Tryon v. Westminster Improvement Com'rs*, 6 Jurist (N.S.), 1324.

¹⁵ *Ladew v. Tennessee Copper Co.*, 179 Fed. 245.

¹⁶ *Ladew v. Tennessee Copper Co.*, 179 Fed. 245; *Irving v. Joint Dist. Council, United Brotherhood of Carpenters, etc.*, 180 Fed. 896.

¹⁷ *House v. Mullen*, 22 Wall. 42, 22 L. ed. 838.

¹⁸ *Infra*, §§ 139-143.

CHAPTER V.

INFORMATIONS AND BILLS IN EQUITY.

§ 131. Informations and bills by the United States. The first proceeding in a suit in equity is the preparation and filing of the first pleading. The suit is begun when the complainant's first pleading is filed.¹ This was either an information, a bill, or an information and bill.

Formerly in England the attorney-general or solicitor-general could file an information on behalf of the crown, or of those who either as idiots and lunatics partook of its prerogative, or whose rights, as those in charities, were under its particular protection. The law officers of the royal consort had the same right. If the suit did not immediately concern the rights of the crown, a relator, who sustained and directed the litigation, who it seems might prevent the discontinuance of the suit by the Attorney-General without his consent, and who was responsible for the costs, was usually joined with the officer in whose name it was filed.

The main distinction between an information and a bill was that, whereas the latter was in the form of a petition to the court, in the former the officer that filed it stated the case by way not of petition or complaint, but of information to the court of the rights which the crown claimed on behalf of itself or others, and of the invasion or detention of those rights for which the suit is instituted. If the relator had a personal interest in the relief sought, his personal complaint was joined to and incorporated with the information given to the court by the officer of the crown; and the pleading was termed an information and bill.² The proceedings upon an information

¹ *Farmers' L. & Tr. Co. v. Pl.*, § 8; *People v. North San Francisco Ass'n* 38 Cal. 564; *Attorney-General v. Delaware & H. R. Co.*, 27 N. J. Eq. 1; s. c., 27 N. J. Eq. 631; *Newark Aqueduct Board v. Parson*, 45 N. J. Eq. 394.

² *Mitford's Pl.*, ch. 1; *Story's Eq.*

could only abate by the death or determination of interest of the defendant. If, however, the information were filed at the instance of one or more relators and all died, the court would not allow the cause to proceed till an order had been obtained giving leave to insert the name of a new relator, and one had been inserted accordingly. Otherwise, proceedings upon informations were substantially the same as upon bills, except that great laxity of practice was permitted when informations were filed on behalf of charities.³

In the courts of the United States, it has been held to be the proper practice for the Government to sue in equity in its own name, by a bill similar to one filed by a private citizen;⁴ but a pleading styled an information, filed on behalf of the United States, being in substance a bill, was sustained as such;⁵ and so was one filed on behalf of the United States in his own name by the District Attorney for the Northern District of New York.⁶

The most usual instances of these bills at the present time are in suits to enforce the Interstate Commerce Act⁷ and the Anti-Monopoly Law⁸ and suits or proceedings to cancel certificates of citizenship or of naturalization.⁹

It has been held that bills in equity will be sustained when filed by the United States to determine a controversy as to: the boundaries between a State and a Territory;¹⁰ to compel the cancellation of illegal contracts between a railroad com-

³ Mitford's Pl., ch. 1; Story's Eq. Pl., § 8.

⁴ Benton v. Woolsey, 12 Pet. 27, 9 L. ed. 616; U. S. v. Hughes, 11 How. 552, 568, 13 L. ed. 809, 816; s. c. as Hughes v. U. S., 4 Wall. 232, 18 L. ed. 303; Miss. & Mo. R. Co. v. Ward, 2 Black, 485, 492, 17 L. ed. 311, 314; U. S. v. Union Pac. R. Co., 98 U. S. 569, 25 L. ed. 143; Moffat v. U. S., 112 U. S. 24; U. S. v. Minor, 114 U. S. 233, 29 L. ed. 110; U. S. v. Am. Bell. Tel. Co., 128 U. S. 316, 32 L. ed. 450.

⁵ U. S. v. Hughes, 11 How. 552, 568, 13 L. ed. 809, 816; s. c. as Hughes v. U. S., 4 Wall. 232, 18 L. ed. 303. See Benton v. Woolsey, 12

Pet. 27, 9 L. ed. 987. In Hawaii, at the suit of the Attorney General, an injunction was granted forbidding a railroad company from decreasing the intervals at which cars were run upon its line, from one every ten minutes to one every twenty minutes. Territory of Hawaii v. Honolulu Rapid Transit & Land Co., Sup. Ct. of Hawaii, January 20, 1908.

⁶ Benton v. Woolsey, 12 Pet. 27, 9 L. ed. 987.

⁷ *Infra*, see § 151.

⁸ 26 St. at L. 209; *infra*, § 151a.

⁹ *Infra*, § 151b.

¹⁰ U. S. v. State, 143 U. S. 621, 36 L. ed. 285.

pany and a telegraph company, when legal proceedings were authorized by statute;¹¹ to enforce their priority of payment out of a trust fund;¹² to cancel a land patent,¹³ or a patent for an invention¹⁴ which has been obtained by fraud, or a land patent which has been by a mistake of law issued in violation of a statute.¹⁵

A suit to set aside a land patent issued by mistake can only be maintained when there is no substantial evidence to support the finding of the Department.¹⁶ When a patent for land has been procured from the United States by fraud, the Government may elect to ratify the patent or to sue for damages.¹⁷ The Government's right of election whether to rescind a patent or to ratify it and sue for damages may be exercised by the Attorney General through the District Attorney of the United States for the proper district.¹⁸ It is no objection to the suit that the beneficial interest in the land has become vested in an individual who will acquire a right thereto by a decree in favor of the Government.¹⁹ When land covered by a patent obtained by fraud has been acquired by a purchaser in good faith for value without notice,

¹¹ *U. S. v. Union Pac. Ry. Co.*, 160 U. S. 1, 40 L. ed. 319.

¹² *Hunter v. U. S.*, 5 Pet. 173, 8 L. ed. 86.

¹³ *Moffat v. U. S.*, 112 U. S. 24, 28 L. ed. 623; *U. S. v. Trinidad Coal & Coke Co.*, 137 U. S. 160, 34 L. ed. 640; *J. J. McCaskill Co. v. U. S.*, 216 U. S. 504, 54 L. ed. 590; *U. S. v. Gunning*, 18 Fed. 511; s. c., 22 Fed. 653; *La Rogue v. U. S.*, 239 U. S. 62. Such a bill cannot be filed by an individual. *Briggs v. United Shoe Mach. Co.*, 239 U. S. 48.

¹⁴ *U. S. v. Am. Bell Telephone Co.*, 128 U. S. 315, 32 L. ed. 450; *U. S. v. Gunning*, 18 Fed. 511; s. c., 22 Fed. 653; *Noble v. Union River Logging R. Co.*, 147 U. S. 165, 37 L. ed. 123.

¹⁵ *Mullan v. U. S.*, 118 U. S. 271, 30 L. ed. 170; *McLaughlin v. U. S.*, 107 U. S. 526, 27 L. ed. 621; *Western Pac. R. Co. v. U. S.*, 108 U. S.

510, 27 L. ed. 806. See *U. S. v. Reed*, 53 Fed. 405.

¹⁶ *U. S. v. Debell, C. C. A.*, 227 Fed. 760. The Act of March 2, 1896, ch. 39, 29 St. at L. 42, provides: "No suit shall be brought or maintained, nor shall recovery be had for lands or the value thereof, that were certified or patented in lieu of other lands covered by a grant which were lost or relinquished by the grantee in consequence of the failure of the government or its officers to withdraw the same from sale or entry." This does not apply to a patent applied for after its enactment. *U. S. v. St. Paul M. Ry. Co.*, 247 U. S. 38, Sup. Ct. 525, 62 L. ed. 1130.

¹⁷ *U. S. v. Kolenos*, 226 Fed. 180.

¹⁸ *U. S. v. Kolenos, C. C. A.*, 226 Fed. 180.

¹⁹ *U. S. v. Great Northern Ry. Co.*, 254 Fed. 522.

the Government has no remedy against him.³⁰ The burden of proof is upon the defendant to show that he is a purchaser in good faith for value.³¹ Where land has been recently patented under a grant, and there is basis for a claim that it has passed into the hands of a purchaser in good faith, a bill may be filed by the United States against the original grantee in the alternative for the recovery of the land or the price as the facts may appear.³² When the last purchaser has not paid and the statute of limitations has run against him, but not against his grantor, he may be made a defendant and directed to pay the purchase price with interest and cost, a lien being decreed upon the land to secure the payment.³³ In a suit to set aside a patent for fraud, the United States is not bound to reimburse the fraudulent entryman for his improvements.³⁴

It seems that a bill cannot be filed to enforce a forfeiture of a land grant for failure to perform a condition subsequent, unless expressly authorized by Congress.³⁵ But a bill was sustained when filed to declare the forfeiture of an easement for water storage and a right of way therewith connected under the Act of March 3, 1891,³⁶ of failure to construct the reservoir described in the application.³⁷ The United States may file a bill to prevent the waste by the removal of oil and minerals from public lands to which it has a clear title.³⁸ But in such a suit defendants who have bought oil from those who were operating upon the land cannot be joined since the Government has an adequate remedy at law against them in an action for conversion.³⁹ It has been said that in order to obtain appointment of

³⁰ U. S. v. Koleno, C. C. A., 226 Fed. 180. For a case where a transfer to a corporation organized by the same persons as the defendants was ignored see U. S. v. Exploration Co., 225 Fed. 864.

³¹ Wright-Blodgett Co. v. U. S., 236 U. S. 397; Krueger v. U. S., 246 U. S. 69; U. S. v. Kirk, C. C. A., 248 Fed. 80.

³² Oregon & C. R. Co. v. U. S., C. C. A., 144 Fed. 832.

³³ U. S. v. Cooper, 217 Fed. 846.

³⁴ U. S. v. Howard, C. C. A., 247 Fed. 455.

³⁵ U. S. v. Northern Pac. Ry. Co., 177 U. S. 435, 439, 441, 44 L. ed. 836.

³⁶ 26 St. at L. 1101, Comp. St. § 4934.

³⁷ Union Land & Stock Co. v. U. S., C. C. A., 257 Fed. 635.

³⁸ U. S. v. Midway Northern Oil Co., 232 Fed. 619; U. S. v. Devil's Den Consol. Oil Co., 236 Fed. 973 (reversed on another point, Devil's Den Oil Co. v. U. S., C. C. A., 251 Fed. 548).

³⁹ U. S. v. Midway Northern Oil Co., 232 Fed. 619.

a receiver of the land in such a case, it is necessary for the bill to show that a proceeding is pending in the land office to determine the right of the defendants to the land which they claim under a fraudulent entry.³⁰

The United States may sue to recover land or to set aside a cloud upon the title thereto such as a patent,³¹ or a deed by an Indian who has no power to convey,³² or for an injunction against the taking of oil and gas from Indian lands;³³ for the benefit of Indians who are not competent to sue. To such a suit an Indian interested is not a necessary party.³⁴ The United States are bound by the same equities that would affect the Indian if they were competent to sue.³⁵ When a statute authorized the Secretary of the Interior to sue in the name of the United States for the use of certain Indian tribes and "to pay from the funds of the tribe interested the costs and necessary expenses incurred in maintaining and prosecuting such suits," he was authorized to employ private counsel to conduct the suits, and it was said that, in the absence of such a provision in the statute, the defendant could not object that the suit was not brought by a law officer of the Government.³⁶

The United States may sue to recover duties on imports of which the Government has been defrauded.³⁷ The United States

³⁰ *Devil's Den Consol. Oil Co. v. U. S.*, C. C. A., 251 Fed. 548. See *Folk v. U. S.*, C. C. A., 233 Fed. 177.

³¹ *U. S. v. Allen*, 000 U. S. 000; *U. S. v. Gray*, C. C. A., 201 Fed. 291; *Chase v. U. S.*, C. C. A., 222 Fed. 593; *U. S. v. Debell*, C. C. A., 227 Fed. 760.

³² *U. S. v. Debell*, C. C. A., 227 Fed. 760.

³³ *U. S. v. Mackey*, 214 Fed. 137; see *Folk v. U. S.*, C. C. A., 233 Fed. 177.

³⁴ *U. S. v. Debell*, C. C. A., 227 Fed. 760.

³⁵ *Folk v. U. S.*, C. C. A., 233 Fed. 177.

³⁶ *U. S. Rea-Read Mill & Elevator Co.*, 171 Fed. 501. Where a proceeding to restrain certain carriers and shippers from giving and

receiving rebates on interstate shipments was instituted at the direction of the Attorney General, who retained special counsel nominated by the informing witness, and defendants made no application for a stay of proceedings in order to object to the appearance of such special counsel; it was held that they were not entitled to a dismissal on the ground that prosecutor had agreed with the Attorney General to bear a deficiency in the expense or the prosecution after applying the balance of the Attorney General's appropriation applicable to that purpose. *U. S. v. Milwaukee Refrigerator Transit Co. et al.*, 145 Fed. 1007.

³⁷ *U. S. v. John A. Heitz*, 238 Fed. 1002.

as a bailee for hire can sue for and recover the full value of packages abstracted from the mails.³⁸

The United States may sue to enjoin acts in pursuance of a conspiracy to obstruct Interstate Commerce³⁹ and to cause a scarcity of food in violation of war legislation.⁴⁰

In the suit brought by the State of Florida against the State of Georgia to settle the boundary between them, the Attorney-General of the United States was permitted to file an information praying "that he be permitted to appear in said case, and be heard in behalf of the United States, in such time and form as the court shall order;" and although permission for him to take testimony in the name of Florida with its consent was refused, it was "ordered that the Attorney-General have leave to adduce evidence, whether written or parol, and to examine witnesses and file their depositions in order to establish the boundary claimed by the United States."⁴¹

Informations have been filed in equity in the courts of some of the individual states. These have been usually brought to abate public nuisances,⁴² and to enjoin acts by corporations, which were ultra vires, and which tended to be a public injury;⁴³ but one was allowed to protect a charity, which had no person directly interested qualified to defend its rights.⁴⁴ It has been held: that a State Attorney-General cannot maintain a suit to enjoin insurance companies from carrying out an agreement regulating their rates in restraint of trade.⁴⁵ A State chancellor refused to entertain an information filed in the name of the State Attorney-General on the relation of an alleged imbecile to set aside a conveyance; but he allowed the paper to

³⁸ U. S. Fidelity & Guaranty Co. v. U. S., C. C. A., 246 Fed. 433. See *supra*, §§ 5, 5a.

³⁹ *Re Debs*, 158 U. S. 564, 39 L. ed. 1092.

⁴⁰ U. S. v. Hayes, D. C. (Ind.) Nov. 1919.

⁴¹ *Florida v. Georgia*, 17 How. 478, 480, 523, 15 L. ed. 181, 195.

⁴² *Attorney-General v. Jamaica P. Aq. Co.*, 133 Mass. 361; *Attorney-General v. Hare*, 50 Mich. 447; At-

torney-General v. Delaware & B. B. R. Co., 27 N. J. Eq. 1; s. c., 27 N. J. Eq. 631.

⁴³ *Attorney-General v. Central R. R.*, 50 N. J. Eq. 52, 24 Atl. 964, 17 L.R.A. 97; *Attorney-General v. Am. Tobacco Co.*, 55 N. J. Eq. 352, 356, 3 Atl. 971, 977.

⁴⁴ *Attorney-General v. Butler*, 123 Mass. 306.

⁴⁵ *McCarter v. Fireman's Ins. Co.*, 70 N. J. Eq. 291, 61 Atl. 705.

be converted by amendment into a bill filed by the next friend of the alleged imbecile.⁴⁶

A State sues in a court of the United States by a bill in equity in its own name.⁴⁷

"When the United States comes into a court of equity as a suitor it is subject to the defenses peculiar to that court."⁴⁸ It is subject to the rules of court,⁴⁹ including those regulating the time of filing pleadings.⁵⁰

Such an information or bill should be filed in the name of the United States, not in the name of one of its law officers.⁵¹ If a bill be filed to impeach a patent or other grant by the United States and be not brought by the Attorney-General, or some other officer authorized by statute so to do, it should contain an allegation that the Attorney-General has "given such order for its institution as will make him officially responsible for it, and show his control over the cause."⁵² The signature of the Attorney-General subscribed to the bill is sufficient to show his authority for filing it.⁵³ Where the Attorney-General is disqualified, the bill may be signed by the Solicitor-General and filed in his discretion.⁵⁴

§ 132. Definition and classification of bills. The usual course, and the only one open to a private citizen, is the filing of a bill. The word "bill" is derived from the Latin *libellus*; and such a pleading is sometimes called an English bill; because at the time when pleadings at common law were in Law Latin or Law French, it was as now written in the English language.¹ A bill is a petition addressed to the judges of a court of equity, containing a statement of the facts which in the plaintiff's opin-

⁴⁶ *Thompson v. Thompson*, 6 Houston (Del.), 225.

⁴⁷ *Supra*, § 3a. For a crossbill filed in the name of a State *ex relations* by private citizens, see *Jack v. Williams*, 113 Fed. 823.

⁴⁸ *U. S. v. White*, 17 Fed. 561, 565.

⁴⁹ *U. S. v. Barber Lumber Co.*, 169 Fed. 184.

⁵⁰ *Ibid.*

⁵¹ *Benton v. Woolsey*, 12 Pet. 27, 9 L. ed. 987.

⁵² *Miller, J.*, in *U. S. v. Throckmorton*, 98 U. S. 61, 71, 25 L. ed. 93, 97.

⁵³ *U. S. v. Mullan*, 10 Fed. 785; s. c., 118 U. S. 271, 30 L. ed. 170.

⁵⁴ *U. S. v. Am. Bell Tel. Co.*, 128 U. S. 315, 32 L. ed. 450.

§ 132. 1 Story's Eq. Pl., § 7.

ion give him a right to sue, and concluding with a prayer for the relief to which he deems himself entitled.

Quis, quid, coram quo, quo jure petitur, et a quo.

Recte compositus quisque libellus habet.²

Bills are divided by the books into three classes; original bills, bills not original, and bills in the nature of original bills. A fourth class, which may be termed original bills in the nature of bills not original, is recognized by the Federal courts. Original bills are those which relate to some matter not before litigated in the court of equity by the same parties standing in the same interests. Bills not original are those, which relate to some matter already litigated in the court of equity by the same parties, or their representatives, and which are either an addition to or a continuance of an original bill, or both.³ Bills in the nature of original bills are those which serve to bring before the court the proceedings and decree in a former suit, for the purpose of either obtaining the benefit of the same or procuring the reversal of the decision made therein.⁴ Original bills in the nature of bills not original are those having all the characteristics of original bills, except that the Federal courts will take jurisdiction of them without regard to the citizenship or the parties, or the other limitations of the original Federal jurisdiction.⁵ Original bills are of two kinds: those which pray relief, and those which do not pray relief. Original bills which pray relief are said to belong to three classes: bills which pray the decree of the court concerning some right claimed by the plaintiff in opposition to some right claimed by the defendant, bills of interpleader, and bills of *certiorari*. Original bills not praying relief are of two kinds: bills of perpetuate the testimony of witnesses, and bills of discovery. Bills not original are bills of revivor, supplemental bills and bills of revivor and supplement. Bills in the nature of original bills are bills in the nature of supplemental bills, bills in the nature of bills of revivor, cross-bills,

² Com. Dig., Chancery, E. 2.

³ Quoted with approval in *Anglo-Florida Phosphate Co. v. McKibben*, C. C. A., 65 Fed. 529, 530, 531.

⁴ Mitford's Pl., ch. 1, § 2; Story's Eq. Pl., § 16.

⁵ *Minnesota Co. v. St. Paul Co.*,

2 Wall. 609, 17 L. ed. 886; *Krippendorf v. Hyde*, 110 U. S. 276, 28 L. ed. 145; *Pacific R. Co. of Mo. v. Mo. Pac. Ry. Co.*, 111 U. S. 505, 28 L. ed. 498; *Continental Tr. Co. v. Toledo, St. L. & K. C. R. Co.*, 82 Fed. 642; *supra*, § 51.

bills of review, bills impeaching decrees upon the ground of fraud, bills to suspend the operation of decrees on special circumstances or to avoid them on the ground of matter subsequent, and bills partaking of the qualities of some one or more of these bills.⁶ If the court has jurisdiction of an original bill, it will take jurisdiction of bills not original, and bills in the nature of original bills, growing out of the first suit, without regard to the citizenship of the parties thereto.⁷ And in certain other cases it will take jurisdiction of bills otherwise original which are so intimately connected with matters before the Federal court that it is in the interest of convenience and justice to have them disposed of before the same tribunal.⁸ These may be named original bills in the nature of bills not original. They are usually called ancillary bills.⁹ Such is a bill to obtain a judicial construction of previous decrees;¹⁰ a bill to obtain a determination of the rights of a claimant to a fund in the hands of a Federal marshal;¹¹ a bill to stay proceedings at law;¹² and a bill to set aside a decree.¹³ The peculiarities in the form and the procedure upon original bills not praying relief, bills not original, and bills in the nature of original bills, will be discussed in the latter part of this work. In this chapter, the form of original bills praying relief and, in the chapters immediately succeeding, the proceedings upon them, will be explained, beginning with the ordinary kind,—bills which seek relief concerning some right claimed by the plaintiff in opposition to one claimed by the defendant.

§ 133. Frame of a bill in equity. Formerly, bills usually consisted of nine parts: the direction or address, the intro-

⁶ Mitford's Pl., ch. 1, § 2; Story's Eq. Pl., §§ 16-24.

⁷ Clarke v. Mathewson, 12 Pet. 164, 9 L. ed. 1041; Jones v. Andrews, 10 Wall. 327, 333, 19 L. ed. 935, 937; Pacific R. Co. of Mo. v. Mo. Pac. Ry. Co., 111 U. S. 505, 28 L. ed. 498. See § 53.

⁸ Minnesota Co. v. St. Paul Co., 2 Wall. 609, 17 L. ed. 886.

⁹ *Supra*, § 51.

¹⁰ Minnesota Co. v. St. Paul Co., 2 Wall. 609, 17 L. ed. 886.

¹¹ Krippendorf v. Hyde, 110 U. S. 276; Freeman v. Howe, 24 How. 450, 16 L. ed. 749.

¹² Logan v. Patrick, 5 Cranch, 288, 3 L. ed. 103; Dunn v. Clarke, 8 Pet. 1, 8 L. ed. 845; Jones v. Andrews, 10 Wall. 327, 333, 19 L. ed. 935, 937; Dunlap v. Stetson, 4 Mason, 349.

¹³ Pacific R. Co. of Mo. v. Mo. Pac. Ry. Co., 111 U. S. 505, 28 L. ed. 498.

duction, the premises or stating part, the common-confederacy clause, the charging part, the jurisdiction clause, the interrogating part, the prayer of relief, and the prayer of process.¹ Of these, however, the common confederacy clause, alleging that the defendant or defendants are combining and confederating with some persons to the plaintiff unknown, whose names when discovered he prays leave to insert as defendants, which owed its origin to an idea that otherwise the bill could not be amended so as to add new defendants, and its retention to the practice of taxing costs according to the length of the documents filed; the charging part, alleging the defense which it anticipated would be made by the defendant, and the reply which the plaintiff intended to make thereto; and the jurisdiction clause, alleging that the acts of the defendant which were complained of were contrary to equity, and that the plaintiff was without any remedy at law: were not even then considered necessary by the best authorities,² and by the equity rules of 1842 they were expressly declared superfluous.³

The equity rules promulgated in 1912 have obviated the necessity of the address,⁴ the interrogating part⁵ and the prayer

¹ § 133. 1 Mitford's Pl., ch. 1, § 3; Story's Eq. Pl., §§ 26-48.

² Mitford's Pl., ch. 1, § 3; Langdell's Eq. Pl., § 55; Story's Eq. Pl., §§ 29, 32, 33, 34; Comstock v. Herron, 45 Fed. 660.

³ Rule 21 of 1842.

⁴ Eq. Rule 25. By the Equity Rules of 1842. "20. Every bill in the introductory part thereof, shall contain the names, places of abode, and citizenship of all the parties, plaintiffs and defendants, by and against whom the bill is brought. The form, in substance, shall be as follows: 'To the judges of the circuit court of the United States for the district of —: A. B., of —, and a citizen of the State of —, brings this his bill against C. D., of —, and a citizen of the State of —, and E. F., of —, and a citizen of the State of —. And there-

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upon, your orator complains and says that,' etc."

⁵ The old form was as follows: "To the end, therefore, that the said A. B. and the rest of the confederates, when discovered, may, upon their several and respective corporate oaths, full, true, direct, and perfect answer make to all and singular the matters hereinbefore stated and charged, as fully and particularly as if the same were hereinafter repeated, and they thereunto distinctly interrogated; and that not only to the best of their respective knowledge and remembrance, but also as to the best of their several and respective information, hearsay and belief; and more especially that they may answer and set forth whether, etc.; or they may set forth and discover whether they do not know, have

of process.⁶

"Hereafter it shall be sufficient that a bill in equity shall contain in addition to the usual caption:

First, the full name, when known, of each plaintiff and defendant, and the citizenship and residence of each party. If any party be under any disability that fact shall be stated.

Second, a short and plain statement of the grounds upon which the court's jurisdiction depends.

Third, a short and simple statement of the ultimate facts upon which the plaintiff asks relief, omitting any mere statements of evidence.

heard, or are informed, and in their conscience believe that," &c. Story's Eq. Pl., § 35, note 2. "41. By the equity rules of 1842 the interrogatories contained in the interrogating part of the bill must be divided as conveniently as may be from each other, and numbered consecutively 1, 2, 3, etc.; and the interrogatories which each defendant is required to answer shall be specified in a note at the foot of the bill, in the form to the effect following, that is to say: 'The defendant (A. B.) is required to answer the interrogatories numbered respectively 1, 2, 3, etc.' " "42. The note at the foot of the bill, specifying the interrogatories which each defendant is required to answer, shall be considered and treated as part of the bill; and the addition of any such note to the bill, or any alteration in or addition to such note after the bill is filed shall be considered and treated as an amendment to the bill." "43. Instead of the words of the bill now in use preceding the interrogatory part thereof, and beginning with the words 'to the end, therefore,' there shall hereafter be used words in the form or to the effect following: 'To the end, there-

fore, that the said defendants may, if they can, show why your orator should not have the relief hereby prayed, and may, upon their several corporate oaths, and according to the best and utmost of their several and respective knowledge, remembrance, information, and belief, full, true, direct, and perfect answer make to each of the several interrogatories hereinafter numbered and set forth, as by the note hereunder written they are respectively required to answer; that is to say,—

" 'Whether, etc.

" 'Whether, etc.' "

⁶ Equity Rules of 1842. "23. The prayer for process of subpoena in the bill shall contain the names of all the defendants named in the introductory part of the bill, and if any of them are known to be infants under age, or otherwise under guardianship, shall state the fact, so that the court may take order thereon as justice may require upon the return of the process. If an injunction or a writ of *ne exeat regno*, or any other special order pending the suit, is asked for in the prayer for relief, that shall be sufficient, without repeating the same in the prayer for process."

Fourth, if there are persons other than those named as defendants who appear to be proper parties, the bill should state why they are not made parties—as that they are not within the jurisdiction of the court, or cannot be made parties without ousting the jurisdiction.

Fifth, a statement of and prayer for any special relief pending the suit or on final hearing, which may be stated and sought in alternative forms. If special relief pending the suit be desired the bill should be verified by the oath of the plaintiff, or someone having knowledge of the facts upon which such relief is asked."⁷

§ 134. Address and caption. In England, a bill in chancery was required to be addressed to the person having the custody of the great seal, usually either the sovereign, or the Lord Chancellor, except when the Lord Chancellor himself was the complainant, when it was addressed to the sovereign "in his high court of chancery."¹ In the United States, as a great seal is not, as in England, essential to the validity of writs in equity, before the Equity Rules of 1912, a bill was addressed to the judge or judges of the court where it is filed.² The Equity Rules of 1912 in prescribing the requirements of a bill in equity, omit therefrom the address, but require the usual caption.³ The caption should state the name of the court, including the district and division and the names of each of the parties.

§ 135. Introduction and jurisdictional averments. The introduction formerly contained the names, descriptions, and residences of the complainants, together with the character in which they sued, if in a representative capacity, and such other allegations as were necessary to found the jurisdiction of the court.¹ Sometimes the names and descriptions of the defendants were also here inserted, but it was more usual to name them in the next part of the bill.²

The Equity Rules of 1842 regulated the subject as follows: "Every bill in the introductory part thereof shall contain the names, places of abode, and citizenship of all the parties, plaintiffs and defendants, by and against whom the bill is brought.

⁷ Eq. Rule 25.

§ 135. ¹ Mitford's Pl., ch. 1, § 3;

§ 134. ¹ Mitford's Pl., ch. 1, § 3;

Story's Eq. Pl., § 26.

Story's Eq. Pl., § 26.

² Story's Eq. Pl., § 26. *Contra*,

² Eq. Rule 20 of 1842.

Leavenworth v. Pepper, 32 Fed. 718.

³ Eq. Rule 25.

The form, in substance, shall be as follows: 'To the judges of the Circuit Court of the United States for the district of —; A. B., of —, and a citizen of the State of —, brings this his bill against C. D., of —, and a citizen of the State of —, and E. F., of —, and a citizen of the State of —. And thereupon your orator complains and says that, etc.'"³

The Equity Rules of 1912 provide: that a bill in equity shall contain "First, the full name, when known, of each plaintiff and defendant, and the citizenship and residence of each party. If any party be under any disability that fact shall be stated. Second, a short and plain statement of the grounds upon which the court's jurisdiction depends. * * * Fourth, if there are persons other than those named as defendants who appear to be proper parties, the bill should state why they are not made parties as that they are not within the jurisdiction of the court, or cannot be made parties without ousting the jurisdiction.""⁴

Where there are two districts in a State, the bill must show in which district a party resides.⁵

An allegation of residence without an allegation of citizenship is insufficient.⁶ So is an allegation that plaintiff is "of,"⁷ or is a *bona fide* resident of,⁸ a certain State; or that he is a citizen of a State by domicile or residence,⁹ but a description of a party as a citizen of a certain county in a specified State was held to be sufficient to describe him as a citizen of the State and a resident of the county.¹⁰ Where a bill recited facts to show diversity

³ Eq. Rule 20 of 1842.

⁴ Eq. Rule 25.

⁵ *Harvey v. Richmond & M. Ry. Co.*, 64 Fed. 19.

⁶ *Tug River C. & S. Co. v. Brigel*, 67 Fed. 625; *Robertson v. Cease*, 97 U. S. 646, 24 L. ed. 1057; *Pacific Postal Tel. Co. v. Irvine*, 49 Fed. 113; *Stockwell v. Boston & M. R. Co.*, 131 Fed. 152; *Atchison, T. & S. F. Ry. Co. v. Frederickson*, C. C. A., 177 Fed. 206; *M'Eldorney v. Card*, 193 Fed. 475; *Gangler v. Chicago, M. & P. S. Ry. Co.*, 197 Fed. 79; *International Bank & Trust Co. v. Scott*, C. C. A., 159 Fed. 58, holding that such a defect is not cured by an admission in an answer that

"plaintiff" is a resident citizen of a foreign country, the reference being to the liquidating committee of a bank, which had instituted a suit, and not to the individuals composing the same, who were the real plaintiffs.

⁷ *Yeandle v. Pennsylvania R. Co.*, C. C. A., 169 Fed. 938. *Columbia Digger Co. v. Rector*, 215 Fed. 618.

⁸ *Koike v. Atchison, T. & S. F. Ry. Co.*, 157 Fed. 623.

⁹ *Clinchfield Coal Corporation v. Steinman*, 217 Fed. 875; *Yanuszauckas v. Mallory S. S. Co.*, C. C. A., 232 Fed. 132.

¹⁰ *Gruetter v. Cumberland Telephone & Telegraph Co.*, 181 Fed.

of citizenship without making distinct the traversible averments of such diversity, it was held to be sufficient.¹¹ So it was held: that, in view of the Fourteenth Amendment, an allegation that a plaintiff was a citizen of the United States and a resident of a specified State therein, was sufficient to show that he was a citizen of such State.¹² An averment that a party is a tax assessor in a State is not equivalent to an averment that he is a citizen thereof.¹³ Where the plaintiffs sue as executors or administrators, it is insufficient to allege that letters of administration or letters testamentary had been taken out in a specified State¹⁴ or "that said plaintiffs as such executors, are citizens" of a specified State;¹⁵ but it was held to be sufficient to aver that the defendants, "as they are the qualified executors of the last will and testament of James Brown, deceased, were, each and all, at the time of the commencement of this suit, and still are, citizens of the State of New York; and that the defendant John S. Schultze, also a qualified executor of the last will and testament of James Brown, deceased, was then, and still is, a citizen of the State of New Jersey."¹⁶

If one of the parties is a corporation, the bill must state by or under the laws of what State it was created, and its members will then be conclusively presumed to be citizens of that State.¹⁷ An allegation that a party described as a committee is a citizen of a specified State¹⁸ or that it is a corporation "duly established

248. But see *Stuart v. Easton*, 156 U. S. 46, 39 L. ed. 341; *Hennessey v. Richardson Drug Co.*, 189 U. S. 25, 47 L. ed. 697.

¹¹ *Gorham Mfg. Co. v. Weintraub*, 176 Fed. 927.

¹² *Clausen v. American Ice Co.*, 144 Fed. 723.

¹³ *Assessor of Vernon Parish, La. v. Gould*, 210 Fed. 895.

¹⁴ *Yeandle v. Pennsylvania R. Co., C. C. A.*, 169 Fed. 938.

¹⁵ *Amory v. Amory*, 95 U. S. 186, 24 L. ed. 428.

¹⁶ *Cooke v. Seligman*, 7 Fed. 263.

¹⁷ *Lafayette Ins. Co. v. French*, 18 How. 404, 15 L. ed. 451; *Muller v. Down*, 94 U. S. 444, 24 L. ed. 207;

Steamship Co. v. Tugman, 106 U. S. 118, 27 L. ed. 87.

¹⁸ *Thomas v. Board of Trustees of Ohio State University*, 195 U. S. 207, 49 L. ed. 160; *Loneragan v. Illinois Cent. R. Co.*, 55 Fed. 550; *Frisbie v. Chesapeake & O. R. Co.*, 57 Fed. 1; *De Loy v. Traveler's Ins. Co.*, 59 Fed. 319; *American S. R. Co. v. Johnson*, 60 Fed. 503; *Winkler v. Chicago & E. I. R. Co.*, 108 Fed. 305; *Dalton v. Milwaukee Mechanics' Ins. Co.*, 118 Fed. 876; *Knight v. Litcher & Moore Lumber Co.*, 130 Fed. 404. *Supra*, § 48. *Parker Washington Co. v. Cramer*, C. C. A., 201 Fed. 878; *Chicago, R. I. & P. Ry. Co. v. Stephens*, C. C.

by law," having its principal place of business in a specified State,¹⁹ or that it is a corporation of a specified State,²⁰ or that it is a corporation existing and doing business in a specified State,²¹ or that it "claims to be" a corporation organized under the laws of a specified State, as a company of a specified character,²² or that it is a "joint stock company," duly organized and existing under the laws of a specified State and a citizen thereof,²³ is insufficient. The pleading should allege that it was created by or under the laws of such State,²⁴ or at least that it was organized²⁵ under the laws thereof. An allegation that a party was a corporation under the laws of the State of Virginia, and a citizen of Virginia, and a resident of the Western District thereof, was held to be good.²⁶ The residence or domicile of a corporation is sufficiently alleged by an averment that it is organized under and pursuant to the laws of a State and has its principal office and place of business in a certain county, when the county is within the judicial district.²⁷ It has been held: that the fact that the residence of a corporation is at a certain place cannot be inferred because the name of that place is part of the corporate name.²⁸

If one of the parties is an alien, the bill should aver that he is "a citizen and subject of a foreign State," specifying that State's name.²⁹ An allegation that a party is "a citizen of London, England,"³⁰ was held to be insufficient to show that he was

A., 318 Fed. 585; *De Biasi v. Normandy Water Co.*, 228 Fed. 234; *Fentress Coal & Coke Co. v. Elmore*, C. C. A., 240 Fed. 328.

¹⁹ *N. Y. & N. E. R. Co. v. Hyde*, C. C. A., 56 Fed. 188, 191.

²⁰ *Farmers' Oil & Guano Co. v. Duckworth Co.*, C. C. A., 217 Fed. 862.

²¹ *Chicago, R. I. & P. Ry. Co. v. Stephens*, C. C. A., 218 Fed. 535.

²² *Lownsdale v. Gray's Harbor Boom Co.*, 117 Fed. 983.

²³ *Rountree v. Adams Express Co.*, C. C. A., 165 Fed. 152. For what is a sufficient allegation of the citizenship of members of a partnership, see *Derk P. Yonkerman Co. v.*

C. H. Fuller's Ad. Agency, 135 Fed. 613.

²⁴ *Lonergan v. Illinois Cent. R. Co.*, 55 Fed. 550.

²⁵ *Sun Pr. & Pub. Ass'n v. Edwards*, 194 U. S. 377, 48 L. ed. 1027; *Ward v. Blake Mfg. Co.*, C. C. A., 56 Fed. 437.

²⁶ *Mathieson Alkali Works v. Mathieson*, C. C. A., 150 Fed. 241.

²⁷ *United States v. Stannard*, 207 Fed. 198.

²⁸ *Harvey v. Richmond & M. Ry. Co.*, 64 Fed. 19.

²⁹ *Wilson v. City Bank*, 3 Sumner, 422.

³⁰ *Stuart v. Easton*, 156 U. S. 46, 39 L. ed. 341. But in *Mahoning*

an alien; but the averment that the complainants are "all of Cognac, France, and citizens of the Republic of France," was held to be adequate.³¹ An allegation that the State of which a party is a citizen is unknown, is insufficient when the jurisdiction is claimed for difference of citizenship.³²

Where a bill or a common-law pleading is filed or served subsequent to the commencement of the suit, it should aver the citizenship of the parties at the time the suit was commenced as well as in the present tense.³³ It has been held, that an allegation that a corporation has a place of business within the district, when admitted in the answer, relates to the time when the suit was brought.³⁴

How advantage could be taken of an omission in the introduction of the residence of the parties, whether by demurrer or simply by a motion for security for costs, was, under the old practice, a doubtful question.³⁵ It was held: that a bill was not demurrable for the failure to state the residence of a party;³⁶ and that where the jurisdiction does not depend upon a difference of citizenship, such as a case arising out of the bankruptcy laws, an omission to aver the citizenship of the parties does not make the bill demurrable, but that the objection can be made by motion only;³⁷ and that an allegation of the residence of the parties is not required in a pleading at common law.³⁸ The bill was certainly demurrable if enough did not appear upon its face to show the court's jurisdiction.³⁹ It has been suggested that a de-

Valley Ry. Co. v. O'Hara, C. C. A., 196 Fed. 945, held that an averment that plaintiff "is now, and at all times hereinafter mentioned was, a citizen of Ireland," was a sufficient allegation that he was an alien.

³¹ Hennessy v. Richardson Drug Co., 189 U. S. 25, 47 L. ed. 697.

³² Tug River C. & S. Co. v. Bridgel, 67 Fed. 625.

³³ Lackey v. Newton Min. Co., 56 Fed. 628.

³⁴ Streat v. Am. Rubber Co., 115 Fed. 634.

³⁵ Rowley v. Eccles, 1 Sim. & S. 511; Daniell's Ch. Pr. (2d Am. ed.) 409.

³⁶ Vermont Mach. Co. v. Gibson, 50 Fed. 233; (a patent case); Harvey v. Richmond & M. Ry. Co., 64 Fed. 19; (a case of difference of citizenship); Wright v. Skinner, 136 Fed. 694; (a bankruptcy case).

³⁷ Wright v. Skinner, 136 Fed. 694.

³⁸ Balt. & O. R. Co. v. Doty, C. C. A., 133 Fed. 866.

³⁹ Bingham v. Cabot, 3 Dall. 382, 1 L. ed. 646; Jackson v. Ashton, 8 Pet. 148, 8 L. ed. 898; U. S. v. Pratt C. & C. Co., 18 Fed. 708; Lackey v. Newton Min. Co., 50 Fed. 634.

fect in this respect in the introductory part of a bill is not cured by an allegation in its title or caption.⁴⁰ It has been said that no one can be made a defendant under a fictitious name;⁴¹ but in an English case where the parents of an infant, who was a necessary defendant to a bill, refused to have her baptized in order to interpose difficulties in the plaintiff's way, Sir John Leach ordered that she should be described as the youngest female child of A. B. (naming her father) and C. D. (naming her mother).⁴²

Where the complainant is assignee of the cause of action, it is the safer practice to allege the citizenship of his assignor.⁴³

An admission on the trial of "the liability of defendant in this case and everything as alleged except the measure of damages," is insufficient to show the jurisdiction of the court.⁴⁴

Where the jurisdiction does not depend upon difference of citizenship, the bill should state, here or elsewhere, the facts showing that it arises under the Constitution or laws of the United States or is justified by some other Federal statute.⁴⁵

The bill should also state, here or elsewhere, the facts which show that the matter in dispute exceeded the jurisdictional amount,⁴⁶ at the time when suit was brought,⁴⁷ unless the case be one of which the District Courts of the United States takes

⁴⁰ Jackson v. Ashton, 8 Pet. 148, 8 L. ed. 898. See Sharon v. Hill, 23 Fed. 353; Railway Co. v. Ramsey, 22 Wall. 322, 22 L. ed. 823; Berger v. Sperry, 95 U. S. 401, 24 L. ed. 390; Robertson v. Cease, 97 U. S. 646, 24 L. ed. 1057; Gordon v. Third Nat. Bank, 144 U. S. 97, 36 L. ed. 360.

⁴¹ Kentucky S. Mining Co. v. Day, 2 Sawyer C. C. 468.

⁴² Ely v. Broughton, 2 Sim. & S. 188.

⁴³ Parker v. Ormsby, 141 U. S. 81, 35 L. ed. 654; U. S. Nat. Bank v. McNair, 56 Fed. 323; Kolze v. Hoadley, 200 U. S. 76, 83, 50 L. ed. 377; J. J. McCaskill Co. v. Dickson, C. C. A., 159 Fed. 704. See *supra*, § 63.

⁴⁴ Grand Trunk Western Ry. Co. v. Reddick, C. C. A., 160 Fed. 898.

⁴⁵ *Supra*, §§ 24-40.

⁴⁶ U. S. v. Pratt C. C. Co., 18 Fed. 708; Murphy v. East Portland, 42 Fed. 308; Olson v. Nor. R. Co., 43 Fed. 112; Lehigh Z. & I. Co. v. N. J. Z. & I. Co., 43 Fed. 545, 546; Strasburger v. Beecher, 44 Fed. 209; Back v. Sierra N. C. M. Co., 46 Fed. 673; Harvey v. Raleigh & G. R. Co., 89 Fed. 115; Yellow A. M. & M. Co. v. Winchell, 95 Fed. 213; Evenson v. Spaulding, 150 Fed. 517; Southern Land & Timber Co. v. Johnson, 156 Fed. 246; Nolen v. Riechman, 225 Fed. 812; *supra*, § 6.

⁴⁷ Strasburger v. Beecher, 44 Fed. 209.

jurisdiction, irrespective of the value of the matter in dispute.⁴⁸ The allegation is not insufficient because it uses the word "amount," instead of "matter" in dispute.⁴⁹ Upon a bill for an injunction, where the amount involved cannot be deduced from the facts alleged, a simple allegation that the right sought to be protected is of the value of more than three thousand dollars, exclusive of interest and costs,⁵⁰ or that the value of the matter in controversy exceeds such amount,⁵¹ will usually be sufficient. An omission from the statement of such an averment is cured by allegations in other parts of the bill which show that the value of the matter in dispute is sufficient.⁵² When the test of the value of the matter in dispute was stock in a corporation, it was presumed that the same was worth par, in the absence of allegations to the contrary.⁵³

⁴⁸ *Supra*, § 5.

⁴⁹ *Blackburn v. Portland Gold-Min. Co.*, 175 U. S. 571, 44 L. ed. 276.

⁵⁰ *Chicago, M. & St. P. Ry. Co. v. Incorporated Town of Lost Nation*, 237 Fed. 709.

⁵¹ *Texas & P. Ry. Co. v. Kute-man*, C. C. A., 54 Fed. 547. See *Hyde v. Victoria Land Co.*, 125 Fed. 970; *Louisville & N. R. Co. v. Smith*, C. C. A., 128 Fed. 1, 5; *Southern Cash Register Co. v. National Cash Register Co.*, 143 Fed. 659; *Spaulding v. Evenson*, 149 Fed. 913. See, also, *supra*, § 13.

In the following case the allegations were held to be insufficient: "The averments of the bill in the instant case fail to show that when the Judicial Code went into effect on the 1st day of January, 1912, there had already accrued to the plaintiff a right of action against the defendant under the previously existing law, which made it a prerequisite of the existence of the right of action that the matter in dispute exceed, exclusive of the interest and costs, the

sum or value of \$2,000. *Act*, March 3, 1875, c. 137, 18 Stat. 470, 4 Fed. St. An. 265. Averments to the effect that the matter in dispute, at the time the bill was filed on the 5th day of June, 1912, exceeded, exclusive of interest and costs, the sum or value of \$2,000, by no means show that, while the former law was in force, a cause of action involving what was the jurisdictional amount under it had accrued to the plaintiff. For anything that is shown to the contrary, what the defendant did or omitted to do while the former law was in force may not have given rise to a cause of action in favor of the plaintiff which involved anything like the amount which was required to authorize the bringing of a suit in a court of the United States." *Texas Gum Co. v. Autosales Gum & Chocolate Co.*, 219 Fed. 175, 167, per Walker, J.

⁵² *Lee Line Steamers v. Robinson*, C. C. A., 232 Fed. 417.

⁵³ *Bernier v. Griseom-Spencer Co.*, 161 Fed. 438.

Although it is the proper practice that this part of the bill should contain the statement that the complainant sues on behalf of others as well as himself, if he intends so to do, it has been suggested that this might not be necessary when his case is founded upon a statute "which itself gives that force and direction to the bill."⁵⁴ It has been held: that such an omission does not make the bill demurrable.⁵⁵ There is a dictum to the effect that a bill stating that the plaintiffs are acting on behalf of themselves and such other creditors of and claimants against the defendants, or any of them, as may desire relief similar to that prayed for herein and may intervene and become parties thereto," should be dismissed.⁵⁶

§ 136. The narrative part of a bill. The most important portion of a bill in equity is the narrative or stating part, otherwise called the stating part. This contains the plaintiff's cause of action.

The Equity Rules of 1912 provide: that it shall consist of "a short and simple statement of the ultimate facts upon which the plaintiff asks relief, omitting any mere statement of evidence."¹

"It should set forth the plaintiff's case in a clear and distinct narrative, with the facts relied upon as the basis of the suit. For convenience, each paragraph should be numbered, so that the successive allegations may be readily referred to."² The objection of old common-law pleading was to bring the matter in controversy to certain distinct issues. In equity pleading no such attempt was made. The statement of the plaintiff's case in the bill differs little in language or form from any other statement of facts which might be drawn up for the information of third parties, say an application to a government board. The defendant's answer usually admits, or denies, or qualifies *seriatim* each statement in the bill; and occasionally, before proceeding to notice the statement in detail, the defendant gives a general history of the case from his own point of view. The issues, both of fact and of law, are thus often involved in large masses of statement, and have to be selected, so to speak, by the judge who

⁵⁴ *Irons v. Manufacturers' Nat. Bank*, 17 Fed. 308; *McClelland v. Kingfield Co.*, 218 Fed. 902, *supra*, § 114.

Rose, C. C. C., 247 Fed. 721.

§ 136. ¹ Eq. Rule 25.

⁵⁵ *Murray v. Sioux Alaska Mining Co.*, C. C. A., 239 Fed. 818.

² An omission to do this will not be a defect in pleading.

⁵⁶ *State of Maine Lumber Co. v.*

tries the cause, with the assistance of the arguments of counsel. It would be difficult to imagine a less technical document than a bill in equity."³

"A bill in equity is not to be read and construed as an indictment would have been read and construed a hundred years ago, but it is to be taken to mean what it fairly conveys to a dispassionate reader by a fairly exact use of English speech."⁴

The bill must contain every fact essential to the plaintiff's cause of action, for no evidence will be admitted or considered to prove any fact not alleged in it.⁵ It must plead every fact essential to the rights of the plaintiff, and necessarily within his knowledge, positively, not upon information and belief,⁶ and with certainty.⁷ Otherwise, it is defective. An allegation of an essential fact which is made by recital, but in such form that the existence of the fact appears by necessary implication is sufficient.⁸ An allegation may be made by reference to a former allegation.^{9a} This is the better practice in pleading a second cause of action.^{9b}

It is an elementary rule of pleading in equity⁹ and at common

³ Lectures before the Law School of Boston University on Equity Pleading by Judge Dwight Foster, MS. See Hayne, Eq. 70.

⁴ *Swift & Co. v. U. S.*, 196 U. S. 375, 395, 25 Sup. Ct. 276, 49 L. ed. 518; per Holmes, J.: "After all the specific charges there is a general allegation that the defendants are conspiring with one another, the railroads and others, to monopolize the supply and distribution of fresh meats throughout the United States, etc., as has been stated above, and it seems to us that this general allegation of intent colors and applies to all the specific charges of the bill." See *Prindle v. Brown*, C. C. A., 155 Fed. 531, 533; *Ware-Kramer Tobacco Co. v. Am. Tobacco Co.*, 180 Fed. 160.

⁵ *Gordon v. Gordon*, 3 Swanst. 400, 472; *Miller v. Cotten*, 5 Ga. 341, 346; *Wilson v. Stolley*, 4 McLean, 275; *Crocket v. Lee*, 7

Wheat, 522, 5 L. ed. 513; *Jackson v. Ashton*, 8 Pet. 148, 8 L. ed. 898; *Henry v. Suttle*, 42 Fed. 91; *Phillips v. Philipps*, 4 Q. B. D. 127, 133.

⁶ *Lord Uxbridge v. Staveland*, 1 Ves. Sen. 56; *Egremont v. Cowell*, 5 Beav. 620; *Gaines & Co. v. Stroufe*, 117 Fed. 965; *Mitford's Pl.* 40; *Story's Eq. Pl.*, §§ 255, 256.

⁷ *Harrison v. Dixon*, 9 Pet. 483, 503, 9 L. ed. 201, 208; *Wormald v. De Lisle*, 3 Beav. 18; *Brooks & Hardy v. O'Hara Brothers*, 8 Fed. 529; *Daniell's Ch. Pr.* (2d Am. ed.) 421-425; *infra*, § 137.

⁸ *Investor Pub. Co. Dobinson*, 72 Fed. 603; *Grasselli Chemical Co. v. Aetna Explosives Co.*, 247 Fed. 603.

^{9a} *Maxwell Steel Vault Co. v. National Casket Co.*, 205 Fed. 515, 524.

^{9b} *Ibid.*

⁹ *Ibid.*

law,¹⁰ that when a state of facts is relied upon, it is enough to allege it simply without setting out the subordinate facts which are the means of proving it or the evidence sustaining the allegation. Documents need not be set forth at length provided their execution and import are properly pleaded;¹¹ but particular clauses, upon the construction of which the case depends, should be copied in full into the bill.¹² Letters which show an excuse for not proceeding with more diligence may properly be included.¹³ When the complainant needs to plead a lengthy document, it is the better practice to annex a copy to the bill as an exhibit and to state in the body of the pleading that it is referred to, designating the same by a letter or number by which it is marked, with the same effect as if set forth specifically and at length.¹⁴ Where the pleader wished to include in his bill a judgment of a State court, it was held to be sufficient for him to describe the suit and the issues therein, to set forth the date of the judgment and the volume and page of the official reports where it could be found.¹⁵ Facts not necessarily in the complainant's knowledge he may allege "as your orator is informed and believes, and therefore avers,"¹⁶ or "your orator avers upon information and belief."¹⁷ Or "your orator further shows on information and belief."¹⁸ An allegation "as your orator is informed and believes" was said to be bad.¹⁹ So was an allegation upon belief.²⁰ It is the safer practice to set forth in

¹⁰ *Williams v. Wilcox*, 8 A. & E. 314, 331, per Denman, C. J. See *Steuart v. Gladstone*, 10 Ch. D. 644.

¹¹ *St. Louis Car Co. v. J. G. Brill Co.*, 249 Fed. 502.

¹² *United States v. United Shoe Machinery Co.*, 234 Fed. 127; *Foster v. Callaghan & Co.*, 248 Fed. 944, in which the author was counsel.

¹³ *Foster v. Callaghan & Co.*, 248 Fed. 944.

¹⁴ *Everglades D. League v. Broward D. Dist.*, 253 Fed. 246. See *infra*, §§ 365, 366.

¹⁵ *Hewitt v. Great Western Beet Sugar Co.*, C. C. A., 230 Fed. 394.

¹⁶ *Coryell v. Klehn*, 157 Ill. 462; s. c., 41 N. E. 64; *Wyckoff v. Wagner T. Co.*, 88 Fed. 515. *Murray v. Continental Gin Co.*, 126 Fed. 533,

534; *Helmet Co. v. William Wrigley, Jr., Co.*, C. C. A., 245 Fed. 824.

¹⁷ *Helmet Co. v. William Wrigley, Jr., Co.*, C. C. A., 245 Fed. 824.

¹⁸ *Elliott & Hatch Book-Type-writer Co. v. Fisher Typewriter Co.*, 109 Fed. 330; *Murray Co. v. Continental Gin Co.*, 126 Fed. 533, a charge of the infringement of a patent. See *Boyd v. Thayer*, 143 U. S. 135, 36 L. ed. 103.

¹⁹ *Wyckoff v. Wagner Typewriter Co.*, 88 Fed. 515; *Dupree v. Leggette*, 140 Fed. 776.

²⁰ *Rubber T. Co. v. Davie*, 100 Fed. 85. But see *Leavenworth v. Pepper*, 32 Fed. 718; *Kelley v. Boettcher*, C. C. A., 85 Fed. 553; *Curran v. Campion*, 85 Fed. 67.

the bill any facts which justify delay in the commencement of the suit or which would take the case out of the bar of the statute of limitations, if that might otherwise apply.²¹ Under the former practice, where the complainant anticipated a defense which could only properly be met by pleading new matter, it was necessary to set up the same by way of confession and avoidance in his bill.²² This was originally inserted in the charging part. "It usually consists of some allegation or allegations which set forth the matters of a defense or excuse which it is supposed the defendant intends or pretends to set up to justify his non-compliance with the plaintiff's right or claim, and then charges other matters, which disprove or avoid the supposed defense or excuse. It is sometimes also used for the purpose of obtaining a discovery of the nature of the defendant's case, or to put in issue some matter which it is not for the interest of the plaintiff to admit; for which purpose the charge of the pretense of the defendant is held to be sufficient."²³ This was more recently, when considered to be necessary, inserted in the narrative part of the bill.²⁴ Illustrations of such cases are: a prior patent;²⁵ and, it seems, an estoppel;²⁶ but not ordinarily *ultra vires*.²⁷ The practice under the new rules has not been decided. In England, it is well settled that this should not be done;²⁸ but there the plaintiff has the right to reply, by way of confession and

²¹ Edison El. Light Co. v. Equitable Life Assur. Soc. of U. S., 55 Fed. 478. But see Brush El. Co. v. Ball El. Light Co., 43 Fed. 899.

²² Curtain Supply Co. v. Nat. Lock Washer Co., 174 Fed. 45.

²³ Story's Eq. Pl., § 31. See Mitford's Pl., ch. 1, § 3.

²⁴ Equity Rule 21; Partridge v. Haycraft, 11 Ves. 574.

²⁵ Curtain Supply Co. v. Nat. Lock Washer Co., 174 Fed. 45, 50. Where the answer set up a license, complainant was not allowed to prove an abandonment thereof because the bill contained no allegation to that effect. Wilson v. Stolley, 4 McLean, 275.

²⁶ Hill v. Hite, C. C. A., 85 Fed. 268. But see Woodward v. Boston

L. M. Co., 63 Fed. 609; Story's Eq. Pl., § 31; Southern Pac. R. Co. v. U. S., 168 U. S. 1, 42 L. ed. 355.

²⁷ Interstate Construction Co. v. Regents of the U. of Idaho, 199 Fed. 509. It was held in North Carolina, that, where a deed was pleaded in the answer together with averments of the facts upon which its validity depended, no amendment of the bill was needed to enable the plaintiff to attack the validity of the deed. Boyd v. Hawkins, 2 Dev. Eq. (N. C.) 195, 215.

²⁸ Hall v. Eve, 4 Ch. D. 341, 345; per James, L. J.: "It is no part of the statement of claim to anticipate the defence, and to state what the plaintiff would have to say in answer to it."

avoidance or otherwise, to any defense in answer.²⁹ Whether that is so under the new Federal Equity Rules is unsettled.³⁰ Under the New York Code of Civil Procedure, a defense in an answer may be met by confession and avoidance without any reply or reference to the same in the complaint or other pleading by the plaintiff, unless a reply is ordered.³¹

§ 137. Certainty. A bill must state the plaintiff's case with sufficient certainty.¹

²⁹ Ibid.

³⁰ See §§ 195, 203, *infra*.

³¹ *Welsh v. German-American Bank*, 42 N. Y. Superior Ct. 462, errors in accounts stated; *Freund v. Paten*, 10 Abb. N. C. 311, fraud in a discharge in bankruptcy.

§ 137. 1 Thus it was held that a bill by a receiver of a national bank to recover for the loss caused to it by the negligence of its directors, which prays relief against the persons who acted as directors during various periods of time, together with the representatives of such as are dead, must "state the dates of the losses sustained by the corporation and the dates of the acts or omissions contributing to those losses, with sufficient certainty to inform each of the defendants with which and how many of the losses it is sought to charge him." *Price v. Coleman*, 21 Fed. 357. But a late decision holds that upon such a bill it is unnecessary to allege the exact amount of the loss arising from each transaction, where that was not yet known but that the acts of the defendants, which were charged to constitute negligence or misconduct, must be set forth with particularity, and the details of the several transactions should be given with as much fullness as could be done by the complainant.

Allen v. Luke, 141 Fed. 694. The following allegations were held to have sufficient certainty: that the defendants "suffered and permitted the said reports," which were alleged to be false, "to be placed on file in the Department of the Comptroller of the Currency; that the said directors utterly failed and neglected to perform their aforesaid official duties, and each and every of them; and that for a considerable period of time prior to said November 13th, 1902, as hereinbefore and hereinafter set forth, failed to give any adequate attention to the affairs of said bank, and allowed the said bank to be improvidently and recklessly managed;" and that the defendants "wholly failed and neglected to make personal examinations into the conduct and management of its affairs and into the condition of its accounts." Ibid. For an insufficient allegation that plaintiff was a *bona fide* purchaser of a note before its maturity, see *Caesar v. Capell*, 83 Fed. 409. For a lack of certainty in allegations concerning the assignment of a patent, see *Jaros H. U. Co. v. Fleece H. U. Co.*, 60 Fed. 622. A bill to enjoin the enforcement as a lien upon land of a judgment entered a few days after complainant had begun to erect a

The same precision of statement required in pleadings at law is not necessary.² Less certainty is required concerning facts of which a discovery is sought from the defendant.³

An allegation that an event occurred on or about a certain specified day is, however, sufficient.⁴ An allegation that an event happened before a specified date, without averring the day of the event, may be the subject of a motion for a bill of particulars, but it seems that it is not a ground for dismissing the whole bill.⁵

The bill must state facts, not conclusions of law which will be disregarded by the court.⁶ Thus the averment of irreparable injury will be disregarded in the absence of allegations of facts from which the court can see that irremediable mischief may be apprehended from the threatened wrong.⁷ An allegation that a decree was null, void and inoperative, is insufficient without a specification of the defects in the same.⁸ An allegation, that an act complained of was not a judicial act, and was done without the jurisdiction of a judge, is a mere conclusion of law.⁹ An averment that acts were done in pursuance of a conspiracy does

building upon such land under a contract which he claimed gave him priority under a mechanic's lien, was held demurrable for lack of certainty because it failed to set forth "the actual dates at which he commenced, carried on, and finished work and labor, and the actual dates on which he furnished materials," in order that the court might determine the validity and extent and right to priority of the lien he claimed. *McKee v. Travelers' Ins. Co.*, 41 Fed. 117, 119. An allegation that a song formed a material part of a dramatic composition was held fatally indefinite because it failed to say whether the pleader intended merely the words of the song, which were set out in the bill, or also the music to which they were sung. *Henderson v. Thompkins*, 60 Fed. 758, 765. It has been held: that a bill to restrain the wrongful diversion of water from a street is not demurrable

for failure to allege the particular point of the diversion, and the means and methods used therein. *Miller v. Rickey*, 127 Fed. 573.

² *Prindle v. Brown*, C. C. A., 155 Fed. 531, 533; *Daniel's Ch. Pr.*, 1st Am. ed. 421; *Storey's Eq. Pl.*, § 253. See *Drouillard v. Baxter*, 1 Scam. 192.

³ *Towle v. Pierce*, 12 Met. (Mass.) 329, 332, 46 Am. Dec. 679; *Lafayette Co. v. Neely*, 21 Fed. 738.

⁴ *Richards v. Evans*, 1 Ves. Sen. 39; *Roberts v. Williams*, 12 East. 33, 37; *Leigh v. Leigh*, *Daniell's Ch. Pr.* 369.

⁵ *Prindle v. Brown*, C. C. A., 155 Fed. 531, 533. See § 242, *infra*.

⁶ *Harper v. Hill*, 35 Miss. 63.

⁷ *Indian Land & Trust Co. v. Schoenfelt*, C. C. A., 135 Fed. 484.

⁸ *Flannigan v. Chapman & Dewey Land Co.*, C. C. A., 144 Fed. 371. See *U. S. v. Norsch*, 42 Fed. 417.

⁹ *O'Connell v. Mason*, 132 Fed. 245.

not change the nature of a civil action or add anything to its legal force and effect.¹⁰ A general charge of fraud is not sufficient, but it must allege the specific acts or language which constitute the fraud.¹¹ All the evidence of the fraud need not be pleaded.¹² It is sufficient if the main facts or incidents which

¹⁰ *Howland v. Korn*, C. C. A., 232 Fed. 35, in which the author was counsel.

¹¹ *Gilbert v. Lewis*, 1 De G. J. & Sm. 38, 49; *Bryan v. Spruill*, 4 Jones Eq. (N. C.) 27; *U. S. v. Atherton*, 102 U. S. 372, 26 L. ed. 213; *U. S. v. Norsch*, 42 Fed. 417. But see *Field v. Hastings & Bradley, Co.*, 65 Fed. 279; *Kittel v. Augusta, T. & G. R. Co.*, 65 Fed. 859; *Patton v. Glatz*, 56 Fed. 367; *Von Horst v. Am. Hop & Barley Co.*, 177 Fed. 976, where allegations that an assessment was made pursuant to a conspiracy to deprive complainant of his stock, was held to be insufficient without any showing of facts tending to prove such conspiracy or improper motive; *James v. City Investing Co.*, 188 Fed. 513. See *infra*. A bill to set aside a decree for fraud must specifically state the manner in which the imposition was practiced upon the court. *U. S. v. Norsch*, 42 Fed. 417; *U. S. v. Rose*, 166 Fed. 999, a bill to set aside a decree of naturalization. So held where a bill attacked a land patent for fraud and mistake. *Le Marchel v. Teegarden*, 133 Fed. 826. In a suit to set aside conveyances of land, made by an executor in probate proceedings, allegations that the sales were fraudulently conducted are insufficient without any averment of the substantive facts justifying the charge. *Williamson v. Beardsley*, 137 Fed. 467. A bill to set aside a land patent on account of fraud or mis-

take must state the particulars of the fraud, the names of those engaged therein, the officers who were deceived and the manner in which the mistake occurred. *U. S. v. Atherton*, 102 U. S. 372, 26 L. ed. 213. But see *U. S. v. Am. Bell Tel. Co.*, 128 U. S. 315, 32 L. ed. 450; *John A. Roebling's Sons Co.*, 248 Fed. 596. A patent for public lands will not be set aside unless the bill shows that it was issued to the wrong party by fraud, gross mistake, or erroneous construction of law. A bill to enjoin the construction of a county vault, which avers that the commissioners who let the contract "were imposed upon by false and fraudulent representation made to them by . . . the contractor and carpenter, as to the character, quality, and cost of the material of said vault," does not show with sufficient definiteness what representations were made; and an averment "that said contract or agreement was made by collusion or agreement between said A. and co-respondents, or some of them, in order to give said A. an undue advantage in the erection of the vault over any other persons, to the great damage and injury of the county," is insufficient as failing to set out the facts constituting collusion. *Hays v. Alrichs*, 115 Ala. 239; s. c., 22 S. R. 465. See *Moore v. Hawkins*, 19 How. 69, 15 L. ed. 533.

¹² *U. S. v. Am. Bell Tel. Co.*, 128 U. S. 315, 316, 32 L. ed. 450. It has

constitute the fraud against which relief is desired are fairly stated so as to put the defendant upon his guard and apprise him of whatever answer may be required of him.¹³ A bill to set aside

been held that a creditor's bill for an injunction and a receiver, because of the fraudulent disposition of assets, need not describe the assets. *Shainwald v. Lewis*, 6 Fed. 766, 775.

¹³ *U. S. v. Am. Bell Tel. Co.*, 128 U. S. 315, 316, 32 L. ed. 450. In a suit for a conveyance of land, it was held to be sufficient to allege that the defendant, while plaintiff's agent, proposed that she convey the property to him for the purposes of its management, and promised that he would reconvey it upon demand, which promise he then had no intention of performing, but made in order to fraudulently procure the land; and that she was induced by his promise and representations to make the transfer. *Alaniz v. Casenave*, 91 Cal. 41. See also *Tyler v. Savage*, 143 U. S. 79, 36 L. ed. 82; *Peck v. Vinson*, 124 Ind. 12; *Lawrence v. Gayetty*, 78 Cal. 126, 12 Am. St. Rep. 29. An averment that one B. was from infancy of unsound mind, and that his mother and her legal adviser procured a deed from him for a grossly inadequate consideration, which was never paid, is a sufficient averment of fraud. *Rhino v. Emery*, C. C. A., 72 Fed. 382. The allegation that a decedent, when very feeble both in mind and body, was persuaded and induced through some undue and improper influence, unknown to complainants, to execute a deed, was held to be insufficient. *Jackson v. Rowell*, 87 Ala. 685, 4 L.R.A. 637. But see *Mott v. Mott*, 49 N. J. Eq. 246; s. c., 22 Atl. 997, cited *infra*, § 138. A

bill alleged "that the bank was insolvent on the 5th day of May; that this was well known to its officers; that it wrongfully neglected to disclose its insolvency to complainant and by continuing business and otherwise represented to complainant and all other persons dealing with it, that it was solvent; that complainant, on the faith of these representations, believed such to be the fact, without suspicion that the bank was, or was in danger of becoming, insolvent; that, acting upon the representations, and relying on the bank's solvency, complainant delivered the draft; that next morning the bank closed its doors, and the draft was collected thereafter; and that, by reason of the premises, the draft or its proceeds did not become the property of the bank." These allegations were held sufficient to charge fraud. "The omission to state in the pleading the degree of insolvency which rendered the bank's conduct fraudulent was not fatal, as the conclusion asserted showed the intention of the pleader." *St. Louis & S. F. Ry. Co. v. Johnson*, 133 U. S. 566, 577, 578, 33 L. ed. 683, 686, 687. For a case where it was held that sufficient fraud was shown to authorize a bondholder to bring a suit of foreclosure when the mortgage provided for foreclosure only upon request of the majority of the bondholders, *Brown v. Denver Omnibus & Cab. Co.*, C. C. A., 254 Fed. 560. On a bill against the officers of a bank for damages caused by the bad management of its affairs, it was held that specific

a transfer of property in fraud of the creditor or stockholder must show that at the time of the transfer there were other stockholders or creditors who were defrauded.¹⁴ It has been held: that a general allegation that there were others is in-

allegations, which in themselves might not be sufficient, when supported by general allegations of misconduct and negligence, made out a case for relief. *Ackerman v. Halsey*, 37 N. J. Eq. 336; s. c., 38 N. J. Eq. 501. The following allegation was held to be insufficient: "that in 1911 the defendant Cooper, in whom the complainant placed trust and confidence, and while president of the two defendant corporations, through an agent approached the complainant and induced him to purchase certain shares of stock in the Waycross Savings & Trust Company, paying therefor \$1,100, and giving his note for \$4,400 upon the express understanding and agreement that said note should be renewed from time to time until fully paid, principal and interest, by the dividends accruing on said stock; that this course of procedure was followed until the principle sum of said note was reduced to \$4,000; that said Cooper, as such president of said corporation, so managed their affairs as to bankrupt the Waycross Savings and Trust Company, and enrich the First National Bank of Waycross with all the valuable assets of the first-mentioned company; that among the assets of the first-mentioned company transferred to the bank was the note of complainant with the stocks as collateral attached; that in March, 1915, said Cooper met complainant in Jacksonville, Fla., and procured the renewal of said note made payable to the First National Bank of

Waycross, the complainant not knowing that the payee had been changed, but supposed it was payable to the Waycross Savings & Trust Company, as had theretofore been the case; that such change of the payee was by an oversight of complainant, and by the procurement of said Cooper with the intent to defraud the complainant by depriving him of the defenses he otherwise would have had against the Waycross Savings & Trust Company; that he would not have signed said last mentioned note had he known of the change in the payee, and upon demand being made upon him refused payment of the same; that thereupon suit was brought against him by said First National Bank of Waycross upon said note, which resulted in a judgment of this court on the common-law side for the sum of \$5,040.17 against the complainant in favor of the First National Bank of Waycross; that each of said corporation defendants had full knowledge of the representations and agreements entered into at the time of the purchase of said stock, and giving the first promissory note. The bill also alleges that by some proceeding in the State of Georgia the bank sold said stock for the sum of \$90, and purchased the same and now holds it, and gave credit upon the last-mentioned note for said sum." *Dutton v. 1st Nat. Bank*, 244 Fed. 236.

¹⁴ *Hill v. Wilson*, C. C. A., 210 Fed. 300.

sufficient.¹⁵ An allegation of a fraudulent intent was held to be an allegation of a fact.¹⁶ A bill for relief from an old fraud must state the time of the discovery of the fraud, the reason why it was not discovered earlier, the means used by the defendant to conceal it, the manner in which it was learned, and the diligence with which the transaction was investigated.¹⁷ A general allegation of concealment and ignorance is insufficient.¹⁸ The previous lack of knowledge must be specifically set forth.¹⁹ Positive averments of fraud based upon information and belief are good.²⁰

In an action by a receiver of a National Bank against the directors for negligence, an allegation that they were liable because of "unreasonable neglect and failure to attend" meetings at which the unlawful and negligent acts were committed was held

¹⁵ Ibid.

¹⁶ *Platt v. Mead*, 9 Fed. 91; *Dutton v. 1st National Bank*, 244 Fed. 236.

In a suit to enforce the liability of directors for declaring a dividend when their corporation was insolvent, the following allegation was held to be sufficient:

"That the defendants, knowing that a large sum of money would soon become payable to the plaintiff under its contracts with the corporation, of which the defendants were directors, and that the corporation was in consequence insolvent, diverted a large part of the assets of the corporation to themselves and to other stockholders through and by the fraudulent device of declaring a dividend of 500 per cent. on the capital stock of the company and following this with a successful application to have the affairs of the company placed in the hands of a receiver. The practical result is that the creditors get nothing, and the stockholders receive the one divi-

dend five times the total of the capital stock." *U. S. Smelting Co. v. Hofkin*, 245 Fed. 896, 897.

¹⁷ *Badger v. Badger*, 2 Wall. 95, 17 L. ed. 838; *Hubbard v. Manhattan Trust Co.*, C. C. A., 87 Fed. 51; *Edwards v. Mercantile Trust Co.*, 124 Fed. 381; *Cutter v. Iowa Water Co.*, 128 Fed. 505; *Strout v. U. S. Shoe Mach. Co.*, 208 Fed. 646. For allegations held to be sufficient, see *Lockhart v. Leeds*, 195 U. S. 427, 49 L. ed. 263. See *Bangs v. Loveridge*, 60 Fed. 963.

¹⁸ Ibid.

Where, as an excuse for laches, it is alleged that negotiations were pending from which plaintiff hoped to obtain a settlement, the bill should allege that his adversary encouraged such hope. *Mackall v. Casilear*, 137 U. S. 556, 567, 34 L. ed. 776, 779.

¹⁹ *Church v. Swetland*, C. C. A., 243 Fed. 289.

²⁰ *Leavenworth v. Pepper*, 32 Fed. 718, 719; *Helmet Co. v. William Wrigley, Jr. Co.*, C. C. A., 245 Fed. 824.

to be insufficient;²¹ but an allegation that a director "steadfastly and wilfully neglected and refused to acquaint himself with the affairs of such association and wilfully, negligently, and steadfastly refused to attend any meetings of the board" was held to be good.²² It is insufficient to allege that the defendant is a trustee without stating the facts that show how the trust arose.²³

An allegation that an ice company is engaged in cutting and harvesting ice in New Hampshire and transporting the same to Boston and selling it in Boston is insufficient to show that the company is engaged in interstate commerce.²⁴ An allegation that the defendants entered into a combination and conspiracy in restraint of Interstate Commerce, in violation of the Anti-Trust Act, a reference to which act was set forth, is also insufficient.²⁵ In a bill to set aside a freight rate established by a State board or officer, it is insufficient to aver that the rates are unjust and unreasonable and to aver their prospective effect without stating concrete facts from which such effect can logically or naturally result,²⁶ and it is insufficient to allege that the known loss resulting from the rate will be a specified amount without stating the facts from which such result is reached, nor that the railroad's principal business between the points affected consists of interstate commerce and the road will be compelled to lower its interstate rates without showing what part of the predicted loss will be on the traffic affected as distinguished from the general body of traffic. It has been said that the bill must disclose facts showing with reasonable definiteness, not only the present total

²¹ Williams v. Brady, 221 Fed. 118.

²² Williams v. Brady, 232 Fed. 740, 743.

²³ Evan v. Avon, 29 Beav. 144; Dickinson v. Kempner, 193 Fed. 204. It was held: that a bill by a judgment debtor against the judgment creditor and other defendants, which alleged that the creditor would hold a certain part of an amount collected on the judgment in trust for his co-defendants, or one of them; and that complainant had a set-off against each and all of

such co-defendants; was not insufficient for uncertainty, because it did not allege which of them was the owner of the beneficial interest in the judgment; there being averments that complainant had no knowledge as to such fact and prayed discovery in relation to the same. Brown v. Pegram, 149 Fed. 515.

²⁴ Corey v. Independent Ice Co., 207 Fed. 459.

²⁵ Ibid.

²⁶ Southern Pac. Co. v. Railroad Commission of California, 193 Fed.

value and total gross revenue of the road affected, but also the gross revenue from each class of business, interstate and local, freight, passenger or other, and the proportionate property values devoted thereto, together with the gross operating expenses and a proportionate application thereof to such different classes of traffic, so that the net revenue from each source may be thereby ascertained.²⁷ In a bill to enjoin railroads from discriminating between white and black passengers, it is insufficient to aver that passenger coaches maintained for the Negro race are not provided with separate and equal toilet and waiting rooms for male and female passengers, nor equal smoking accommodations, nor separate and equal chair-cars, sleeping-cars and dining-car accommodations.²⁸

An allegation that a defendant corporation is about to exceed its powers is insufficient. The bill must show what acts are threatened, and why they exceed the powers of the corporation.²⁹

It has been said that as much certainty is required in a bill by a stockholder to enforce a corporate right as in a bill by the corporation for the same purpose.³⁰ In a stockholders' suit to wind up a corporation as insolvent, it is not necessary that all the property of the corporation should be specifically described in the bill.³¹ The allegation that the corporation cannot pay its current obligations as they mature and is unable in the ordinary course of its business to pay its liabilities, is a sufficient allega-

699; *Northern Pac. Ry. Co. v. Lee*, 199 Fed. 21.

²⁷ *Southern Pac. Co. v. Railroad Commission of California*, 193 Fed. 699.

²⁸ *M'Cabe v. Atchison, T. & S. F. Ry. Co.*, 235 U. S. 151, affirming, C. C. A., 186 Fed. 966.

²⁹ *Leo v. Union Pac. Ry. Co.*, 19 Fed. 283.

³⁰ *Whitney v. Fairbanks*, 54 Fed. 985.

³¹ *Williams v. Am. Ass'n, C. C. A.*, 197 Fed. 500. A bill by a stockholder seeking dissolution of a corporation and accounting, alleged that business had been suspended, "among other things," because of

the worthlessness of a patent under which it had been carried on, but without stating that that was the controlling reason; that the officers were misapplying the funds, but without stating that any effort had been made to have the corporation bring suit; that the officers had tampered with the books, but without stating in what manner; that certain assets had not been entered in the books, but without charging concealment or intentional wrong. It was held that the allegations were too general and indefinite to justify granting relief. *Watson v. U. S. Sugar Refinery, C. C. A.*, 68 Fed. 769.

tion of insolvency in a bill that prays the appointment of a receiver.³²

The bill should state facts, not evidence.³³ It should not state admissions.³⁴ "The pleader should state the facts, and not formulate mere epithetic 'charges.'" If the facts are not to be ascertained by diligence, or because of some obstruction, or if the evidence of them is in possession of the other side, this should be made to appear, with technical averments showing the necessity of discovery, when that is wanted; but a court cannot sustain a bill upon mere denunciatory statements of the plaintiff's suspicions or belief. The best pleadings are those which state the inculpatory facts that carry with them their own conviction of the fraud, and by which the wrongdoing appears, without much necessity for characterizing it as such."³⁵

Objections to a bill for certainty should be raised by a special motion to dismiss upon that ground,³⁶ or by a motion for a further and better statement of the nature of the claim or further

³² *Am. Can Co. v. Erie Preserving Co.*, 171 Fed. 540; *Cincinnati Equipment Co. v. Degnan*, C. C. A., 184 Fed. 834.

³³ *Eq. Rule 25.*

³⁴ This was held by Judge Story not to be the rule in this country. *Smith v. Burnham*, 2 Sumner, C. C. 612; *Jenkins v. Eldredge*, 3 Story C. C. 181, 283, 284; *Story's Eq. Pl.*, § 265. By the English Chancery practice, admissions could not be put in evidence unless they had been specifically set forth in the bill. *Hall v. Maltby*, 6 Price, 240; *Evans v. Bicknell*, 6 Ves. 183; *Austin v. Chalmers*, 6 Cl. & Fin. 38; *Story's Eq. Pl.*, § 265. This is no longer the practice there. *Davy v. Garrett*, 7 Ch. D. 473, 47 L. J. Ch. 218, 26 W. R. 225, 38 L. T. 77, (letters); *Jones v. Turner*, (1875) W. N. 239, (plaintiff had "been informed by the defendant"). According to Professor Langdell, "when

a bill charges a defendant with having had notice, or with having committed a fraud, or with insanity, or drunkenness, or lewdness, or misconduct in office, if the plaintiff intends to prove specific acts of notice, or of fraud, insanity, drunkenness, lewdness, or misconduct in office, it seems that such acts should be specifically charged in the bill. But this view is not fully supported by authority. It may also be stated generally, that whenever the plaintiff has evidence which is likely to take the defendant by surprise, it is the safer course to indicate its nature in the bill, rather than to run the risk of having it objected to at the hearing." *Langdell's Eq. Assurance Corporation*, L. R. 6 Eq. 23; *Clark v. Perriam*, 2 Atk. 337; *Shepherd v. Morris*, 4 Beav. 252.

³⁵ *Lafayette Co. v. Neely*, 21 Fed. 738.

³⁶ See *Eq. Rule 29.*

and better particulars of the matter stated.²⁷ By the former practice, when not raised by demurrer, they were ordinarily held to have been waived.²⁸

§ 138. Inconsistency and bills with a double aspect. The Equity Rules of 1912 provide: that the relief prayed "may be stated and sought in alternative forms."¹

It has not yet been decided whether this changes the former practice, which was as follows: A bill must not state two inconsistent states of fact and ask relief in the alternative. But it may state the facts and ask relief in the alternative according to the conclusion of law that the court may draw from them, so that if one kind of relief sought be denied, another may be granted; and it may state facts of a different nature not inconsistent with each other, and equally supporting the prayer for relief. In both of these cases a bill is said to have "a double aspect."² Thus, a bill may state facts constituting an attempt to form a new corporation by the consolidation of two already existing and pray that, if the new corporation have a legal existence, the plaintiff may be declared entitled to a certain number of shares therein, otherwise to a corresponding interest in the stock of one of the old companies.³ A bill to enjoin the infringement of a copyright may set forth an agreement between the author and the plaintiff, and then allege that if such agreement does not constitute an assignment of the copyright, it is an exclusive license.⁴ The complainant may seek to quiet the title to lands,

²⁷ Eq. Rule 20; *infra*, §§ 240-242.

²⁸ *Chicago, M. & St. P. R. Co. v. Pullman P. C. Co.*, 50 Fed. 24; *Green v. Terwilliger*, 56 Fed. 384; *Thomas v. Nantahala, M. & T. Co., C. C. A.*, 58 Fed. 485; *Rorback v. Dorsheimer*, 25 N. J. Eq. 516, 518; *Mason v. Daly*, 117 Mass. 403.

§ 138. ¹ Eq. Rule 25.

² *Shields v. Barow*, 17 How. 130, 144, 15 L. ed. 158, 162; *Halsey v. Goddard*, 86 Fed. 25; *Shackleton v. Baggaley, C. C. A.*, 170 Fed. 57, *Story's Eq. Pl.*, § 426, note, § 254.

³ *Kilgour v. New Orleans Gas Light Co.*, 2 Woods, 144, 148. The averment "that if said intention is

true, which is denied, then the said State law, . . . is null and void, because it operates as a discrimination against the shareholders of national banks in violation of the express terms of § 5219 of the Revised Statutes of the United States," is sufficient to raise the issue whether there is in the act any discrimination prohibited by the act of Congress. *Whitney Nat. Bank v. Parker*, 41 Fed. 402, 406. See *Boyd v. N. Y. & H. R. Co.*, 220 Fed. 174.

⁴ *Black v. Henry G. Allen Co.*, 9 L.R.A. 433, 42 Fed. 618, 623. See *Chaffin v. Hull*, 39 Fed. 877.

claiming either as devisee or as heir-at-law.⁵ A bill may contain a prayer that an agreement be either set aside as obtained by fraud, or else specifically enforced⁶ or an accounting thereunder directed,⁷ or else that it be reformed, or if that cannot be allowed that it be cancelled,⁸ or else that a lien upon the same, in favor of the plaintiff, be foreclosed,⁹ or that the defendant either restore property obtained by fraud or else pay the value of the same.¹⁰ But, at least before the act of March 3, 1915,^{10a} not for specific performance or in the alternative, for damages which might be recovered at law.¹¹ A bill may allege that the defendant had actual knowledge or constructive notice of an essential fact.¹²

⁵ *Gaines v. Chew*, 2 Haw. 619, 643, 11 L. ed. 402, 411; *Tully v. Triangle Film Corp.*, 229 Fed. 297.

⁶ *Hardin v. Boyd*, 113 U. S. 756, 28 L. ed. 1141. But see *Shields v. Barrow*, 17 How. 130, 143, 15 L. ed. 158, 161; *St. Louis, V. & T. H. R. Co. v. Terre Haute & I. R. Co.*, 33 Fed. 440, 448. But see *Cella v. Brown*, C. C. A., 144 Fed. 742. A bill was sustained when filed by one partner against another praying for specific performance of a contract for the sale of land, or else for an account of the partnership debts, and a charge of their amount upon the land as belonging to the assets of the firm. *Hoxie v. Carr*, 1 Sumn. 173. It was held: that a bill was not demurrable for multifariousness, or as based on antagonistic rights, when it alleged that a mortgage debt was paid before the mortgage was foreclosed under a power of sale, and asked that the mortgage and deed be cancelled, and, at the same time, asked that the sale be set aside because the mortgage became the purchaser at his own sale. *Dickerson v. Winslow*, 97 Ala. 491; s. c., 11 S. R. 918. But see *Cut-*

ler v. Iowa Water Co., 96 Fed. 777.

It was held that a bill was not demurrable for multifariousness, nor based upon antagonistic rights, when it prayed, for specific performance of an agreement to deliver coal in return for an advance of money, and in the alternative for the foreclosure of a mortgage, by which the return of the money was secured (*Peale v. Marian Coal Co.*, 172 Fed. 639).

⁷ *Jackson v. Jackson*, C. C. A., 175 Fed. 710.

⁸ *Electric Goods Mfg. Co. v. Koltonski*, 171 Fed. 550.

⁹ *Jones v. Missouri-Edison El. Co.*, C. C. A., 144 Fed. 765.

¹⁰ *Hubbard v. Urton*, 67 Fed. 419; *U. S. v. Debell*, C. C. A., 227 Fed. 760. But see *Alger v. Anderson*, 92 Fed. 696.

^{10a} 38 St. at L. 956, quoted *supra*, § 80.

¹¹ *United States v. Debell*, C. C. A., 227 Fed. 760; *Beveridge v. Crawford Cotton Mills*, 257 Fed. 832.

¹² *Brady v. Reliance Motion Picture Corp.*, 232 Fed. 259; *Beveridge v. Crawford Cotton Mills*, 257 Fed. 832.

When the complainant alleged that a decree which he wished to set aside was obtained either by mistake of all the parties, or by deception practiced upon himself, or by collusion of the defendant with third parties, the bill was held to be demurrable for indefiniteness.¹³ "To allege that a sale is simulated and if not simulated is fraudulent, meaning thereby it is a sham sale, and if not a sham then a real sale, but fraudulent, may be consistent, but it is not certain; and certainty is a requisite in equity pleading as well as consistency. It seems to me that, if there is doubt as to the nature of the transaction, the creditor, who has 'to strike in the dark,' should charge a fraudulent simulation, and on discovery amend if necessary."¹⁴

¹³ *Brooks v. O'Hara*, 8 Fed. 529; s. c., 2 *McCrory*, 644. But see *Williams v. U. S.*, 138 U. S. 514, 517, 34 L. ed. 1026, 1028.

¹⁴ *Pardee, J.*, in *Socola v. Grant*, 15 Fed. 487, 489.

A bill by a judgment creditor of a railroad company, against that and another railroad company, to redeem property in the possession of the latter company as mortgagee, on the ground that such possession was fraudulently acquired, and also to subject to the payment of the judgment certain bonds about to be issued by the latter, to the officers of the former company, in order to confirm the title to such property, was held to be bad as multifarious. *Merriman v. Chicago & E. I. R. Co.*, C. C. A., 64 Fed. 535, 550, 551, per *Baker D. J.*: "If the appellant's case was solely that the Eastern Illinois Company has no title to the property of the Danville Company, they might pray for various forms of alternative relief consistent with that case; but they cannot in the same bill make a case that it has no title, and also a case that it has a title, and then ask for inconsistent relief accord-

ing to the different cases thus made. Such course of procedure we do not understand is warranted by the doctrine of alternative relief. Such are alternative cases, and not cases of alternative relief. They are inconsistent, for a decree of one of those forms of relief would proceed upon a theory fatal to the other form of relief."

Where a bank filed a bill to foreclose a mortgage and to restrain a sale of the mortgaged property to satisfy a judgment obtained against it by another, and the holder of the judgment thereupon filed an answer and cross-bill alleging that the mortgage had been withheld from record in fraud of creditors, and praying that the property be sold to satisfy the judgment, and the complainants filed an amendment alleging that, previous to the recovery of the said judgment, they themselves had recovered a judgment upon an indebtedness separate and distinct from the mortgage indebtedness, and that if their mortgage was invalid they had a prior lien under this judgment; it was held that the bill was demurrable for multifariousness. *Mobile Savings*

It was held in England that a bill may not pray relief primarily against one of two defendants, and, in case the court should hold him free from liability, then against the other.¹⁵ It was held that where a bill prayed specific performance of a contract in relation to certain patents, and also contained expressions looking for relief by an injunction against an infringement of one of them, it could not be maintained for the latter relief as a bill with a double aspect, since the necessary parties must be different in each case.¹⁶ And that a bill could not seek a preliminary injunction to restrain infringement through sales, made by defendant, in violation of the terms of its license, where the bill also prayed for additional relief, which could only be granted if the license was still in force.¹⁷ It was further held: that a bill was bad when it contained two alternative claims each belonging to several persons, of whom one had no interest in one claim, and others had no interest in the other;¹⁸ that a bill should not pray in the alternative legal and equitable relief,¹⁹ and that a bill in equity with a double aspect must state each position separately and distinctly.²⁰ Under the modern practice in England, it has been held that, in an action for the recovery of land, plaintiff may claim possession as the residuary

Bank v. Burke, 94 Ala. 125, 10 S. R. 328.

¹⁵ *Clark v. Lord Rivers*, L. R. 5 Eq. 91, 97. But see *Kilgour v. New Orleans G. L. Co.*, 2 Woods, 144, 148; *Brown v. Pegram*, 149 Fed. 515. "The plaintiff brought a bill in equity joining A and B as defendants. The bill alleged that the plaintiff owned a lot fifty feet wide, that A owned a lot on one side and B owned a lot on the other side of the plaintiff's lot, that all three claimed under a common grantor, that A and B had erected buildings on their lots, that these buildings were less than fifty feet apart, but that the plaintiff's surveyors could not agree as to which defendant was encroaching. The bill prayed for a determination of the encroachment and a decree for the removal of the

encroaching building and damages. Held, that the bill was not demurrable. *Caleo v. Goldstein*, 118 N. Y. Supp. 859, (Sup. Ct., App. Div.)

¹⁶ *Am. Box Mach. Co. v. Crosman*, 57 Fed. 1021. See *Magic R. Co. v. Elm City Co.*, 13 Blatch. 151; *Halsey v. Goddard*, 86 Fed. 25.

¹⁷ *Lovell-McConnell Mfg. Co. v. Waite Auto Supply Co.*, 198 Fed. 130.

¹⁸ *Stebbins v. St. Anne*, 116 U. S. 386, 29 L. ed. 667.

¹⁹ *Cherokee Nation v. Southern Kansas Ry. Co.*, 135 U. S. 641, 651, 34 L. ed. 295, 300; *Alger v. Anderson*, 92 Fed. 696; *Beveridge v. Crauford Cotton Mills*, 257 Fed. 832.

²⁰ *Electric Goods Mfg. Co. v. Koltonski*, 171 Fed. 550; *Munro v. Smith*, 243 Fed. 654.

devisee; and, in the alternative, should the will be held invalid, as heir at law.²¹

"When the pleadings are so framed as to rest the claim for relief solely on the ground of fraud, it is not open to the plaintiff, if he fails in establishing the fraud, to pick out from the allegations of the bill facts which might, if not put forward as proofs of fraud, have yet warranted the plaintiff in asking for relief. A defendant in answering a case not founded on fraud is not bound to do more than answer the case in the mode in which it is put forward. If, indeed, relief is asked alternatively, either on the ground of fraud, or, failing on that ground, on some other equity, a plaintiff failing on the first may succeed on the latter alternative. But when the attention of the defendant has been distinctly called to it, and he has been called upon to answer the case according to both alternatives, it is the duty of the judge to determine whether the two are so interwoven with each other that, on the failure of proof of fraud, it is impossible to treat the facts as separate allegations, justifying a separate mode of dealing with them."²² Thus, it has been held, that where a bill to rescind a contract was based solely upon alleged fraudulent representations by defendant, it could not be sustained upon proof of a mutual mistake;²³ and upon a bill to set aside a decree for fraud and error, apparent upon the record, relief upon proof of a mistake of fact was denied.²⁴ When the bill charged fraud by the defendants and the evidence showed that they had obtained their title through the fraud of

²¹ Annual Practice, 1913, p. 317. But see *Field v. Camp*, 193 Fed. 160.

²² Dwight Foster's Lectures on Equity Pleadings, MS.; *Eyre v. Potter*, 15 How. 42, 56, 14 L. ed. 592, 598; *Britton v. Brewster*, 2 Fed. 160; *French v. Shoemaker*, 14 Wall. 314, 335, 20 L. ed. 852, 857; *Fisher v. Boody*, 1 Curt. 206; *Hoyt v. Hoyt*, 27 N. J. Eq. 399; *Wilde v. Gibson*, 1 H. of L. Cases, 605; *Hickson v. Lombard*, L. R. 1 H. of L. 326; *Thomson v. Eastwood*, L. R. 2

App. Cases, 215; *Price v. Berrington*, 2 Mach. & G. 486, 498; *Dashiell v. Grosvenor*, C. C. A., 27 L.R.A. 67, 66 Fed. 334; *Grosvenor v. Dashiell*, 62 Fed. 584; *Brown v. Davis*, C. C. A., 62 Fed. 519; *Hendryx v. Perkins*, C. C. A., 114 Fed. 801. See *Chicago, B. & Q. R. R. Co. v. Babcock*, 204 U. S. 585, 593, 51 L. ed. 636, 638.

²³ *Burk v. Johnson*, C. C. A., 146 Fed. 209.

²⁴ *Hendryx v. Perkins*, C. C. A., 114 Fed. 801.

another, which was also charged, the complainant was allowed a recovery.²⁵

When a bill alleges both fraud and mistake, if the latter alone is proved the bill will be sustained.²⁶ If the plaintiff wish to set aside a deed on account of fraud, imposition, and undue influence, he may allege both that the maker was insane and that he had a great imbecility of mind.²⁷ It was held: that a suit to enjoin a railroad company from granting rebates to favored shippers, under the Elkins act of February 19, 1903, could not be sustained under the statute of July 2, 1890, forbidding combinations and monopolies in restraint of commerce between the States.²⁸

The objection of inconsistency cannot be raised for the first time upon an appeal.²⁹

§ 139. Multifariousness or misjoinder. In general. The Equity Rules of 1912 provide: "The plaintiff may join in one bill as many causes of action, cognizable in equity, as he may have against the defendant. But when there are more than one plaintiff, the causes of action joined must be joint, and if there be more than one defendant the liability must be one asserted against all of the material defendants, or sufficient grounds must appear for uniting the causes of action in order to promote the convenient administration of justice. If it appear that any such causes of action cannot be conveniently disposed of together, the court may order separate trials."¹ To what extent this modifies the previous practice has not yet been determined.

The former practice was as follows: A bill must not be multifarious. Multifariousness consists in the joinder of two or more distinct and unconnected grounds for equitable relief, each of which might be the foundation for a separate bill. This may occur in three ways,—by a misjoinder of plaintiffs, by a misjoinder of de-

²⁵ Corban v. Conklin, C. C. A., 208 Fed. 231.

²⁶ Williams v. U. S., 138 U. S. 514, 517, 34 L. ed. 1026, 1028; U. S. v. Mills, C. C. A., 190 Fed. 513, 515.

²⁷ Story's Eq. Pl., § 254; Bennet v. Wade, 2 Atk. 325; Colton v. Ross, 2 Paige (N. Y.) 396; Lloyd v. Brewster, 4 Paige (N. Y.) 537;

Mott v. Mott, 49 N. J. Eq. 177; s. c., 22 Atl. 997. But see Jackson v. Rowell, 87 Ala. 685, 4 L.R.A. 637; *supra*, § 137.

²⁸ U. S. v. Atchison, T. & S. F. Ry. Co., 142 Fed. 176.

²⁹ Wasatch Min. Co. v. Creston Min. Co., 148 U. S. 293, 37 L. ed. 454.

§ 139. ¹ Eq. Rule 26.

fendants, and by a misjoinder of grounds for equitable relief held by and against the same parties.³ "To lay down any rule applicable universally, or to say what constitutes multifariousness as an abstract proposition is, upon the authorities, utterly impossible. The cases upon the subject are extremely various, and the court in deciding them seems to have considered what was convenient in particular circumstances, rather than to have attempted to lay down any absolute rule."³ "The only way of reconciling the authorities upon the subject is by adverting to the fact that, although the books speak generally of demurrers for multifariousness, yet in truth such demurrers may be divided into two distinct kinds. Frequently the objection raised though termed multifariousness, is in fact more properly misjoinder; that is to say, the cases or claims united in the bill are so different a character that the court will not permit them to be litigated in one record. It may be that the plaintiffs and defendants are parties to the whole of the transactions which form the subject of the suit, and nevertheless these transactions may be so dissimilar that the court will not allow them to be joined together, but will require distinct records. But what is more familiarly understood by the term 'multifariousness' as applied to a bill, is where a party is able to say he is brought as a defendant upon a record, with a large portion of which, and of the case made by which he has no connection whatever."⁴ There is, however, little practicable good to be obtained from a maintenance of this distinction except as a means of elucidating some of the expressions in the earlier authorities.⁵

"The decisions on this subject are contradictory and unsatisfactory. The common-sense rule in such cases is that an individual shall not be called to maintain his title or shall not assert it in connection with others to which it has no analogy, and in the investigation of which the costs and complexity of the case will be increased."⁶ It has been said that the fact that separate

³ Calvert on Parties, Book I, Ch. VII.

³ Lord Cottenham in *Campbell v. Mackay*, 1 M. & Cr. 603, 618.

⁴ Lord Cottenham in *Campbell v. Mackay*, 1 M. & Cr. 603, 618. Approved in *Shields v. Thomas*, 18 How. 253, 259, 15 L. ed. 368, 370.

⁵ See Calvert on Parties, Book I, ch. vii.

⁶ McLean, J., in *Turner v. Am. Baptist Missionary Union*, 5 McLean, 344, 349.

The following rule laid down by Mr. Gibson in his *Suits in Chancery*, section 292, was quoted with

decrees may be requisite in order to afford complete relief does not necessarily make the bill multifarious.⁷

§ 140. Multifariousness by misjoinder of plaintiffs. The Equity Rules of 1912 provide: "All persons having an interest in the subject of the action and in obtaining the relief demanded may join as plaintiffs, and any person may be made a defendant who has or claims an interest adverse to the plaintiff. Any person may at any time be made a party if his presence is necessary or proper to a complete determination of the cause. Persons having a united interest must be joined on the same side as plaintiffs or defendants, but when any one refuses to join, he may for such reason be made a defendant."¹ "When there is more than one plaintiff, the causes of action joined must be joint, and if there be more than one defendant the liability must be one asserted against all of the material defendants, or sufficient grounds must appear for uniting the causes of action in order to promote the convenient administration of justice."²

It has not yet been decided whether this last clause modifies

approval by Judge Jenkins in *Von Auw v. Chicago T. & F. G. Co.*, 69 Fed. 448: "To make a bill demurrable for multifariousness it must contain all of the following characteristics. First, two or more causes of action must be joined against two or more defendants; second, these causes of action must have no connection or common origin, but must be separate and independent; third, the evidence pertinent to one or more of the causes must be wholly impertinent as to the other or others; fourth, one or more of the causes of action must be capable of being fully determined without bringing in other cause or causes to adjust any of the legal or equitable rights of the parties; fifth, the decree as to one or more of the separate or independent causes must be conclusive against one or more of the defendants, and the decree proper as

to the other cause or causes, must be conclusive against the other defendants or defendant; sixth, the relief proper against one or more of the defendants in one or more of the separate and independent causes of action must be distinct from the relief proper against the other defendant or defendants of the other cause of action; seventh, the satisfaction of the proper decree by any of the defendants to the extent of his alleged liability on any one or more of the distinct causes of action must not be a satisfaction of a proper decree against the other defendant or defendants, or the other cause or causes of action; and eighth, the multifariousness must be apparent, and the misjoinder of distinct causes of action manifest."

⁷ *Neal v. Rathell*, 70 Md. 592; s. c., 17 Atl. 566.

§ 140. ¹ Eq. Rule 37.

² Eq. Rule 26. Eq. Rule 37.

the whole sentence or only that which refers to the joinder of defendants. It consequently is uncertain whether it affects so much of the former practice as permitted a joinder of plaintiffs, who had a common interest in the relief sought.

In England, a party cannot now unite in the same suit claims which he holds in two different capacities unless connected.³ In New York, it was held, where the plaintiff prayed the same relief both individually and as executor upon the same cause of action, which appeared upon the face of his complaint to be for the benefit of the testator's estate, that there was no misjoinder of parties or of causes of action.⁴

No persons can unite as complainants in a bill in equity unless they have a joint or common interest in obtaining the same relief.⁵ Thus, if one of them has no interest in the relief claimed, the bill is demurrable.⁶

Those who claim the return of money paid by them severally on distinct promissory notes cannot join their claims in the same bill;⁷ nor can several creditors claiming under several obligations unite in a suit to attach the debts of an absent debtor.⁸ Persons who have been defrauded of stock in a corporation by the same parties who promised it to them before the organization of the corporation cannot join in a bill to compel the issue of the stock to each of them.⁹ Persons who have been separately indicted for similar acts committed while acting as agents for the same principal cannot join in a bill to enjoin the further prosecution of the indictments.¹⁰

But in a bill to compel specific performance of a decree in a former suit, all the complainants in the first suit may join as plaintiffs, though the decree sought to be enforced orders the

³ Order xviii.

⁴ *Moss v. Coehn*, 158 N. Y. 240. See *Metropolitan Trust Co. v. Columbus, S. & H. R. Co.*, 93 Fed. 689.

⁵ *Story's Eq. Pl.*, § 279; *Calvert on Parties* (2d ed.), 105, 110.

⁶ *Walker v. Powers*, 104 U. S. 245, 249, 26 L. ed. 729, 731; *Doggett v. Railroad Co.*, 99 U. S. 72, 25 L. ed. 301. *Nat. Surety Co. v. Wash.*

Iron Works, 243 Fed. 260. *Contra*, *Havens v. Burns*, 188 Fed. 441.

⁷ *Yeaton v. Lenox*, 8 Pet. 123, 8 L. ed. 889.

⁸ *Ibid.* But see *Norris v. Hassler*, 22 Fed. 401; *Langdon v. Branch*, 37 Fed. 449.

⁹ *Summerlin v. Fronterizac S. M. & M. Co.*, 41 Fed. 249.

¹⁰ *Woolstein v. Welsh*, 42 Fed. 566.

payment of specific sums severally to each of them.¹¹ Several fire insurance companies were allowed to unite in a bill to set aside one award against them upon an arbitration of claims by the same person under several policies;¹² and to enjoin the prosecution of separate actions at law, brought by the same plaintiffs against them and other insurance companies to recover upon policies on the same property, which provided for a proportional liability, where the same defense had been interposed to each action,¹³ but not where they had issued concurrent policies upon the same policy, the liability of each being independent of that of the rest.¹⁴

Plaintiffs with conflicting interests cannot so join.¹⁵ Such are, in a suit for the construction of a will, persons, each of whom is interested in having a different construction put upon it.¹⁶ Nor can two join in a bill to set aside a fraudulent conveyance of land, of whom one claims the land as a creditor of the person who has made the conveyance, and the other as the purchaser of the land upon a sheriff's sale to satisfy a judgment held by him.¹⁷ So, a bill was held to be multifarious which sought to enforce a trust in land and also to give the title to one of the complainants to the same property.¹⁸

But the interests of the complainants need not be co-extensive.

¹¹ *Shields v. Thomas*, 18 How. 253, 15 L. ed. 368. It has been held that this rule does not extend to a bill for specific performance of a contract to convey real estate in which the complainants hold distinct rights to separate lots. *Marselis v. Morris & L. Co.*, 1 N. J. Eq. 31, 39.

¹² *Hartford Fire Ins. Co. v. Bonner*, 11 L.R.A. 623, 44 Fed. 151.

¹³ *Virginia-Carolina Chem. Co. v. Home Ins. Co.*, C. C. A., 113 Fed. 1.

¹⁴ *Rochester German Ins. Co. v. Schmidt*, C. C. A., 175 Fed. 720.

¹⁵ *Walker v. Powers*, 104 U. S. 245, 26 L. ed. 729; *Saumarez v. Saumarez*, 4 Mylne & Cr. 331, 336; *Parsons v. Lyman*, 4 Blatchf. C. C. 432; *Bell v. Cureton*, 2 M. & K.

503; *Stebbins v. St. Anne*, 116 U. S. 386, 29 L. ed. 667; *Brown v. Bedford City L. & I. Co.* 91 Va. 31, 20 S. E. 968. A bill was held multifarious where all the complainants sought as taxpayers to enjoin a defendant town from purchasing the plant of a defendant waterworks company, and one complainant further sought, as a stockholder in that company, to enjoin the sale on the ground of inadequacy of price. *Peabody v. Westerly Waterworks*, 20 R. I. 176, 37 Atl. 807.

¹⁶ *Parsons v. Lyman*, 4 Blatchf. C. C. 432; *Saumarez v. Saumarez*, 4 M. & Cr. 331, 336.

¹⁷ *Walker v. Powers*, 104 U. S. 245, 26 L. ed. 729.

¹⁸ *Leslie v. Leslie*, 84 Fed. 70.

Thus, a tenant for life and the remaindermen of an estate, either legal or equitable, may join in a suit to protect the estate.¹⁹ Beneficiaries of a trust fund may join in a suit for an accounting, although their interests are several.²⁰ Where either the corporation or its stockholders might have brought a suit, it was held that their joinder as complainants did not prejudice them.²¹ The buyer of a secret formula and the vendor who sold the same with a guarantee, may join in a suit to enjoin the unlawful use of the same.²² The owners of a patent and an exclusive licensee may join as complainants in a suit for its infringement.²³ Three plaintiffs were allowed to unite in a bill to enjoin an infringement of three patents, one of which belonged to all the complainants and the others to two of them.²⁴

Although usually there had to be some privity between the complainants in a bill, and a common interest in the questions involved could not alone lay the foundation for the joinder of parties;²⁵ yet in certain cases those between whom there was no privity were allowed to sue together when they sought to avert an injury which would affect them all alike.²⁶ Thus persons with a common interest in trademarks and labels, as owners and selling agents of the goods upon which they were affixed, might join in a suit to prevent their imitation.²⁷ Several persons who were injured by a statute regulating their separate business of the same character were permitted to unite in a suit to enjoin its enforcement.²⁸ Several tenants or parishioners might unite in a bill of peace seeking to dispose of a disputed right claimed

¹⁹ Story's Eq. Pl., § 27a; Buckenridge v. Glasse, 1 Cr. & Phill, 126; Calvert on Parties (2d ed.), 99; Rainey v. Herbert, C. C. A., 55 Fed. 443.

²⁰ Watson v. National Life & Tr. Co., C. C. A., 162 Fed. 7.

²¹ Bellevue Mills Co. v. Baltimore Trust Co., 214 Fed. 817.

²² James B. Sipe & Co. v. Columbia Refining Co., 171 Fed. 295.

²³ Bellevue Mills Co. v. Baltimore Trust Co., 214 Fed. 817.

²⁴ Low v. McMaster, 255 Fed. 235.

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²⁵ Rochester German Ins. Co. v. Schmidt, C. C. A., 175 Fed. 720; Watson v. Huntington, C. C. A., 215 Fed. 372.

²⁶ See §§ 114, 116 *supra*.

²⁷ Jewish Colonization Ass'n v. Solomon, 125 Fed. 994.

²⁸ Little v. Tanner, 208 Fed. 605; a trading stamp case. But in Ohio v. Cox, 257 Fed. 334, held that different taxpayers could not unite in a suit to enjoin the governor from transmitting to the legislature the amendment to the Constitution forbidding the manufacture and sale of intoxicating liquors.

against them by the lord of the manor²⁹ or the parson of the parish.³⁰ The owners of several lots of land claiming under a common source of title might unite in a bill of peace against several other claimants to the same lots, who also relied upon a common source of title adverse to that of the complainant.³¹ Several owners of different lots of land who have a common interest in an easement derived from the same source may unite in a suit to enjoin the obstruction of the easement.³² Several claimants in possession of several parcels of land whose rights depend upon the same question of fact or law may unite in a bill of peace against the same defendant who claims title to all the land by reason of the same disputed facts or legal propositions.³³ The owners of several mines might join in a suit to restrain different assayers from buying ore from laborers employed by the complainants, although there was no concert of action among the defendants in their various purchases.³⁴ The owners of adjacent property might join in a bill in equity to enjoin smelters from injuring their crops,³⁵ to enjoin a defendant from erecting

²⁹ *Annon*, 1 Chan. Cas. 269; *Smith v. Earl Brownlow*, L. R. 9 Eq. 241.

³⁰ *Budge v. Hopkins*, 2 Eq. Cas. Abr. 70.

³¹ *Crews v. Burcham*, 1 Black, 352; *Prentice v. Duluth S. & F. Co.*, C. C. A., 58 Fed. 437. It has been held that the pastor and some of the members of a religious association may unite in a suit to recover possession of the church and parsonage, to enjoin the trustees and the remainder of the congregation from interfering with each in his ecclesiastical rights; and also to compel an accounting for collections taken up, which are payable to the elder and pastor as salary. *Fuchs v. Meisel*, 113 Mich. 559; s. c., 60 N. W. R. 773. But see *Douglas v. Boardman*, 113 Mich. 618, s. c., 71 N. W. 1100. *Little v. Tanner*, 208 Fed. 605; *Everglades D. League v.*

Napoleon B. Broward D. Dist., 253 Fed. 256.

³² *Norton v. Colusa Parrot Min. & Smelting Co.*, 167 Fed. 202. *Springer v. Lawrence*, 47 N. J. Eq. 461, s. c., 21 Atl. 41. See *Union Mill & M. Co. v. Dangberg*, 81 Fed. 73; *Osborne v. Wisconsin Cent. R. Co.*, 43 Fed. 824; *Cent. Pac. R. Co. v. Dyer*, 1 Saw. 641; *infra*, § 141. *Flint v. Russell*, 5 Dill. 151; *Parker v. Nightingale*, 6 Allen (Mass.), 341, 80 Am. Dec. 632. *Contra*, *Hudson v. Madison*, 12 Simons, 416.

³³ *Holst v. Savannah El. Co.*, 131 Fed. 931; *Rafferty v. Central Tr. Co.* 147 Pa. 579, 30 Am. St. Rep. 763, 23 Atl. 884.

³⁴ *Goldfield Consol. Mines Co. v. Richardson*, 194 Fed. 198, reversed C. C. A., 202 Fed. 637.

³⁵ *Am. Smelting & Refining Co. v. Godfrey*, C. C. A., 158 Fed. 225, 89 C. C. A. 139.

a livery-stable,³⁶ an unauthorized street railroad³⁷ or other nuisance in their vicinity. But another case holds that different persons, each of whom will suffer a distinct injury from the levy of a tax, cannot unite in a bill to enjoin its levy on account of its alleged unconstitutionality.³⁸ Several stockholders who had been compelled to pay corporate debts were allowed to join in a bill against another stockholder or compel him to contribute his proportion, and several persons who had been induced by identical fraudulent misrepresentations to subscribe to stock in a corporation were allowed in Virginia to join in a suit to cancel their subscriptions.³⁹ It has been held: that several depositors may join in a suit against directors of their common bank, for loss through improper loans of the bank funds.⁴⁰ But that several stockholders cannot unite in a bill against an officer of their corporation based upon his fraudulent acts by which some of the complainants were induced to buy their stock and others, who had previously bought, were otherwise injured.⁴¹ A stockholder might sue on his own behalf and on behalf of his corporation, in the same bill, when the same facts sustained the cause of action on behalf of both, such as an attempt to make a fraudulent consolidation between his company and another on terms unduly unfavorable to his corporation.⁴² But, it has been held, that a suit by a stockholder, who is indebted to a building and loan association, to cancel his loan contract for fraud, usury and incapacity of the association to do business within the State, who also prays, on behalf of himself and all other stockholders, to have a receiver of the property of the corporation within

³⁶ Cutting v. Gilbert, 5 Blatchf. C. C. 259. See, however, Central Pac. R. Co. v. Dyer, 1 Saw. 641; Union Pac. R. Co. v. McShane, 3 Dill. 303; *infra*, § 141.

³⁷ Allen v. Fairbanks, 45 Fed. 445.

³⁸ Rader v. Bristol Land Co. 94 Va. 766, 27 S. E. 590.

³⁹ Foster v. Abingdon, 88 Fed. 604; Solomon v. Bates, 118 N. C. 311, 54 Am. St. Rep. 725, 24 S. E. 478.

⁴⁰ Boyd v. Schneider, C. C. A., 131 Fed. 223.

Several stockholders may unite in a suit to enjoin the directors of a corporation from issuing new stock without giving the complainants a reasonable opportunity to take their proportionate share and from allowing any holder thereof to vote at a corporate meeting. Snelling v. Richard, 166 Fed. 635.

⁴¹ Watson v. Huntington, C. C. A., 215 Fed. 472.

⁴² Jones v. Missouri-Edison El. Co., C. C. A., 144 Fed. 765.

the State appointed upon allegations of mismanagement and misappropriation by its officers, is multifarious;⁴³ that so is a suit by a corporation for a breach of contract, coupled with claims by individuals, to compel the delivery of stock of the same defendant.⁴⁴

It has been said that the fact that separate decrees may be requisite in order to afford complete relief does not necessarily make the bill multifarious.⁴⁵

§ 141. Multifariousness by misjoinder of defendants. The Equity Rules of 1912 provide: "If there be more than one defendant the liability must be one asserted against all of the material defendants, or sufficient grounds must appear for uniting the causes of action in order to promote the convenient administration of justice."¹

This seems to broaden the former rule, which was as follows: No persons could be joined as defendants to a bill in equity who had not a joint or common interest in opposing the relief prayed.² Different relief might, however, be obtained against different defendants when the bill sought to prevent or annul the effect of acts in pursuance of a common scheme, or so connected with each other as to form part of the same transaction.³ The rule was thus stated by Sir John Leach: "In order to determine whether a suit is multifarious, or, in other words, contains distinct matters, the inquiry is not, as this defendant supposes, whether each defendant is connected with every branch of the cause, but whether the plaintiff's bill seeks relief in respect of matters which are in their nature separate and distinct. If the object of the suit be single, but it happens that different persons have separate interests in distinct questions which arise out of that single object, it necessarily follows that such different persons must be brought before the court, in order that the suit may conclude the whole object."⁴

⁴³ *Emmons v. National Mut. Bldg. & Loan Ass'n of New York*, C. C. A., 135 Fed. 689.

⁴⁴ *Backus v. Brooks*, 189 Fed. 922.

⁴⁵ *Neal v. Rathell*, 70 Md. 592; s. c., 17 Atl. 566.

§ 141. ¹ Eq. Rule 26.

² Calvert on Parties, Book I, ch.

vii; *U. S. v. Alexander*, 4 Cranch, C. C. 311.

³ Calvert on Parties, Book I, ch. vii; *Manners v. Rowley*, 10 Simons, 470.

⁴ *Salvidge v. Hyde*, 5 Maddock, 138, 146.

"The entirety of the case against one defendant constitutes the connecting link."⁵ But a bill is multifarious, when the charge against one is in no way connected with those against other defendants.⁶ When the liabilities of the stockholders of a corporation to pay their subscriptions are several, independent, and unconditional, and they have no common defense depending on the same questions of fact and law, the remedy of the corporation or the trustee in bankruptcy, or its receiver, is an action at law against each of them or a bill against several of them to collect such subscriptions is multifarious.⁷ But it was held: that a receiver's bill to collect the amount due by subscriptions to stock was not multifarious when filed against several stockholders, who had a common defense depending upon the same question of fact and law;⁸ and that a bill filed by a creditor on behalf of himself and others similarly situated, to wind up the affairs of the bank, to determine the amount due him, to ascertain the amounts due to other creditors, to distribute the assets among them, and to enforce the liability of the stockholders, who were made defendants with the bank, was not multifarious.⁹ Bills were held to be multifarious when filed by receivers against several stockholders to enforce a statutory liability to creditors,¹⁰ or to collect an assessment made in another proceeding, to which

⁵ Calvert on Parties (2d ed.), 98, quoting Sir John Leach in *Turner v. Robinson*, 1 Sim. & S. 313; and Lord Cottenham in *Attorney General v. Corporation of Poole*, 4 M. & Cr. 17, 31; *Halsey v. Goddard*, 86 Fed. 25; *Porter v. Robinson* 2 Va. Dec. 183, 22 S. E. 843; *Crickard v. Crouch's Adm'rs*, 41 W. Va. 503; s. c., 23 S. E. 727; *Middleton Sav. Bank v. Bacharach*, 46 Conn. 513. But see *Washington City Sav. Bank of Thornton*, 83 Va. 157; *Buffalo v. Town of Pochontas*, 85 Va. 222; *Sylvester v. Boyd*, 166 Mass. 445; s. c., 44 N. E. 343; *Staude v. Keck*, 92 Va. 544; s. c., 24 S. E. 227.

⁶ *Wood v. Dummer*, 3 Mason, 308; *West v. Randall*, 2 Mason, 181, 200; *Lewarne v. Mexican Int. I. Co.*, 38

Fed. 620; *Seales v. Pfeiffer*, 77 Ala. 278; *Sumter County v. Mitchell*, 85 Ala. 313; *Van Houten v. Van Winkle*, 46 N. J. Eq. 380; *National Surety Co. v. Washington Iron Works*, 243 Fed. 260; *Beveridge v. Crawford Cotton Mills*, 257 Fed. 832.

⁷ *Kelly v. Gill*, 245 U. S. 116.

⁸ *Wyman v. Bowman*, C. C. A., 127 Fed. 257; *Clinton Mining & Mineral Co. v. Cochran*, C. C. A., 247 Fed. 449; *John A. Roebling's Sons Co. v. Kinnicutt*, 248 Fed. 596; *supra*, §§ 81, 83.

⁹ *Richmond v. Irons*, 121 U. S. 27, 50, 30 L. ed. 864, 871; *Wyman v. Wallace*, 201 U. S. 230, 242, 50 L. ed. 738, 741.

¹⁰ *Hale v. Allinson*, 188 U. S. 56, 47 L. ed. 380.

the defendants were not parties.¹¹ A bill is not multifarious as regards stockholders, who have a common defense, when filed to collect dividends paid while the corporation was insolvent.¹² Nor a bill by a receiver against a number of bank directors, to recover money lost by the bank through their alleged misconduct.¹³ Nor in New Jersey a stockholder's bill to recover damages for the negligence of the officers and directors of a bank for a period of time during part of which some of the defendants were not in office.¹⁴ Nor a bill against two depositaries of the funds of an insolvent association, the proceeds of embezzlements by its treas-

¹¹ *Fidelity Tr. & Safe Dep. Co. v. Archer*, C. C. A., 179 Fed. 32.

¹² *Hayden v. Thompson*, C. C. A., 71 Fed. 60; reversing, 67 Fed. 273.

¹³ *Allen v. Luke*, 141 Fed. 694.

¹⁴ *Ackerman v. Halsey*, 37 N. J. Eq. 356. *Contra*, under the N. Y. Code, *People v. Eq. L. A. S'y*, 124 App. D. (N. Y.) 714. Bills were held to be *multifarious* which were filed by a stockholder to enforce the liability to the corporation of one defendant for unpaid stock, his joint liability with five others for fraud against the creditors of the corporation, and the liability of these five for the fraudulent sale of corporate property with which the first defendant was not connected. *Holton v. Wallace*, 66 Fed. 409. In Missouri, a bill by a creditor of an insolvent corporation to collect unpaid stock subscriptions and also to recover from one of the subscribers for his conduct as president both in defrauding the corporation and in injuring the individual property of complainant. *Montserrat Coal Co. v. Johnson County C. M. Co.*, 141 Mo. 149; s. c., 42 S. W. 822. By a stockholder who complained of other stockholders and officers for false representations which induced him to buy his stock, and against the

corporation for dissolution and an accounting because of the suspension of its business and waste of the corporate funds. *Watson v. U. S. Sugar Ref. Co.*, C. C. A., 68 Fed. 769. In Massachusetts, by a stockholder against a corporation and its trustees praying for a return of money advanced by him to the corporation through the fraud of the individual defendants, which also alleged misappropriation of the corporate funds and prayed the appointment of a receiver, where there was no allegation that the corporation had no funds to repay the plaintiff, and the receivership was not sought merely as an incident to the principal relief. *Davis v. Peabody*, 170 Mass. 397; s. c., 49 N. E. 750. It has been held that claims against directors and stockholders to enforce different liabilities cannot be combined. *Cambridge Waterworks v. Somerville D. & B. Co.*, 14 Gray (Mass.), 193; *Pipe v. Leonard*, 115 Mass. 286; *Von Auw v. Chicago T. & T. G. Co.*, 70 Fed. 939. But they may be united in a suit to enjoin them from taking part in the same fraudulent transaction. *Jones v. Missouri-Edison El. Co.*, C. C. A., 144 Fed. 765.

urer, all of which were of the same character and grew out of his manipulation of the deposits, in some of which transactions it was alleged that both of them participated and were jointly liable; when it was further charged, that the illegal matters were so interwoven that an accounting was necessary of all the different accounts of the association in both depositaries, that the defendants knowingly participated with the treasurer in the misappropriation of the funds.¹⁵ Nor one by the holder of a bond secured by a lien upon the property of a corporation against both the corporation and its stockholders, at the same time to foreclose his lien and to compel the stockholders to pay so much of the balance of their subscriptions to the stock of the corporation as will suffice for the payment of the deficiency after the foreclosure sale.¹⁶

Nor one by a mortgagee of water works to foreclose the mortgage, and to compel the city which had bought the property to pay hydrant rents to the plaintiff in pursuance of the contract granting the franchise.¹⁷ Nor a bill by a city bondholder for an accounting by his obligor and by the county, to whom assessments, upon which the complainant has a lien, have been paid in part.¹⁸

But bills were held to be *multifarious* when filed: to foreclose a mortgage on a gas plant, covering all moneys "furnished and hereafter paid" by a city for gas-light, which joined the city as a co-defendant with the mortgagor, and prayed for a judgment against the city for what it owed the mortgagor for light.¹⁹ To foreclose a mortgage by a corporation, and to recover dividends from stockholders paid out of the income of the mortgaged property.²⁰ Joining prayer for the recovery of bonds wrongfully re-

¹⁵ *Fidelity & Deposit Co. of Maryland v. Fidelity Trust Co.*, 143 Fed. 152.

¹⁶ *Marine & R. P. M. & Mfg. Co. v. Bradley*, 105 U. S. 175, 26 L. ed. 1034.

¹⁷ *Centerville v. Fidelity Tr. & G'y Co.*, C. C. A., 118 Fed. 322. In Massachusetts a stockholder was allowed to file a bill against a corporation and an officer thereof to recover corporate funds misappropriated by the officer and to apply the same to a dividend due the complainant. *Dunphy v. Traveller Newspaper Ass'n*, 146 Mass. 495.

¹⁸ *Hayden v. Douglas County, Wisconsin*, C. C. A., 170 Fed. 24.

¹⁹ *International Tr. Co. v. Cartersville I. G. & W. Co.*, 63 Fed. 341, 346. See *infra*, § 146.

²⁰ *New Hampshire Sav. Bank v. Ritchey*, C. C. A., 121 Fed. 956.

tained by one defendant, with a prayer for relief against another to apply assets in payment of the same.²¹ A bondholder's bill to enforce a lien upon a fund in the possession of a corporation and to charge the directors individually for payments made to general creditors.²²

A bill was held multifarious which sought both to foreclose a mortgage and to restrain another defendant from asserting a claim of title adverse to both mortgagee and mortgagor,²³ when such adverse title accrued prior to the mortgage;²⁴ and even, it has been held in New York, when it subsequently arose;²⁵ and a bill to foreclose two mortgages by the same mortgagor upon separate lots owned by different persons;²⁶ or to foreclose a mortgage and recover damages from a third person for fraud in inducing the loan thereby secured.²⁷ But a party claiming a lien upon the property by a judgment against the mortgagor prior to the mortgage, the validity of which lien is contested by the mortgagee, may be joined as a party defendant in a foreclosure suit.²⁸

A bill may be filed to establish a lien, with a prayer for the enforcement of the individual liability of some of the defendants, whose indebtedness the lien secures.²⁹ A bill against different lienholders on the same property to have their bills settled and adjusted is not multifarious.³⁰ Nor a bill to set aside a lease of a mine and to obtain an injunction, damages, and an accounting against persons who under authority from the lessee have taken all from the same.³¹ A bill is multifarious which seeks to obtain a transfer of land from one defendant, and to restrain another

²¹ *Sawyer v. Atchinson, T. & S. F. R. Co.*, C. C. A., 129 Fed. 100.

²² *Cass v. Realty Securities Co.*, 148 App. Div. (N. Y.) 96.

²³ *Dial v. Reynolds*, 96 U. S. 340, 24 L. ed. 644. But see *California S. D. & I. Co. v. Cheney El. L. T. & P. Co.*, 56 Fed. 257; *Mendenhall v. Hall*, 134 U. S. 559, 568, 33 L. ed. 1012, 1015.

²⁴ *Ibid.*

²⁵ *Erie County Sav. Bank v. Schuster*, 187 N. Y. 111.

²⁶ *Eastern B. L. Ass'n v. Denton*, 65 Fed. 569.

²⁷ *Security S. & L. Ass'n v. Buchanan*, 66 Fed. 799.

²⁸ *Converse v. Michigan Dairy Co.*, 45 Fed. 18; *Copen v. Flesher*, 1 Bond, 440.

²⁹ *Ingersoll v. Coram*, 127 Fed. 418; reversed on another point, C. C. A.

³⁰ *Elder v. Western Mining Co.*, C. C. A., 237 Fed. 966, 976.

³¹ *Rumbarger v. Yokum*, 174 Fed. 55.

from asserting a conflicting claim to the same.³² So is a bill by an executor to settle the conflicting controversies between himself, the heirs of his testatrix, the heirs of her husband both of whom dispute bequests under her will, and one claiming to be a creditor of her estate.³³

A bill is *not* multifarious, which prays an accounting by one defendant under contracts made between him and the complainant, and joins another defendant, who is charged to be a secret partner with the former in these transactions, and who has received part of the profits of the same³⁴ or prays an accounting against a trustee and seeks to set aside a release of a claim of the estate given by him to a third person joined as a defendant;³⁵ but a bill was held to be multifarious which joined, with

³² Copen v. Flesher, 1 Bond, 440.

³³ Haines v. Carpenter, 1 Woods, 262. The following bills have also been held to be *multifarious*: A bill by a creditor of an estate to enjoin the sale, to pay debts, of firm lands purchased by him from the heirs, and to recover from the administrator and his sureties the amount of his debt. Banks v. Speers, 103 Ala. 436. A petition against the executors of the petitioners' deceased father and against three successive guardians of the petitioners themselves, praying an account by the defendants of their respective trusts and waiving discovery. Cornwell Mfg. Co. v. Swift, 89 Mich. 503; s. c., 50 N. W. 1001. A bill to enforce a claim for *devastavit* against the personal representatives of some of the sureties upon an administrator's bond, and for a settlement of the estate, which also sought to enforce against the representatives of the other sureties, in their individual capacities, the personal penalty for failure to give the notice to creditors required by law. Page v. Bartlett, 101 Ala. 193. See also Cocks v. Varney, 42 N. J. Eq. 514; Henninger v. Heald, 51 N.

J. Eq. 74; Bullock v. Knox, 96 Ala. 195; Dickerson v. Winslow, 97 Ala. 491; Smith v. Smith, 102 Ala. 516; Bolles v. Bolles, 44 N. J. Eq. 385, 14 Atl. 593; Wells v. S. & P. Guano Co., 89 Va. 708; Torrent v. Hamilton, 95 Mich. 159; Ashley v. City of Little Rock, 56 Ark. 391.

³⁴ McMullen Lumber Co. v. Strother, C. C. A., 136 Fed. 295.

³⁵ Pulver v. Leonard, 176 Fed. 586, 590. See Payne v. Hook, 7 Wall. 425, 433, 19 L. ed. 260. But bills were held *not* multifarious against an administrator *de bonis non*, the administrator of his predecessor and the holder of the only claim against the estate, for the purpose of completing the administration and disallowing the claim (Deans v. Wilcoxon, 25 Fla. 980); by heirs against executors under a will, the probate of which had been revoked, and those who had bought property of the state from them with notice of the invalidity of the will (Gaines v. Chew, 2 How. 619, 11 L. ed. 402); and by a surety upon an official bond against the principal, the other sureties and purchasers with notice of property upon which the bond gave a lien.

the executors and legatees under a will that it prayed to have set aside, another defendant who had a deed from the testator which it prayed should be cancelled.³⁶ Nor a bill to set aside transactions which form a series of acts connected with the same fraudulent design.³⁷ For example: creditors' bills to reach property fraudulently transferred to different corporations, the stock in which is owned and controlled by the judgment debtor,³⁸ and, to reach property, different parts of which have been sold to several defendants,³⁹ were held not to be multifarious; but where, in the same case, the complainant had obtained judgments against different defendants, it was held that he could not join in the same bill prayers to set aside as fraudulent several conveyances made by them of different property.⁴⁰ So were a bill filed by an assignee in bankruptcy against all the incumbrancers of his assignor's estate, some but not all of whom had liens upon the same property, to set aside their liens as fraudulent, and to have the property sold for the common benefit of the creditors;⁴¹ a bill filed by the beneficiary under several deeds of trust, some upon different parts of the same property, and one covering the entire property, against the trustees, the trustor, and the different persons claiming liens upon it,⁴² to set aside a will and deed, executed through the fraud and undue influence of one defendant, although other defendants claimed through him, different interests in the property in question;⁴³ a bill filed by one of the next of kin against both an administrator and his sureties, to

Schuessler v. Dudley, 80 Ala. 547. 60 Am. Rep. 124.

³⁶ Miller v. Weston, C. C. A., 199 Fed. 104.

³⁷ Field v. Western Life Indemnity Co., 166 Fed. 607.

³⁸ Fowler v. Palmer, C. C. A., 160 Fed. 1.

³⁹ Hultberg v. Anderson, 170 Fed. 657; U. S. v. Rea-Reed Mill & Elevator Co., 171 Fed. 501.

⁴⁰ Hobbs Mfg. Co. v. Gooding, 166 Fed. 933.

⁴¹ McLean v. Lafayette Bank, 3 McLean, 415. See also Jones v. Slauson, 33 Fed. 632; Potts v. Hahn, 32 Fed. 660; Pullman v.

Stebbins, 51 Fed. 10. *Contra*, Metcalf v. Cady, 8 Allen (Mass.) 587. In Mississippi a stockholder's bill was sustained which sought to set aside two separate deeds of trust executed by the corporation where one of the defendants owned a number of the bonds secured by each deed. Hardie v. Bulger, 66 Miss. 577.

⁴² Grant v. Phoenix Life Ins. Co., 121 U. S. 105, 30 L. ed. 905. See Pullman v. Stebbins, 51 Fed. 10; Hibernia Ins. Co. v. St. Louis & N. C. Transp. Co., 10 Fed. 596; s. c., 120 U. S. 166, 30 L. ed. 621.

⁴³ Williams v. Crabb, C. C. A., 59

obtain the plaintiff's share of the estate;⁴⁴ a creditor's bill against the members of two different firms, and the personal representatives of those who were dead, when some were members of both;⁴⁵ a bill to set aside an assignment of one partner's interest in the firm and then to divide the assets.⁴⁶ But it has been held: that a bill is multifarious and demurrable when it seeks to enjoin several persons from suing to recover damages from the defendants because of the same alleged act of negligence.⁴⁷ Or a bill filed to enjoin different actions upon promissory notes transferred by independent transactions to the different defendants and which had been obtained from the plaintiff by the same fraud.⁴⁸ Or a bill to enjoin two separate suits brought by different plaintiffs upon independent causes of action by the same attorney under agreement that they would sue simultaneously.⁴⁹ And a suit to restrain the extraction of oil from the complainant's land which joined with the trespassing extractors companies to whom the oil was sold by them.⁵⁰ A bill to enforce an equitable title, such as a trust,⁵¹ or to remove a cloud upon a complainant's title,⁵² may also seek partition after the primary relief has been established, provided that no defendants need to be joined who are not proper parties to a suit for the principal relief. A bill was sustained which sought partition and also the cancellation of tax deeds upon the common property held by strangers to the partition.⁵³

Persons who are acting in concert as employees or directors of the same corporation in the infringement of a patent or trade-

L.R.A. 425, 117 Fed. 193, 202;
James v. City Investing Co., 188
Fed. 513.

⁴⁴ Payne v. Hook, 7 Wall. 425.

⁴⁵ Nelson v. Hill, 5 How. 127, 12
L. ed. 81. See also Oliver v. Piatt,
3 How. 333, 11 L. ed. 622. But see
Griffin v. Merrill, 10 Md. 364.

⁴⁶ Hayes v. Heyer, 4 Sandford
Ch. (N. Y.) 485.

⁴⁷ Vandalia Coal Co. v. Lawson,
App. Indiana, Jan. 29, 1909, 87 N.
E. Rep. 47.

⁴⁸ Warnock Uniform Co. v. John
D. Garifalos and Max Kobre, 224
N. Y. 522.

⁴⁹ Robinson v. Wemmer, 253 Fed.
790.

⁵⁰ U. S. v. Thirty-Two Oil Co., 242
Fed. 730.

⁵¹ Hopkins v. Grimshaw, 165 U.
S. 342, 358, 41 L. ed. 739, 744;
Briges v. Sperry, 95 U. S. 461;
Hayes' Appeal, 123 Pa. St. 110;
Hayes v. Heyer, 4 Sandf. Ch. (N.
Y.) 517. But see Belt v. Bowie, 65
Md. 350.

⁵² Vreeland v. Vreeland, 48 N. J.
L. 56; s. c., 24 Atl. 551. But see
Robinson v. Springfield Co., 21 Fla.
203.

⁵³ Ulman v. Jaeger, 67 Fed. 980.

mark,⁵⁴ or who are charged with using a corporation as the means of such an infringement,⁵⁵ or, it was held, the manufacturer and sellers of the same articles,⁵⁶ may be joined with the corporation as defendants to a suit for an injunction and an accounting; but it has been held that a bill cannot join complainants against different violators of the same patent⁵⁷ or copyright,⁵⁸ when their infringements were not performed in confederacy with each other. But the soundness of the decision last cited has been doubted by Judge Story⁵⁹ and it was distinguished by Chancellor Kent.⁶⁰ It was held that a bill against an interfering patentee was multifarious when it joined the commissioner of patents as a defendant and prayed for a reissue.⁶¹ A bill of peace may be filed to dispose of the claims of a number of defendants, which all depend on the determination of a single question of fact or law.⁶² Such bills have been maintained when

⁵⁴ *Popperhusen v. Falke*, 4 Blatchf. C. C. 493.

⁵⁵ *Nerve Food Co. v. Baumbach*, 32 Fed. 205; *California F. S. Co. v. Improved F. S. Co.*, 51 Fed. 296.

⁵⁶ *Capewell Horse Nail Co. v. Green*, C. C. A., 188 Fed. 20.

⁵⁷ *Jewell v. City of Philadelphia*, 186 Fed. 639; *Edison v. Allis-Chalmers Co.*, 191 Fed. 837; *Climax Lock & Ventilator Co. v. Ajax Hardware Mfg. Co.*, 192 Fed. 126; *Taggart v. Bremner*, C. C. A., 236 Fed. 544.

⁵⁸ *Dilly v. Doig*, 2 Ves. Jr. 486. See *Thomas H. El. Co. v. Sperry El. Co.*, 46 Fed. 75.

⁵⁹ *Story's Eq. Pl.*, §§ 277, 278.

⁶⁰ *Brinkerhoff v. Brown*, 6 J. Ch. (N. Y.) 139, 155. See *Foxwell v. Webster*, 10 Jur. (N. S.) 137.

⁶¹ *Geld v. Gold*, 181 Fed. 544.

⁶² *Gaines v. Chew*, 2 How. 619, 11 L. ed. 402; *U. S. v. Curtner*, 26 Fed. 296, 298; *Hyman v. Wheeler*, 33 Fed. 329. Such are a bill by a parson or lord of a manor to establish a claim against all of his parishioners. *Brown v. Vermuden*, 1 Chan. Cas. 272. Or tenants, Con-

yers v. Lord Abergavenny, 1 Ark. 285; a bill by the owner of a fishery, *Mayor of York v. Pilkington*, 1 Atk. 284; or a water-right, *Union Mill S. M. Co. v. Dangberg*, 81 Fed. 73; to establish his claim against a number of riparian owners. Or by the owner of a fishery, to enjoin, from the use of the same, several persons who claim the right under a State statute, and who commit trespass upon the land of plaintiff, which are only incidental to their fishing. *Percy Summer Club v. Astle*, 145 Fed. 53; and to prevent injury to the stream, *Woodruff v. North Bloomfield G. M. Co.*, 16 Fed. 25; *Pacific L. S. Co. v. Handley*, 98 Fed. 327; *Warren v. Parkhurst*, 186 N. Y. 45, L.R.A. (N. S.) 1149, 78 N. E. 579, 9 Ann. Cas. 512. But see *Illinois Steel Co. v. Schweder*, 133 Wis. 561, 14 L.R.A. (N. S.) 239, 126 Am. St. Rep. 977, 113 N. W. 51; criticised 21 Law Review, 200. But a bill to enjoin the owners of a mill from floating logs over complainants' dam, and to recover damages for previous floatage, which joined as defendants former owners of the

filed: by a railroad company against several ticket-scalpers to enjoin their sale of tickets which by their terms could not be transferred, and the use of which could only be accomplished by a fraud.⁶³ To prevent several hackmen from congregating on the sidewalk adjacent to its station.⁶⁴ To enjoin different abutters from interfering with a right of way,⁶⁵ or different riparian owners from polluting a stream.⁶⁶ To enjoin different smelters from injuring the complainant's crops.⁶⁷ The owners of several mines were allowed to join in a suit to restrain different assayers from buying ore from laborers employed by the complainants, although there was no concert of action among the defendants in their various purchases.⁶⁸ Bills have been sustained when filed: To restrain the tax collectors of different counties from levying taxes separately assessed, but part of each of which was to be paid to the State, and the validity of all of which depended upon the construction of a single statute.⁶⁹ By a city to establish its claim to a tax against several of the class liable to the same.⁷⁰ To quiet a title against a number of claimants to land in severalty, the validity of the separate title of each of whom depends upon the construction of one special statute⁷¹ or the validity or construction of the same document⁷² or proceeding.⁷³

mill, was held to be *multifarious*. *Allison v. Davidson* (Tenn. Ch. App.) 39 S. W. 905. See *Car-michael v. Texarkana*, 94 Fed. 561. See *supra*, § 116.

⁶³ *Bitterman v. Louisville & N. R. Co.*, 207 U. S. 205, 52 L. ed. 171; *Nashville, C. & St. L. Ry. Co. v. McConnell*, 82 Fed. 65; *Illinois Cent. R. Co. v. Caffrey*, 129 Fed. 770; *Pennsylvania Co. v. Bay*, 150 Fed. 770.

⁶⁴ *Donovan v. Pennsylvania Co.*, 199 U. S. 279, 50 L. ed. 192.

⁶⁵ *Louisville & N. A. Co. v. Smith*, C. C. A., 128 Fed. 1.

⁶⁶ *Woodruff v. No. Bloomfield Gravel Co.*, 16 Fed. 25.

⁶⁷ *Am. Smelting & Refining Co. v. Godfrey*, C. C. A., 158 Fed. 225, 89 C. C. A., 139.

⁶⁸ *Goldfield Consol. Mines Co. v. Richardson*, 194 Fed. 198, reversed C. C. A., 202 Fed. 637.

⁶⁹ *Union Pac. R. Co. v. McShane*, 3 Dill, 303. But see *supra*, § 140.

⁷⁰ *London v. Perkins*, 2 Brown Parl. Cas. 652.

⁷¹ *Heckman v. U. S.*, 224 U. S. 413, 56 L. ed. 820; modifying and affirming *U. S. v. Allen*, C. C. A., 179 Fed. 13, which reversed *U. S. v. Allen*, 171 Fed. 907; *U. S. v. Flournoy L. S. & R. E. Co.*, 69 Fed. 886; *Central Pacific R. Co. v. Dyer*, 1 Saw. 641; see *Osborne v. Wisconsin Cent. R. Co.*, 43 Fed. 824; *supra*, § 140.

⁷² *Gaines v. Chew*, 2 How. 619, 11 L. ed. 402; *Crews v. Burcham*, 1 Black, 352, 17 L. ed. 91; *Hyman v. Wheeler*, 33 Fed. 329; *U. S. v. Curtner*, 26 Fed. 296; *U. S. v. Rea-Read Mill & Elevator Co.*, 171 Fed. 501. But see *Kansas City Southern Ry. Co. v. Quigley*, 181 Fed. 190.

⁷³ *Ulman v. Iaeger*, 67 Fed. 980.

A bill is not multifarious when brought to enjoin several members of a trade union or other persons from acts of violence or other trespasses in furtherance of a strike.⁷⁴ But it was held that the claimant of a large tract of land, separate parts of which were in the possession of different persons claiming title in various ways, could not enforce his rights against them all in a single bill.⁷⁵

Where the evidence did not justify a charge of combination made in the bill, it was dismissed for multifariousness upon the hearing.⁷⁶

§ 142. **Multifariousness without misjoinder of parties.** The Equity Rules of 1912 provide: "The plaintiff may join in one bill as many causes of action, cognizable in equity, as he may have against the defendant. . . . If it appear that any such causes of action cannot be conveniently disposed of together, the court may order separate trials."¹ This seems to abrogate the old doctrine of equitable practice, that a bill was bad for multifariousness when two or more distinct and uncon-

But bills were held to be *multifarious* when brought against thirty-four defendants to enforce thirty-four separate, although similar, contracts, *Cheney v. Goodwin*, 88 Me. 563; s. c., 34 Alt. 420; against fifteen defendants to cancel separate notes severally held by them, some of which were alleged to be forgeries and the others obtained by fraud, the forger and defrauder being a stranger to the suit, *Scott v. McPartland*, 70 Fed. 280; to enjoin several landowners from suing plaintiff because of his alleged nuisance, *Ducktown Sulphur, etc., Co. v. Fain*, 109 Tenn. 56, 70 S. W. 813. See *So. Penn. Oil Co. v. Calf Creek O. & G. Co.*, 140 Fed. 507, and to enjoin different persons from suing a telephone company in tort for removing telephones from their separate

premises. *Cumberland Tel. & Tel. Co. v. Williamson* (Miss.), 57 So. 559; following *Tribette v. Illinois Cent. R. Co.*, 70 Miss. 182, 19 L.R.A. 660, 35 Am. St. Rep. 642, 12 So. 32; overruling *Whitlock v. Yazoo & Mississippi Valley R. Co.*, 91 Miss. 779, 45 So. 861. See *Harv. Law Rev.*, XXV, 559.

⁷⁴ *Oxley Stave Co. v. Coopers' Int. Union*, 72 Fed. 695; *Casey v. Cincinnati Typ. Union*, 12 L.R.A. 193, 45 Fed. 135; *Arthur v. Oakes*, C. C. A., 25 L.R.A. 414, 4 Inters. Com. Rep. 744, 9 Am. Crim. Rep. 169, 63 Fed. 310; *supra*, § 115 *infra*, § 276.

⁷⁵ *Buchanan Co. v. Adkins*, C. C. A., 175 Fed. 692.

⁷⁶ *Coe v. Turner*, 5 Conn. 86. But see *infra*, § 143.

§ 142. ¹ Eq. Rule 26.

needed grounds of equitable relief were therein joined. A bill for the foreclosure of two mortgages can now be sustained.³

To create this defect under the former practice, it was requisite that the grounds of relief should be different and that each ground should be sufficient as stated to sustain a separate bill.³ A bill was considered to be multifarious when it joined two matters, where the necessary parties to the suit were the same, but their interests and attitude were decidedly at variance.⁴

Bills were held not to be multifarious when filed: to dissolve a partnership and to partition the estate, real and personal;⁵ to set aside and cancel an insurance policy and enjoin the further prosecution of an action to recover premiums paid upon the same;⁶ to compel the issue of a policy and at the same time collect the same;⁷ to reform a written agreement on account of a mistake and enforce its performance as reformed;⁸ to set aside the release of a judgment and to subject an equity in land to the payment of such judgment⁹ by a bondholder to compel a city to apply to their payment the proceeds of assessments, upon which he had a lien, and also praying to enforce a general liability by the city to pay the bonds;¹⁰ to foreclose a mortgage, with a prayer for the enforcement of the liability at common law of the owner of the mortgaged premises to pay rents to the mortgagor.¹¹

It has been said: "That when the right of a party to specific relief is so incumbered that he cannot assert that right against another until he has removed the incumbrance, he cannot include an attempt to get rid of the incumbrance in a suit for specific relief, which he might be entitled to have, if the incumbrance

³ *Elliott v. Klein*, 244 Fed. 463.

³ *Brown v. Guarantee Safe Dep. & Tr. Co.*, 128 U. S. 403.

⁴ See *Field v. Camp*, 193 Fed. 160; *Wilson v. American Ice Co.*, 206 Fed. 736; *Crawford v. Washington Northern R. Co.*, C. C. A., 283 Fed. 261.

⁵ *Briges v. Sperry*, 95 U. S. 401, 24 L. ed. 390.

⁶ *Eq. Life Assur. Soc. v. Patterson*, 1 Fed. 126.

⁷ *Herbert v. Mutual Life Ins. Co.*, 12 Fed. 807; *Brugger v. State Inc. Ins. Co.*, 5 Sawyer, 304, Fed. Cas. No. 2051.

⁸ *Gillespie v. Moon*, 2 J. Ch. (N. Y.) 585, 7 Am. Dec. 559.

⁹ *Ross v. Miller*, C. C. A., 252 Fed. 697.

¹⁰ *Olmsted v. City of Superior*, 155 Fed. 172.

¹¹ *Fidelity Tr. & Guaranty Co. v. Fowler Water Co.*, 113 Fed. 560.

were out of the way."¹² It was held, under the former rules, that an equitable owner of stock, whose title was contested, could not in the same suit obtain the legal title and also protection of the corporate assets.¹³ But the soundness of these decisions may be doubted, and, under the new rules, the doctrine, that equity having once obtained jurisdiction will afford full relief, may be enforced.

It has been held that a bill is not multifarious which joins an insufficient with a good case for equitable relief, when there is no misjoinder of parties, and that the proper course of the defendant is to demur to so much of the bill as is insufficient;¹⁴ but that a bill is multifarious which joins two inconsistent complaints by different plaintiffs. Under the former practice, where a cause of action arising under the laws of the United States was joined with one of which a Federal court had no original jurisdiction, and there was no diversity of citizenship, a demurrer for multifariousness was sustained.¹⁵ The fact that the complainants prayed for relief to which they were not entitled, or alleged facts not material to any relief was held not to make the bill multifarious.¹⁶ Since the new equity rules, it has been held: that when the complainant prayed relief which the court, because of a lack of diversity of citizen-

¹² *Inman v. N. Y. Interurban Water Co.*, 131 Fed. 997, 999; quoted with approval, *Witherbee v. Bowles*, 142 App. Div. (N. Y.) 407, 417, reversed, 201 N. Y. 427.

¹³ *Inman v. N. Y. Interurban Water Co.*, 131 Fed. 997, 999; *Witherbee v. Bowles*, 142 App. Div. (N. Y.) 407, 417, reversing 201 N. Y. 427; *U. S. Steel Corporation v. Hodge*, 64 N. J. Eq. 807, 809, 60 L. R.A. 742. *Contra*, *Weber v. Wallerstein*, No. 1, 111 App. Div. (N. Y.) 693. See *infra*, § 145.

¹⁴ *McCabe v. Bellows*, 1 Allen (Mass.) 269; *Snavely v. Harkrader*, 29 Gratt. (Va.) 112; *Everglades Drainage League v. Broward Drainage Dist.* 253 Fed. 246. *Story's Eq. Pl.*, § 283. *Contra*, *Hastings v. Douglas*, 249 Fed. 378, 384; *Price*

v. Union Land Co., C. C. A., 187 Fed. 886. See *Brown v. Guarantee Trust Co.*, 128 U. S. 403, 32 L. ed. 468.

¹⁵ *Keasby & Mattison Co. v. Philip Cary Mfg. Co.*, 113 Fed. 432; *C. L. King & Co. v. Inlander*, 133 Fed. 416. *Contra*, *Onondaga Indian Wigwam Co. v. Ka-Noo-No Indian Mfg. Co.*, 182 Fed. 832. See, also, *Jaros Hygienic Underwear Co. v. Fleece Hygienic Underwear Co.*, 60 Fed. 622; *Ball & Socket Fastener Co. v. Cohn*, 90 Fed. 664; *Adam v. Folger*, C. C. A., 120 Fed. 260; *G. Heileman Brewing Co. v. Independent Brewing Co.*, C. C. A., 191 Fed. 489. See *supra*, § 24.

¹⁶ *Everglades Drainage League v. Broward Drainage Dist.*, 253 Fed. 246.

ship as to the controversy thereover, had no jurisdiction to grant, the bill should be dismissed as multifarious unless they filed a disclaimer of all right thereto.¹⁷ Where the requisite diversity of citizenship was pleaded, such joinder might be made when the transactions were connected;¹⁸ but not, in a patent case, where the infringement was committed within the district, but neither party was a citizen or resident thereof.¹⁹

Under the former practice, it was not multifarious to seek, in the same bill, an injunction against the infringement of several copyrights by the same publication²⁰ or theatrical performance,²¹ or in different States where the general method of the infringement was the same and the acts were committed pursuant to a common purpose by the defendant.²² Where diverse citizenship exists and the jurisdictional amount is involved, the bill may join prayers to restrain the infringement of a trade mark²³ or of a patent²⁴ and to restrain unfair competition. A bill may seek to restrain the infringement by the same defendant of separate patents owned by the plaintiff.²⁵ It has been held, in England, that plaintiff may not sue the defendant for the infringement of twenty-three patents, but that he will be limited to selecting no more than three of them for joinder of acts of infringement thereof in the same suit.²⁶ The former rules concerning the joinder of complaints against the infringement of different patents are considered in a subsequent section.²⁷

§ 143. Objections for multifariousness or misjoinder. An objection to a bill for multifariousness or a misjoinder of parties or of causes of action, when it appears upon the face of the bill, should be taken by a motion to dismiss upon that specific

¹⁷ *Hastings v. Douglas*, 249 Fed. 378, 384.

¹⁸ *Havens v. Burns*, 188 Fed. 441.

¹⁹ *Woerheide v. H. W. Johns-Manville Co.*, 199 Fed. 535.

²⁰ *Amberg F. & I. Co. v. Shea*, C. C. A., 82 Fed. 314; *Harper v. Holman*, 84 Fed. 222.

²¹ *Empire City Amusement Co. v. Wilton*, 134 Fed. 132.

²² *Bracken v. Rosenthal*, 151 Fed. 136.

²³ *Samson Cordage Works v. Puritan Cordage Mills*, C. C. A., 211 Fed. 603.

²⁴ *Miller Rubber Co. v. Behrend*, C. C. A., 242 Fed. 515.

²⁵ *Elliott Co. v. Lagonda Mfg. Co.*, 205 Fed. 152; *Eclipse Mach. Co. v. Harley Davidson Motor Co.*, 244 Fed. 463; *Crystal Percolator Co. v. Landers*, 258 Fed. 28.

²⁶ *Saccharin Corporation v. Wild* (1903, C. A.), 1 Ch. 410. See *Saccharin Corporation v. White* (C. A.), 88 L. T. 850.

²⁷ *Infra*, § 146.

ground.¹ The rule formerly was that the objection should be raised by a special demurrer.² If not apparent upon the face of the bill, it is doubtful whether it can be raised by plea or answer.³ If it is shown by the bill, it can never be taken for the first time at the hearing⁴ or upon appeal;⁵ but the court may, of its own motion, dismiss a bill for multifariousness at any time;⁶ and perhaps the objection that the rights of the complaints are inconsistent can be raised at the hearing.⁷ In one case the court, at the hearing, required the petitioner to elect which claim it should enforce, and then dismissed the rest of the petition.⁸

The objection cannot be taken by a defendant who is not injured by it.⁹ The misjoinder of a defendant against whom the

§ 143. 1 Eq. Rule. 29.

² *Nelson v. Hill*, 5 How. 127, 12 L. ed. 81; *Herndon v. Chicago, Rock Island & Pac. Ry. Co.*, 218 U. S. 135, 155, 54 L. ed. 970, 976.

³ *Benson v. Hadfield*, 4 Hare, 32; *Greenwood v. Churchill*, 1 M. & K. 559; *Gibbs v. Glagett*, 2 Gill & J. (Md.) 14; *Putnam v. Hollander*, 6 Fed. 882; *Story's Eq. Pl.*, § 747; *Beames on Pleas*, 157, 158. But see *Coe v. Turner*, 5 Conn. 86.

⁴ *Greenwood v. Churchill*, 1 M. & K. 559; *Oliver v. Piatt*, 3 How. 333, 412, 11 L. ed. 622, 658; *Nelson v. Hill*, 5 How. 127, 12 L. ed. 81; *Bowman's Devises v. Wathen*, 2 McLean, 376; *U. S. v. Reading Co.*, 183 Fed. 427.

⁵ *Oliver v. Piatt*, 3 How. 333, 412, 11 L. ed. 622, 658; *Barney v. Latham*, 103 U. S. 205, 215, 26 L. ed. 514, 518; *Converse v. Michigan Dairy Co.*, 45 Fed. 18; *Herndon v. Chicago, Rock Island & Pac. Ry. Co.*, 218 U. S. 135, 54 L. ed. 970; *Miller Rubber Co. v. Behrend*, C. C. A., 242 Fed. 515.

⁶ *Oliver v. Piatt*, 3 How. 333, 412, 11 L. ed. 622, 658; *Nelson v. Hill*, 5 How. 127, 132, 12 L. ed. 81, 83;

Greenwood v. Churchill, 1 M. & K. 559; *Ohio v. Ellis*, 10 Ohio, 456; *Herndon v. Chicago, Rock Island & Pac. Ry. Co.*, 218 U. S. 135, 54 L. ed. 970; *Miller Rubber Co. v. Behrend*, C. C. A., 242 Fed. 515.

⁷ *Davies v. Quarterman*, 4 Y. & Coll. 257.

⁸ *State Trust Co. v. Kansas City, P. & G. R. Co.*, 128 Fed. 129.

⁹ *Buerk v. Imhaeuser*, 8 Fed. 457; *Metropolitan Trust Co. v. Columbus, S. & H. R. Co.*, 93 Fed. 689; *Missouri Broom Mfg. Co. v. Guymon*, C. C. A., 115 Fed. 112. Where a contractor had agreed to pay an employee a percentage of the profits of contracts with different municipalities, it was held that a bill by the employee, joining the municipalities as co-defendants with the contractor, for an accounting, though said to be subject to dismissal for multifariousness at the instance of one of the municipalities, was not so at that of the contractor. *Olds v. Regan* (N. J. Ch.), 32 Atl. 827. See also *Couse v. Columbia Power Mfg. Co.* (N. J. Ch.), 33 Atl. 331.

bill states no ground for relief is not a cause for a demurrer by the other defendants.¹⁰ Multifariousness as to subjects or parties does not render a decree void, so that it can be treated as a nullity in a collateral action,¹¹ although the case shown by the principal plaintiff is not sufficient.¹² When a bill was held to be multifarious for uniting an insufficient cause of action with one that was good, it was held that the plaintiff should be given the right to replead,¹³ or to file a disclaimer of the insufficient cause of action;¹⁴ and upon his failure to do so, the dismissal should be without prejudice.¹⁵ It is within the constitutional power of Congress to pass a law allowing, in a single specified suit against a corporation chartered by it, matters and defendants to be joined in a manner that would otherwise constitute multifariousness.¹⁶

The question in each instance where it arises calls for the exercise of the discretion of the court, regard being had to considerations of convenience and the substantial rights of the parties.¹⁷ Multifariousness depends so much upon the discretion of the courts of first instance that a decision overruling an objection upon that ground would not be reviewed upon appeal,¹⁸ except under very extraordinary circumstances. When an objection for multifariousness is sustained the complainant will always be allowed, if he asks leave to do so, to amend upon payment of costs.¹⁹ If the bill is dismissed, the dismissal should be without prejudice.²⁰ In general, it may be remarked that

¹⁰ Warthen v. Brantley, 5 Ga. 571; Whitbeck v. Edgar, 2 Barb. Ch. (N. Y.) 106; Miller v. Jamison, 9 C. E. Green (N. J.), 41 Story's Eq. Pl., § 544.

¹¹ Hefner v. Northwestern Life Ins. Co., 123 U. S. 747, 31 L. ed. 309.

¹² Walker v. Powers, 104 U. S. 245, 249, 26 L. ed. 729, 731; Bracken v. Rosenthal, 151 Fed. 136.

¹³ Price v. Union Land Co., C. C. A., 187 Fed. 886.

¹⁴ Hastings v. Douglas, 249 Fed. 378, 384.

¹⁵ Price v. Union Land Co., C. C. A., 187 Fed. 886.

¹⁶ U. S. v. Union Pacific R. Co., 98 U. S. 569, 25 L. ed. 143.

¹⁷ Weir v. Bay State Gas Co., 91 Fed. 940, per Dallas, J.

¹⁸ See Gaines v. Chew, 2 How. 619, 11 L. ed. 402; Oliver v. Piatt, 3 How. 333, 11 L. ed. 622; Barney v. Latham, 103 U. S. 205, 26 L. ed. 514; Graves v. Ashburn, 215 U. S. 331, 54 L. ed. 217; Sheldon v. Keokuk N. L. Packet Co., 8 Fed. 769; Hosmer v. Wyoming Ry. & Iron Co., 126 Fed. 884.

¹⁹ Walker v. Powers, 104 U. S. 245, 249, 26 L. ed. 729, 731; Price v. Coleman, 21 Fed. 357.

²⁰ Field v. Camp, C. C. A., 201

multifariousness is an objection much more often taken than sustained.²¹

§ 144. General rules of equity pleading. Otherwise, the rules regulating the frame of a bill and, with the exceptions subsequently given, of other pleadings in equity are substantially the same as those of pleading at common law; but more liberality is used in their construction,¹ and the use of technical expressions is never necessary.² The Equity Rules of 1912 provide: "Unless otherwise prescribed by statute or these rules the technical forms of pleadings in equity are abolished."³ When a second cause of action is founded in part upon some of the same facts set forth in the pleading of the first cause of action, it is the better practice to include them by reference.⁴

An allegation that the plaintiff is seized in fee simple is equivalent to an allegation that he is in possession.⁵ If the

Fed. 682; *Price v. Union Land Co.*, C. C. A., 187 Fed. 886.

²¹ Quoted with approval, *United Cigarette Mach. Co. v. Wright*, 132 Fed. 195.

§ 144. ¹ *Daniell's Ch. Pr.* (2d Am. ed.), 413. *Supra*, § 137.

² *Daniell's Ch. Pr.* (2d Am. ed.), 414.

³ Eq. Rule 18.

⁴ *Maxwell Steel Vault Co. v. Nat. Casket Co.*, 205 Fed. 515.

⁵ *Gage v. Kaufman*, 133 U. S. 471, 33 L. ed. 725. A plea which simply alleged that the defendant was "the sole owner in fee simple" of the property in question was held to be bad as a conclusion of law. *McCloskey v. Barr*, 38 Fed. 165. It was said: that, in a suit to remove a cloud from the title of land, generally, "it will be found sufficient for the plaintiff to allege his possession, and interest or estate in the land, as that he is the owner thereof in fee for life or for years, and that he claims the same by a regular chain of conveyances from some recognized and undisputed

source of title, as, the United States, or its donee under the donation act of September 27, 1850, without setting out such conveyances or stating them in detail. But when there is reason to believe, as in this case and many others, that the rightfulness of the defendant's claim depends on the validity or legal effect of some link or links in the conveyances under which the plaintiff claims title, it is very convenient, if not necessary, that the statement of the plaintiff's case should contain the facts fully and in detail at that point in the chain of his title where it conflicts with the claim of the defendant. By so doing the necessity of future amendments will be avoided, and the progress and dispatch of the case promoted." A demurrer to a bill for a lack of certainty in this respect was sustained. *Goldsmith v. Gilliland*, 22 Fed. 865. But see *Thomas v. Nantahala M. & T. Co.*, 58 Fed. 485. On the foreclosure of a mortgage for default in payment of interest coupons, an allegation

plaintiff claim under a derivative title, he must show the steps by which it has come into existence;⁶ but this is not ordinarily necessary when the plaintiff prays protection to rights connected with land, of which he is in possession.⁷ Where, in a suit to restrain, the diversion of the waters of a stream, the complainant's claimed to be prior appropriators as to a certain number of cubic inches of water, and to be entitled to additional amounts as the grantees of other appropriators; it was held, that the bill should allege on what lands such additional amounts of water, appropriated by complainants' grantors, were used by them.⁸ A bill which alleged that the plaintiffs were the owners of an interest in trust funds of approximately a specific amount held by a corporation, a receiver for which was prayed, was held to be insufficient.⁹ Where, however, there is an existing privity between the plaintiff and defendants, independently of the plaintiff's title, which gives the plaintiff a right to maintain the suit; as, for example, if they are landlord and tenant, or mortgagor and mortgagee, then it is not necessary to state the plaintiff's title fully in the bill.¹⁰ The following allegation was held to be sufficient to show that the person who had filed the claim had possession of the collateral: "Your petitioners are informed and believe, and therefore allege, that the said Belin or his agents, among them the First National Bank of Scranton, Pa., still hold said note and said collateral. Said Belin has filed his claim on said note under order of the court made in this pro-

that they are due and wholly unpaid "to your orator and other holders of said bonds" was held a sufficient allegation of ownership. *Toler v. East Tennessee, V. & A. Ry. Co.*, C. C. A., 67 Fed. 168.

⁶ *Lord Digby v. Meech*, Bunb. 195; *Humphreys v. Tate*, 4 Iredell's Eq. (N. C.) 220; *Marshall v. Turnbull*, 34 Fed. 827; *Daniell's Ch. Pr.* (2d Am. ed.) 369, 370. For a case upon the sufficiency of allegations in a bill that complainants comprise all the heirs and next of kin of deceased, as showing complainants' title, the bill also containing the decree of distribution, see *Hubbard*

v. Urton, 67 Fed. 419. "It is not necessary, when all the legal and equitable owners are joined, to state the formalities or the mode of conveyance by which the equitable interests became vested in the co-complainants." *Shipfan, J.*, in *Black v. Henry G. Allen Co.*, 9 L. R. A. 433, 42 Fed. 618, 623.

⁷ *Miller & Lux v. Rickey*, 127 Fed. 573.

⁸ *Miller & Lux v. Rickey*, 127 Fed. 573.

⁹ *Cummings v. Supreme Council of Royal Arcanum*, 247 Fed. 992.

¹⁰ *Daniell's Ch. Pr.* (2d Am. ed.) 370, 371.

ceeding requiring claims against Aetna Explosives Company, Incorporated, to be so filed."¹¹ Where the bill alleged that complainant delivered certain securities to defendant, as trustee and depositary, to hold and thereafter deliver and distribute to him as directed by the complainant, but did not set forth the terms and conditions of the deposit, so as to show that it was not a mere bailment; it was held, that the bill did not aver trust sufficient to confer jurisdiction upon a court of equity.¹²

If the plaintiff's title would be incomplete without the performance of some preliminary act, then a performance must be alleged, and a mere statement that the title is complete was insufficient.¹³ It has been held: that a wife's willingness to join in her husband's conveyance need not be affirmatively shown since the law assumes her willingness to unite with him in conveying the property which he has agreed to convey.¹⁴ In a bill filed by an executor or an administrator, it seems to be sufficient

¹¹ Grasselli Chemical Co. v. Aetna Explosives Co., 247 Fed. 603.

¹² Young v. Mercantile Trust Co., C. C. A., 145 Fed. 39; Ford v. Charles E. Blaney Amusement Co., 148 Fed. 642.

¹³ Walburn v. Ingilby, 1 M. & K. 61; Daniell's Ch. Pr. (2d Am. ed.) 369; *infra*, § 150. An allegation that the complainant acquired the title by purchase from the assignee in bankruptcy of the original owner was held sufficient, although it did not state that the assignee in bankruptcy obtained an order from the court authorizing him to make the sale. Amory v. Lawrence, 3 Cliff. 523. Where the plaintiff sued as a shareholder of a joint-stock company, and merely alleged in his bill "that he purchased for valuable considerations divers shares, upon which the instalment of five per cent. had been paid, and that he ever since has been, and now is, the holder of such shares;" while in another part of the bill it was alleged "that by the rules of the asso-

ciation, as set forth in the prospectus, no transfer of shares would be valid in law or equity, unless the purchaser was approved by a board of directors, and signed an instrument binding him to observe the regulations,"—it was held, on demurrer, that such action on the part of the board and the purchaser was a condition precedent to the transfer of the title to a share of stock; and that the bill was defective for not alleging such action. Walburn v. Ingilby, 1 M. & K. 61. A complainant who rests his title upon a tax deed must plead performance of the prerequisites to the validity of the deed. Greenwall v. Duncan, 16 Fed. 35; Walburn v. Ingilby, 1 M. & K. 61; Atwill v. Ferrett, 2 Blatchf. C. C. 39; Chicago Music Co. v. J. W. Butler Paper Co., 19 Fed. 78; Trow City Directory Co. v. Curtin, 36 Fed. 829; Ford v. Charles E. Blaney Amusement Co., 148 Fed. 642, 645.

¹⁴ Dixon v. Anderson, C. C. A., 252 Fed. 694.

to state that the will has been proved, or letters of administration taken out, "in the proper court," without naming it.¹⁵ If, however, the plaintiff undertake to name the court, and it be an improper or insufficient one, the bill is demurrable.¹⁶ An allegation that the defendant is a trustee is insufficient without a statement of the facts which make him a trustee.¹⁷

When the nature of the conveyance through which the plaintiff claims is such that by common law, independent of a statute, as, for example, the statute of frauds, no deed, writing, or other formality was essential to its validity, the English rule was that compliance with such formality need not be alleged.¹⁸ In this respect equity followed the rule at common law, that such statutory regulations did not alter the form of pleadings.¹⁹ If, however, it appeared upon the face of the bill that compliance had not been made with such a formality, the bill was demurrable upon that ground.²⁰ But when a right has been originally created by statute, as a right to land by devise, or in this country a patent or copyright, according to the former practice, a compliance with the statutory requirements had to be alleged by one claiming under it.²¹ It has been held that an estoppel *in pais* must be pleaded by the party who seeks to avail

¹⁵ *Humphreys v. Ingledon*, 1 P. Wms. 752; *Black v. Henry G. Allen Co.*, 42 Fed. 618, 623. The averment that the complainant was "duly appointed administrator" was held insufficient; the issue of letters of administration must be alleged. *Otto v. Regina M. B. Co.*, 87 Fed. 510. Where the state statute (Minn. R. L. 1905, § 3842) authorizes a foreign guardian to sue in the state provided he file an authenticated copy of letters in the probate court in the county where the ward's property is situated, it was held that a bill by such a guardian was not demurrable for failure to allege the filing of such a copy. *Pulver v. Leonard*, 176 Fed. 586.

¹⁶ *Tourton v. Flower*, 3 P. Wms. 369; *Black v. Henry G. Allen Co.*,

9 L.R.A. 433, 42 Fed. 618, 624; *Daniell's Ch. Pr.* (2d ed.) 264.

¹⁷ *Evan v. Avon*, 29 Beav. 144.

¹⁸ *Daniell's Ch. Pr.* (2d Am. ed.) 416; *Harrison v. Hogg*, 2 Ves. Jr. 327.

¹⁹ *Daniell's Ch. Pr.* (2d Am. ed.) 416; *Stephen on Pleading*, 313.

²⁰ *Randall v. Howard*, 2 Black, 585, 589, 17 L. ed. 269, 271; *Daniell's Ch. Pr.* (2d Am. ed.) 417; *Redding v. Wilkes*, 3 Brown, C. C. 401.

²¹ *Daniell's Ch. Pr.* (2d Am. ed.) 419; *Sullivan v. Redfield*, 1 Paine, 441; *Atwill v. Ferrett*, 2 Blatchf. C. C. 39; *Walburn v. Ingilby*, 1 M. & K. 61; *Atwill v. Ferrett*, 2 Blatchf. C. C. 39; *Chicago Music Co. v. J. W. Butler Paper Co.*, 19 Fed. 758; *Trow City Directory Co. v. Curtin*, 36 Fed. 829; *Ford v. Charles E.*

himself of the same.²² A bill to set aside a patent of public lands must show that the patent was issued to the wrong party through fraud, or gross mistake, or erroneous construction of law.²³ A bill which averred a settlement, improvement, failure to post notices of claims, plaintiff's adverse possession for ten years, and the subsequent issue of a patent to the defendant, and that he claims some title, estate, and interest in the lands by reason of the patent, was held to be insufficient.²⁴ Where complainant for fraud or a mistake in fact attacks a patent, issued by the Land Department, he must plead and prove the evidence before the department, show the particular mistake that was made, the way in which it occurred, and the fraud, if any, which induced the issue of the patent.²⁵ "The rule in equity is that it is not sufficient to charge a fraud simply, but you must charge also some injury as the result of the fraud."²⁶ Where a bill shows apparent laches, it should set forth the impediments to an earlier suit, the cause of the complainant's previous ignorance, if any, of his rights, and when he first knew of them.²⁷

In construing a bill in equity, every doubt is against the pleader;²⁸ but contracts by corporations are presumed to be within their charters until the contrary is shown.²⁹ When the bill contains general and specific allegations as to the same matter, the general allegations will be referred to those which are specific.³⁰ Exhibits attached to the bill, and therein referred

Blaney Amusement Co., 148 Fed. 642, 645; *infra*, §§ 146, 150. This rule of equity practice is enforced under the English Rules of 1883. *Seear v. Lawson*, 16 Ch. D. 621; *Read v. Brown*, 22 Q. B. D. 128; *Davis v. James*, 26 Ch. D. 778.

²² *Maybury v. Louisville & J. F. Co.*, 60 Fed. 645.

²³ *Reed v. St. Paul N. & M. Ry. Co.*, 234 Fed. 207.

²⁴ *Ibid.*

²⁵ *Le Marchel v. Teegarden*, 133 Fed. 826; *U. S. v. Pratt C. & C. Co.*, 18 Fed. 708; *Murphy v. East Portland*, 42 Fed. 308; *Lehigh Z. & I. Co. v. N. J. Z. & I. Co.*, 43 Fed.

545, 546; *Olson v. Nor. R. Co.*, 43 Fed. 112. But see *Robinson v. Suburban Brick Co.*, C. C. A., 127 Fed. 804.

²⁶ *Linn v. Green*, 17 Fed. 407.

²⁷ *Badger v. Badger*, 2 Wall. 87, 17 L. ed. 836; *Richards v. Mackall*, 124 U. S. 183, 31 L. ed. 396; *Gandy v. Marble*, 122 U. S. 432, 30 L. ed. 1223; *Wollensak v. Reiher*, 115 U. S. 96, 29 L. ed. 350.

²⁸ *Phelps v. McDonald*, 99 U. S. 298, 305, 25 L. ed. 473, 475.

²⁹ *Express Co. v. Railroad Co.*, 99 U. S. 191, 199, 25 L. ed. 319, 320.

³⁰ *Ellis v. Colman*, 25 Beav. 662;

to, are considered as a part of the same.³¹ "As to exhibits, they are a mere matter of indulgence. In good pleading, strictly, the bill should give the requisite full information of itself; but indulgence to loose practice and convenience has allowed exhibits with explicit reference to them in the bill, and they may be referred to in aid of the bill; but they may not be omitted altogether, as here, and the pleader content himself with a naked reference by its date to some document of record in a far-away place."³² "Good pleading requires that everything that is material to the case should be set forth in the pleading itself by proper averments. This may be done in general terms, and the exhibit may be referred to for greater certainty as to particular details, but the pleading ought to contain the substance of the case."³³ Where the plaintiff's title is intelligently shown, there is no need for profer of the documents upon which it is founded.³⁴

§ 145. Stockholders' bills. By the Equity Rules of 1912, "Every bill brought by one or more stockholders in a corporation against the corporation and other parties, founded on rights which may properly be asserted by the corporation, must be verified by oath, and must contain an allegation that the plaintiff was a shareholder at the time of the transaction of which he complains, or that his share had devolved on him since by operation of law, and that the suit is not a collusive one to confer on a court of the United States jurisdiction of a case of which it would not otherwise have cognizance. It must also set forth with particularity the efforts of the plaintiff to secure such action as he desires on the part of the managing directors or trustees, and, if necessary, of the shareholders, and the causes of his failure to obtain such action, or the reasons for not making such effort."¹ This, with the exception of the last clause, is the new promulgation of a former equity rule, adopted during the October term, 1881.²

Lumley v. Wabash Ry. Co., 71 Fed. 21; Story's Eq. Pl., § 37a.

³¹ Black v. Henry G. Allen Co., 9 L.R.A. 433, 42 Fed. 618, 625; *infra*, § 366.

³² Hammond, J., in Electrolibration Co. v. Jackson, 52 Fed. 773, 776. But see *infra*, § 146.

³³ Chancellor Ellett in Harvey v. Kelly, 41 Miss. 490, 98 Am. Dec. 267.

³⁴ La. Republique Francaise v. Schultz, 57 Fed. 379. But see *infra*, § 146.

§ 145. 1 Eq. Rule 27.

² Old Eq. Rule 94.

The original object of the rule was to prevent suits brought by stockholders, in collusion with the corporation, in Federal courts, which otherwise would not have had jurisdiction thereof, and to remedy abuses in this respect, which had then become a common practice.³ It has been extended in the lower courts so as often to defeat the rights of shareholders and shield and encourage dishonesty by directors and officers of corporations.⁴ It has been held by one Circuit Court to apply to a suit removed from the courts of the State, the practice of which required no such allegations.⁵

That part of the rule which forbids such a suit by a party who has bought the stock in good faith and for a valuable consideration, since the cause of action arose, might well be attacked as unconstitutional. That such a purchasing stockholder has the right to bring such a suit has been held by the courts of New Hampshire,⁶ Illinois,⁷ Alabama,⁸ Montana,⁹ Idaho,¹⁰ Pennsylvania,¹¹ New Jersey,¹² and New York.¹³ The opposite

³ *Hawes v. Oakland* (Hawes v. Contra Costa Water Co.) 104 U. S. 450, 460, 461, 26 L. ed. 827, 832, where Mr. Justice Miller said that a stockholder could not file a bill founded upon rights which might properly be asserted by his corporation against the company and other parties, unless these facts existed. See also *Huntington v. Palmer*, 104 U. S. 482, 26 L. ed. 833; *Greenwood v. Freight Co.*, 105 U. S. 13, 26 L. ed. 961; *Detroit v. Dean*, 106 U. S. 537, 27 L. ed. 300; *Quincy v. Steel*, 120 U. S. 241, 30 L. ed. 624.

⁴ For an extraordinary case, see *Bartlett v. N. Y. N. H. & H. R. R. Co.*, 221 Mass. 530.

⁵ *Venner v. Great Northern Ry. Co.*, 153 Fed. 408, affirmed on question of jurisdiction only, 209 U. S. 24, 52 L. ed. 666. *Contra*, *Earle v. Seattle, L. S. & E. R. Co.*, 56 Fed. 909; *s. c.*, *Eabens v. Union Pac. Ry. Co.*, 58 Fed. 497; *Maeder v. Buffalo Bill's Wild West Co.*, 132 Fed. 280.

⁶ *Winsor v. Bailey*, 55 N. H. 218.

⁷ *City of Chicago v. Cameron*, 22 Ill. App. 91, affirmed 120 Ill. 447.

⁸ *L. & P. Co. v. Lahey*, 121 Ala. 131.

⁹ *Forrester v. B. & M., etc., Co.*, 21 Mont. 544, 565.

¹⁰ *Just v. Idaho Canal, etc., Co.*, 16 Idaho, 639, 133 Am. St. Rep. 140, 102 Pac. Rep. 381.

¹¹ *Rafferty v. Donnelly*, 197 Pa. St. 423.

¹² *Appleton v. Am. Malting Co.*, 65 N. J. Eq. 375.

¹³ *Pollitz v. Gould*, 202 N. Y. 11, 38 L.R.A.(N.S.) 988, Ann. Cas. 1912D, 1098. The argument of Judge Hiscock seems unanswerable. "As an original proposition it would seem to be clear that a right of action by or in behalf of the corporation for fraud to set aside a conveyance of its assets or to avoid obligations imposed upon it is part of its rights, property and assets in which a stockholder has this indivisible interest transferable by the

transfer of his certificates. I am unable to see any real or substantial distinction by virtue of which a stockholder transferring his certificates would transfer all of his indivisible interest in bonds or real estate on hand, but would not transfer his interest in a right of action to recover bonds or real estate which had been fraudulently withdrawn from the possession of the corporation, and which it was entitled to recover. And if the subsequent holder by acquiring the certificates does acquire such latter interest, it seems to follow that he may, if necessary, in behalf of the corporation, assert and prosecute an action to protect and enforce the same.

“Brief reference may be made to some of the reasons advanced in opposition to this view. Counsel points out practical inconvenience which he says will result from its application, owing to the difficulties in tracing stock and distinguishing that which has not assented to the transaction from that which has or from that which perhaps has been issued since its consummation. These arguments, however, are so counterbalanced by corresponding claims from the opposite standpoint as to be of little weight.

“Again, it is argued that if one buys stock subsequent to the transaction he should be regarded as buying subject to it and not be permitted to question it. If the prior holder should give binding consent to the transaction, this under certain circumstances undoubtedly would prevent the subsequent purchaser from questioning it. But, in the absence of special circum-

stances, I fail to see any principle of estoppel or logic which makes a subsequent purchase of stock so subject to a fraudulent corporate transaction that the purchaser may not insist upon its being set aside. There is scarcely any analogy between the situation of one who buys property from an individual which the latter has subjected to a transaction which has not been disaffirmed and that of one who purchases stock in a corporation which has the continuing right before and after the purchase to disaffirm a wrong which has been perpetrated on it by its agents. There is little or no basis for the practical consideration that one who buys stock should be deemed to have adjusted his price to an existing transaction even though voidable. If he knows of it he may just as properly be assumed to have adjusted his price to the knowledge that the transaction may still be disaffirmed and avoided.

“Then, lastly, an argument is made which seems to be founded on the idea that in order to bring an action of this nature the stockholder must in effect disaffirm the corporate transaction and that this disaffirmance involves a personal right of election which vests in the one holding the stock when the transaction is consummated and which cannot be transferred. It is said ‘the right to question a fraud is not a purchasable commodity,’ and is not ‘capable of assignment and transfer,’ and does not pass ‘as an implied incident to every sale of corporate stock,’ and this view seems to be supported by some of the many cases which have been

position is taken by the courts of Georgia,¹⁴ Colorado,¹⁵ New Mexico,¹⁶ North Carolina,¹⁷ Iowa,¹⁸ Nebraska.¹⁹

This doctrine does not apply to a bill by the stockholder to enforce rights held by him in his own capacity such as to enjoin the execution or enforcement of a contract beyond the powers of the corporation,²⁰ or a contract to which a statute requires

collected and reviewed by counsel with manifest industry and care.

"So far as this argument means to assert that a mere naked right to question a corporate transaction could not be transferred to a stranger, if such an attempt can be conceived of, it may be assumed to be true. But the assertion that the right to protect stock by procuring an improper corporate transaction to be vacated does not pass on a transfer of the stock is a very different proposition.

"The election to disaffirm a fraudulent corporate transaction belongs to and is exercised in the right and name of the corporation and not of the stockholder. The stockholder demands that the right shall be exercised and the cause of action be prosecuted by the corporation or does it himself for the corporation. It is conceded that the one holding the stock when the fraud is consummated has this right. When he transfers his certificates the transaction still stands a continuing wrong impairing the surplus of the company and affecting the stock. If the transferee has the right to have it avoided it will protect and increase the value of his stock. If he has not acquired this right it is the only one held by his predecessor in or through the corporation which has been thought of which has not been transferred by the transfer of the stock. It will be an anomalous exception if the prior holder retains

the right to maintain or have maintained this action while he passes all of his other rights by the transfer of his stock. The only justification pleaded for this is the idea suggested of a personal and non-transferable right of election to disaffirm vested in the original holder. But this theory is entirely unsubstantial. Such prior holder does not acquire this right to object to the transaction and bring an action to set it aside as a power conferred upon him by reason of any personal qualities, but because of his character as a stockholder, and when he loses this character and transfers it to another with his stock there is no reason why the latter should not exercise the right as a proper and necessary incident to and for the benefit of his stock ownership."

¹⁴ *Alexander v. Searcy*, 81 Ga. 536, 12 Am. St. Rep. 337.

¹⁵ *Boldenweck v. Bulhis*, 40 Colo. 253.

¹⁶ *Rankin v. S. W. B. & I. Co.*, 12 N. Mex. 54.

¹⁷ *Moore v. Silver Valley Co.*, 104 N. C. 534.

¹⁸ *Clark v. Am. Coal Co.*, 86 Ia. 436, 17 L.R.A. 557.

¹⁹ *Home Fire Ins. Co. v. Barber*, 67 Neb. 644, 60 L.R.A. 927, 108 Am. St. Rep. 716.

²⁰ *Fortney v. Carter*, C. C. A., 203 Fed. 454; *Westerlund v. Black Bear Min. Co.*, C. C. A., 203 Fed. 599; *Elder v. Western Min. Co.*, C. C. A., 237 Fed. 966, 974. *Contra*, Gen.

the consent of a majority of the stockholders,²¹ nor it seems to restrain the execution of a contract authorized by the other stockholders to the injury of the complainant's rights as a stockholder and creditor;²² or to rescind a contract made by the stockholders individually for the transfer of the corporate property²³ or for the appointment of a receiver of the corporate assets because of insolvency.²⁴ Nor to a bill to enforce a contract by the promoters of the company.²⁵

The rule does not apply where the suit arises under the Constitution or laws of the United States;²⁶ nor to a suit by a mortgagee,²⁷ or a bondholder.²⁸ Nor to a bill by a depositor on behalf of himself and the other depositors to hold the directors of a bank responsible for losses caused by their misconduct.²⁹ The rule applies to a suit by a stockholder to enforce a cause of action under the Anti-Trust Laws.³⁰

It has been held that prior to the distribution of an estate, general or residuary legatees cannot bring such a suit,³¹ and in New York, that a suit to set aside a transfer made by a testator cannot be brought by a legatee or next of kin when the executor opposes the relief.³² The rule when a receiver has been appointed has not yet been settled. It seems clear that in such a case no previous application to the corporation or to the director is required.³³ The proper practice is for the stockholder

Inv. Co. v. Lake Shore M. S. Ry. Co., C. C. A., 250 Fed. 160, 174.

²¹ *Ibid.*

²² *Granite Brick Co. v. Titus*, C. C. A., 226 Fed. 557.

²³ *Old Colony Trust Co. v. Duhaque, L. & Tr. Co.*, 89 Fed. 794.

²⁴ *Re Cleland*, 218 U. S. 120, 54 L. ed. 962; *Adler v. Campeche Laguna Corp.*, 257 Fed. 789.

²⁵ *Rogers v. Penobscot Mining Co.*, 154 Fed. 606.

²⁶ *Ball v. Rftland R. Co.*, 93 Fed. 513. See *Smyth v. Ames*, 169 U. S. 466, 42 L. ed. 819; *Pollock v. Farmers' L. & Tr. Co.*, 157 U. S. 429, 39 L. ed. 759. *Contra*, *Corbus v. Alaska Treadwell Gold Min. Co.*, 187 U. S. 455, 47 L. ed. 256.

²⁷ *Consolidated Water Co. v. City*

of San Diego, 89 Fed. 272; *Dawson v. Columbia Trust Co.*, 197 U. S. 178, 181, 49 L. ed. 713. But see *Newby v. Oregon C. R. Co.*, 1 Sawyer, 63; *Dickinson v. Consol. Traction Co.*, 114 Fed. 232, 245.

²⁸ *Fortney v. Carter*, C. C. A., 203 Fed. 454.

²⁹ *Foster v. Bank of Abingdon*, 88 Fed. 604.

³⁰ *United Copper Securities Co. v. Amalgamated Copper Co.*, 244 U. S. 261; *infra*, § 251a.

³¹ *Whitaker v. Whitaker Iron Co.*, 238 Fed. 980.

³² *McQuade v. Perret*, 223 N. Y. 75.

³³ *Kelly v. Dolan*, 218 Fed. 966, 970.

to request the receiver to bring such a suit before the stockholder's bill is filed,³⁴ and to make the receiver a party defendant.³⁵ It has been held that in case of the refusal of the receiver to sue, the stockholder cannot file such a bill without the consent of the court which appointed the receiver.³⁶ Such a practice however which necessitates a disclosure of the plaintiff's evidence and enables a court upon a summary application to sacrifice the rights of the stockholders is not to be commended.³⁷ When the consent of the court was obtained, it was said that a stockholder could not sue in a foreign jurisdiction unless the cause of action was assigned to him by the receiver.³⁸ Where a receiver of a National Bank had been appointed by the Comptroller of Currency it was held that the stockholder must previously make a demand upon the receiver, the Comptroller and the bank.³⁹ A New York case holds that where in the course of voluntary liquidation a liquidating committee has been appointed, no demand need be made upon them.⁴⁰

The rule does not apply to suits brought by the stockholders of a corporation after its dissolution⁴¹ or after the institution of statutory proceedings for voluntary liquidation,⁴² but the rule applies where, although the charter of the corporation has ex-

³⁴ Finance Co. v. S. J. Short Line R. Co., 183 Fed. 830. See Fisher v. Andrews, 37 Hun (N. Y.) 176; Nelson v. Burrows, 9 Abb. N. C. (N. Y.) 280; Cable v. Beall, 130 N. C. 533.

³⁵ Kelly v. Dolan, 218 Fed. 966, 970.

³⁶ Swope v. Villard, 61 Fed. 417; Kelly v. Dolan, C. C. A., 233 Fed. 635, modifying s. c. 218 Fed. 966. See Land Title & Tr. Co. v. Asphalt Co. of Amer., 120 Fed. 996; Conley v. Internat. Pump Co., 237 Fed. 286, 289; *infra*, § 314.

³⁷ It is an unfortunate fact that in too many cases the name of the receiver is suggested directly or indirectly by those whose misconduct, fraudulent or negligent, has wrecked the corporation. His advice has naturally great influence with the court. The writer knows of a case

in which he did not act as counsel, where the creditors were deprived of assets amounting to several hundred thousand dollars because the receiver before and as a condition of the recommendation for his appointment promised not to sue the directors and subsequently kept his word.

³⁸ Kelly v. Dolan, C. C. A., 233 Fed. 635, 639, where the case was however decided upon another point. See *infra*, § 314.

³⁹ Moss v. Goodhart, 209 Fed. 102.

⁴⁰ Planten v. Nat. Nassau Bank, 174 App. Div. (N. Y.) 234, affirming Giegerich, J., N. Y. L. J., January 22, 1916.

⁴¹ Lafayette Co. v. Neely, 21 Fed. 738. See Boyd v. Hankinson, C. C. A., 92 Fed. 49.

⁴² Planten v. Nat. Nassau Bank, 174 App. Div. 234.

pired, the company still exists for the purpose of winding up its affairs.⁴³ Nor where the corporation has made a general assignment for the benefit of its creditors and the assignee in insolvency has refused to sue,⁴⁴ nor to a suit to rescind a contract, made by the stockholders individually, for the transfer of the corporate property;⁴⁵ nor to a bill for the appointment of a receiver because of insolvency;⁴⁶ nor, it has been held, to a suit by a stockholder alleging that his corporation had ceased actively to conduct its business and to elect officers and directors, praying the appointment of a receiver and a winding up of its affairs.⁴⁷ It has been held that the rule does not apply to a bill to enforce a right of action which the corporation could not enforce in its entirety, such as a suit which prayed the dissolution of the corporation as well as the rescission of a contract made by it.⁴⁸ Nor to a suit to restrain corporate actions to which the president of the corporation is made a party solely for purposes of discovery.⁴⁹ Nor to a bill to set aside the formal action of the stockholders of the corporation.⁵⁰ It was held: that where bondholders by judicial proceedings, compelled an exchange of stock for their bonds subsequent to the transaction of which complaint was made, they could not maintain a stockholders' suit to set the same aside⁵¹ and that a suit to enjoin the execution of a contract cannot be maintained by a complainant who bought his stock with knowledge of the intention thus to contract.⁵²

It has been held that a stockholder cannot sue to enjoin a corporation from paying internal revenue taxes.⁵³

The bill must specifically aver that the suit is not a collusive

⁴³ *Taylor v. Holmes*, 127 U. S. 489, 32 L. ed. 179; s. c., 14 Fed. 498.

⁴⁴ *Streight v. Junk*, C. C. A., 59 Fed. 321.

⁴⁵ *Old Colony Trust Co. v. Du-buque L. & Tr. Co.*, 89 Fed. 794.

⁴⁶ *Re Cleland*, 218 U. S. 120, 54 L. ed. 962.

⁴⁷ *Briggs v. Traders' Ins. Co.*, 145 Fed. 254.

⁴⁸ *Barcus v. Gates*, C. C. A., 89 Fed. 783, 793. See *Towle v. Am. B. L. & I. Co.*, 60 Fed. 131; *Excelsior P. P. Co. v. Browne*, C. C. A.,

74 Fed. 321. But see *Becker v. Hoke*, C. C. A., 80 Fed. 973.

⁴⁹ *Leo v. Union Pac. Ry. Co.*, 17 Fed. 273.

⁵⁰ *Binney v. Cumberland Ely C. Co.*, 183 Fed. 650; *Hyams v. Calumet & Hecla Min. Co.*, C. C. A., 221 Fed. 529, 532.

⁵¹ *Citizens' Sav. & Tr. Co. v. Illinois Cent. R. Co.*, 173 Fed. 556.

⁵² *Continental Securities Co. v. Interborough R. T. Co.*, 221 Fed. 44.

⁵³ *Strauss v. Abrast Realty Co.*, 200 Fed. 327; citing *Corbus v. Alas-*

one to confer on a court of the United States jurisdiction of a case of which it otherwise would not have cognizance.⁵⁴ It is insufficient to allege "that this suit is brought in good faith, and for the collection of, and to compel the collection of, what your orator believes to be a meritorious claim."⁵⁵ Collusion is not established by the facts that the corporation would be benefited by the success of the complainant;⁵⁶ that its officers expressed a desire for the success of the suit;⁵⁷ that the refusal of the corporation to institute the suit was based expressly upon the ground, that that would excite public prejudice against the company;⁵⁸ that one or more other stockholders who are citizens of the same State as the principal defendant, but who are less than a majority, contribute to the expense of the suit;⁵⁹ that the stockholder's counsel is subsequently retained in a prior suit by the corporation brought by it for the same purpose, which is still pending upon an appeal taken by the company;⁶⁰ that the corporation, subsequent to the commencement of the suit, assisted the stockholder in the same, when there is no proof of any agreement between them prior to the filing of his bill.⁶¹ Nor even when the plaintiff testified that he understood the suit was brought to confer, upon a court of the United States, jurisdiction, in a case of which it would not otherwise have cognizance, the difference of citizenship between him and the defendants being undisputed.⁶²

ka Treadwell Gold Mining Co., 187 U. S. 455, 23 Sup. Ct. 157, 47 L. ed. 256; distinguishing *Pollock v. Farmers' Loan & Trust Co.*, 157 U. S. 429, 15 Sup. Ct. 673, 39 L. ed. 759; *Zonne v. Minneapolis Syndicate*, 220 U. S. 187, 31 Sup. Ct. 361, 55 L. ed. 428. See *supra*, § 100a; *infra*, § 271b.

⁵⁴ *Quincy v. Steel*, 120 U. S. 241, 246, 30 L. ed. 624, 626; *Smith v. Chase & Baker Piano Mfg. Co.*, 197 Fed. 466.

⁵⁵ *Quincy v. Steel*, 120 U. S. 241, 246, 247, 30 L. ed. 624, 626.

⁵⁶ *Chicago v. Mills*, 204 U. S. 321, 51 L. ed. 504; affirming *Mills v. Chicago*, 143 Fed. 430.

⁵⁷ *Ibid.*

⁵⁸ *Chicago v. Mills*, 204 U. S. 321, 51 L. ed. 504; affirming *Mills v. Chicago*, 143 Fed. 430; *New Albany Waterworks v. Louisville Banking Co.*, 122 Fed. 776, 58 C. C. A. 576; *Consumers' Gas Trust Co. v. Quincy*, C. C. A., 137 Fed. 882.

⁵⁹ *Chicago v. Mills*, 204 U. S. 321, 51 L. ed. 504; affirming *Mills v. Chicago*, 143 Fed. 430.

⁶⁰ *Ibid.*

⁶¹ *Ibid.* For other cases where refusals to sue were held not to be collusive, see *Bowdoin College v. Merritt*, 65 Fed. 213; *Towl v. Am. B. L. & I. Co.*, 60 Fed. 131.

⁶² *Ibid.* *Perkins v. Pac. Ry. Co.*, 155 Fed. 445.

"It must also set forth with particularity the efforts of the plaintiff to secure such action as he desires on the part of the managing directors or trustees, and, if necessary, of the shareholders, and the causes of his failure to obtain such action, or the reasons for not making such effort."⁶³ An allegation, that the officers and directors do not wish to comply with a statute charged to be unconstitutional, but intend to do so for fear of incurring penalties is insufficient.⁶⁴

A previous demand upon the board of directors is unnecessary in a case of emergency, when irreparable injury would be caused by delay; for example, in a suit to redeem, when the time for redemption expired within a few days;⁶⁵ or where the bill shows danger of the removal of the assets from the jurisdiction pending such an application.⁶⁶ Nor is a previous demand required in a case where it clearly appears, that the corporation would certainly refuse to bring the suit, and the demand would be a vain and useless act.⁶⁷ For example, a bill by a minority

⁶³ Eq. Rule 27. See also *Hawes v. Oakland*, 104 U. S. 450, 26 L. ed. 827; *Huntington v. Palmer*, 104 U. S. 482, 26 L. ed. 833; *Dodge v. Woolsey*, 18 How. 331, 15 L. ed. 401; *Greenwood v. Freight Co.*, 105 U. S. 13, 16, 26 L. ed. 961; *Detroit v. Dean*, 106 U. S. 537, 542, 27 L. ed. 300, 302; *County of Tazewell v. Farmers' L. & T. Co.*, 12 Fed. 752; *Dimpfell v. Ohio & Miss. R. Co.*, 110 U. S. 209, 28 L. ed. 121; *Quincy v. Steel*, 120 U. S. 241, 30 L. ed. 624; §§ 12, 87, 207; *Whitney v. Fairbanks*, 54 Fed. 985; *Strang v. Edson*, 198 Fed. 813.

⁶⁴ *Wathen v. Jackson Oil & Refining Co.*, 235 U. S. 635.

⁶⁵ *Young v. Alhambra Mine Co.*, 71 Fed. 810.

⁶⁶ *Tevis v. Hammersmith*, 31 Ind. App. 281, 66 N. E. 79.

⁶⁷ *County of Tazewell v. Farmers' L. & T. Co.*, 12 Fed. 752; *Ranger v. Champion C. P. Co.*, 52 Fed. 611; *Rogers v. Nashville, C. & St. L. Ry. Co.*, C. C. A., 91 Fed. 299; *De Neuf-*

ville v. N. Y. & N. Ry. Co., C. C. A., 81 Fed. 10. But see *Squair v. Look-out Mountain Co.*, 42 Fed. 729; *Farmers' L. & T. Co. v. Toledo, A. A. & N. M. Ry. Co.*, 67 Fed. 49; *Church v. Citizens' S. R. Co.*, 78 Fed. 526; *Dana v. Morgan*, 219 Fed. 313. The following allegation was held to be sufficient: "'Your orators further aver that it would be useless to make demand upon said William H. Shippen to file suit against himself, and that your orators have made demand upon the Shippen Bros. Lumber Company, one of the defendants herein, and upon its officers and directors, that defendant institute suit against the said William H. Shippen and Frank E. Shippen for the purpose of enjoining and restraining them and their agents from acting as officers and directors of the said lumber company, and for the purpose of restraining them from asserting any rights and liabilities which they or either of them claim against said

stockholder to set aside a transaction committed by the approval of the majority in their individual interest,⁶⁸ or when the directors of the corporation, at the time the suit was brought, were the same as those who had committed the wrongs, which the suit is brought to redress,⁶⁹ or a bill to enforce a cause of action against a defendant which owns or holds the voting power of a sufficient amount of stock of the plaintiff's corporation to control a stockholders' meeting.⁷⁰ Nor is there necessity for such a demand in a suit where the bill states facts showing that the managing directors are in league with the president, who chose them, and who is using the corporation to defraud the complainant;⁷¹ nor where it is shown that a majority of the stock of the corporation is controlled by another company, which the bill seeks to enjoin from voting thereupon, so as to elect its own directors and eliminate competition, to the irreparable injury of the complainant.⁷² It is insufficient, however, to allege complicity of the president and directors in the fraud, of which complaint is made, when the bill does not show that an application to the stockholders for action would be unavailing.⁷³

Shippen Bros. Lumber Company on any account whatsoever, and especially upon a certain alleged note of said Shippen Bros. Lumber Company claimed to be held and owned by the said William H. Shippen, and that for reasons unknown to your orators this demand has been refused. This suit is not filed for the purpose of collusively giving jurisdiction to this honorable court of a cause of which it has not jurisdiction.' '' Russell v. Shippen Bros. Lumber Co., 224 Fed. 254, 256, 257.

⁶⁸ Doctor v. Harrington, 196 U. S. 579, 49 L. ed. 606; Rogers v. Nashville, C. & St. L. Ry. Co., C. C. A., 91 Fed. 299; De Neufville v. N. Y. & N. Ry. Co., C. C. A., 81 Fed. 10; Sager v. Culver, 147 N. Y. 241, 246; Earle v. Seattle, L. S. & E. Ry. Co., 56 Fed. 909; Eldred v. Am. P. C. Co., 99 Fed. 168; Berwind v. Canadian Pac. Ry. Co., 98 Fed.

158; Hyams v. Calumet & Hecla Mining Co., 221 Fed. 529; Forbes v. Wilson, 243 Fed. 264.

⁶⁹ Howard v. National Telephone Co., 182 Fed. 215. See, also, Continental Securities Co. v. Interborough R. T. Co., 165 Fed. 945; O'Connor v. Virginia Passenger & Power Co., 184 N. Y. 46, 52.

⁷⁰ Delaware & Hudson Co. v. Albany & Susquehanna R. R. Co., 213 U. S. 435, 53 L. ed. 862; Field v. Western Life Indemnity Co., 166 Fed. 607; Ross v. Quinnesec Iron Mining Co., C. C. A., 227 Fed. 337.

⁷¹ Monmouth Inv. Co. v. Means, C. C. A., 151 Fed. 159; Hyams v. Calumet & Hecla Mining Co., 221 Fed. 529.

⁷² Bigelow v. Calumet & Hecla Min. Co., 155 Fed. 869.

⁷³ Macon, D. & S. R. Co. v. Shailer, C. C. A., 141 Fed. 585; Smith v. Chase & Baker Piano Mfg. Co.,

An attempt to induce action by the shareholders must also be shown unless facts are pleaded which show that such an attempt would have been unavailing.⁷⁴ A bill to compel a declaration of dividends was held to be insufficient when it averred that complainant had demanded of directors such a declaration and that the same had been refused, although a meeting of the stockholders and directors had been held since such demand.⁷⁵ Where the matter has been considered at a stockholders' meeting, a protest then made by the dissenting stockholders is sufficient to enable the latter to maintain a bill;⁷⁶ but the bill should then show that a majority of the stockholders voted in favor of the proposition.⁷⁷ Bills which show that the largest block of stock, although less than a majority, is held or controlled by the wrongdoers, and that all the stock not owned or controlled by the complainants is scattered among small holders;⁷⁸ or that complainant has been denied the right to vote upon his stock⁷⁹ are sufficient. By the courts of the State of New York, no application to the stockholders is required.⁸⁰

The facts showing the control of the corporation, in such a case, must be specifically pleaded.⁸¹ An averment that the holders of a majority of the stock have granted a voting power to the directors, who are implicated in the transaction attacked, is sufficient.⁸² But it was held in New York that averments that the defendants, against whom the complaint is made, caused the election of a board of directors, "subservient to the domination and dictation of said defendants," and that "the company by its board of directors, acted fraudulently and collusively and under the domination of" one of such defendants; were insuffi-

197 Fed. 466, where the bill showed that the complainant was requested to attend a directors' meeting, but had not done so, nor made any attempt to settle the dispute; *Binney v. Cumberland Ely Copper Co.*, 183 Fed. 650.

⁷⁴ *Heinz v. National Bank of Commerce*, C. C. A., 237 Fed. 942.

⁷⁵ *Wilson v. American Ice Co.*, 206 Fed. 736.

⁷⁶ *Binney v. Cumberland Ely Copper Co.*, 183 Fed. 650.

⁷⁷ *Ibid.*

⁷⁸ *Delaware & Hudson Co. v. Albany & Susquehanna R. R. Co.*, 213 U. S. 435, 452, 53 L. ed. 862, 868.

⁷⁹ *Granite Brick Co. v. Titus*, C. C. A., 226 Fed. 557, 565.

⁸⁰ *Continental Securities Co. v. Belmont*, 206 N. Y. 7, affirming 150 App. Div. 298.

⁸¹ *O'Connor v. Virginia Passenger & Power Co.*, 184 N. Y. 46, 52.

⁸² *Doctor v. Harrington*, 196 U. S. 579, 49 L. ed. 606.

cient to show that the plaintiff was relieved from making an application to the board prior to the commencement of his suit;⁸³ and that a previous demand upon a corporation to disregard a lease did not authorize a suit to annul the same.⁸⁴

The bill should show the time and manner of the demand and that the board of directors has not changed.⁸⁵ Where a bill showed that the corporation had refused to sue upon the advice of counsel that the proceeding could not be successfully maintained, it was dismissed.⁸⁶

General averments of fraud or misconduct are insufficient.⁸⁷

⁸³ O'Connor v. Virginia Passenger & Power Co., 184 N. Y. 46, 52. See *Brewer v. Boston Theatre*, 104 Mass. 378.

⁸⁴ Flynn v. Brooklyn C. R. Co., 158 N. Y. 493, 509.

⁸⁵ Swope v. Villard, 61 Fed. 417.

⁸⁶ Hendrickson v. Bradley, C. C. A., 85 Fed. 508.

⁸⁷ Schell v. Alston Mfg. Co., 149 Fed. 439; *Smith v. Chase & Baker Piano Mfg. Co.*, 197 Fed. 466; *Continental & C. Tr. & S. Bank v. Alis-Chalmers Co.*, 200 Fed. 600, 611. See *supra*, § 137. For a case where it was held that the facts did not show fraud, see *Marks v. Merrill Paper Co.*, C. C. A., 203 Fed. 16. The following allegations were held to be sufficient: "That the objects and purposes for which defendant corporation was formed are: To erect and operate factories for the manufacture of tanning extracts, and other extracts obtained from trees, barks, leaves, plants, etc. To conduct a general tanning business, manufacturing leather and leather goods and other products made from skins, hides, and peltry of animals. To deal in all kinds of timber, logs, wood, bark, etc., and to manufacture them into all kinds of marketable products and commodities. To manufacture, buy, sell, and other-

wise deal in extracts, oils, fertilizers, glue, etc. That the authorized capital stock of said corporation is \$500,000, divided into shares of \$100 each, one half to be preferred and the other half common stock. That, of the authorized issue, 1,750 shares of preferred and 1,250 shares of common stock has been issued. That Edward D. Adams owns 1,100 shares preferred and 620 shares of common stock. That George L. Adams owns 335 shares preferred and 311 shares of common stock. That defendant W. F. Decker owns 100 shares preferred and 100 shares common stock. Plaintiff Chas. C. Krauss owns 42 shares preferred and 41 shares common stock. Louis McFadden owns 49 shares preferred and 31 shares common stock. George L. Adams, Edward D. Adams and Wm. F. Decker are, and have been since its organization, directors of the company. George L. Adams is, and has been since its organization, president; William F. Decker secretary and treasurer, and manager of the company.

As grounds of complaint and the basis upon which complainants seek the intervention of the court and relief against the alleged wrongful conduct of the majority stockholders, directors, and managing officers

of the company, the plaintiffs, among other things, allege: That they have at all times refused to permit plaintiffs to have any voice in the control and management of the company. That Edward D. Adams has never attended a meeting of the board of directors, never visited the plant, or given any attention to the affairs of the company, but has willfully neglected and carelessly absented himself from the meetings of the board of directors. Practically the same complaint is made of Geo. L. Adams, another director, with the result 'that the business is deteriorating' in a number of respects, pointed out in the bill. That the said directors, being also the managing officers, with intention of defrauding the Brevard Tannin Company and the complainants, caused to be issued and delivered to the said W. F. Decker, one of the directors aforesaid, 100 shares of common stock of the company, for which no consideration passed from the said parties to the company, 'but the same was issued and delivered to the said W. F. Decker as a part of an unlawful and fraudulent agreement between the said Edward D. Adams, Geo. L. Adams, and Wm. F. Decker, as hereinafter set out.' That on the 15th day of March, 1913, the said Edward D. and George L. Adams and Wm. F. Decker caused a deed to be executed of the company to John W. McMinn, for the nominal consideration therein expressed of \$10, conveying to the said McMinn certain tracts of land described in an exhibit attached for the real consid-

eration of \$27,000. That there was no warrant or authority given to the said parties to make such sale, but that it was made at a grossly inadequate price, to the great prejudice of the company. That on October 28, 1912, defendant Wm. F. Decker, director of said company, entered into a contract with one Louis Carr, afterwards assigned to the Carr Lumber Company, by which said Decker was to receive all of the wood usable in making tanning extracts from a tract of land containing 69,000 acres, a part of the Vanderbilt estate. That an interest in the said contract was subsequently assigned by Decker to George L. Adams. That in making said contract Decker was acting for and in behalf of the stockholders of the Brevard Tannin Company, and said contract was in fact made by Decker with Carr, for the use of and benefit of said company. That the contract was made in his own name, and he has refused and neglected, and still refuses and neglects, to assign the same to the company. That the contract was taken in the name of Decker, pursuant to a fraudulent agreement and understanding between said Edward D. and Geo. L. Adams and Decker. That by the sale of the land to McMinn the company was denuded of all woodland which it then owned, and all of its available wood supply in that vicinity taken from it.

"That the issue of the 100 shares of stock to Wm. Decker was made in consideration of the promise of said Decker to supply the

company with wood from the Vanderbilt tract. That he is not now able, nor has he been able since the execution of said contract, to supply the company with wood, except by virtue of the acquiescence of the Champion Fibre Company, to which said Decker has sold all of the wood to be taken from the Vanderbilt tract, to the extent of this capacity to produce during the whole period of his contract with said Louis Carr.

"The bill charges: That Wm. F. Decker embezzled and converted to his own use \$93.11 of the money of the defendant company. That he forged the name of one John Morris upon a check drawn by said company for \$337.75, appropriating the amount to his own use. That said Decker fraudulently appropriated other money belonging to said company to his own use, giving particulars thereof—all of which acts on the part of Decker were well known, or should have been known, to said Edward D. and Geo. L. Adams. That Decker cut wood from the lands of the company, and sold same, of the value of \$456, to the Champion Fibre Company, which he converted to his own use. That by reason of the negligence, carelessness, and inattention of the business of said directors and managing officers the stockholders of the company have been damaged, the property allowed to depreciate and decay, its business permitted to be dissipated, so that the company has lost approximately the sum of \$50,000 per year during the year 1915, and during the year 1916 the sum of \$100,000 per year, etc.

"For the purpose of meeting the jurisdictional requirements of equity rule 27 (198 Fed. xxv, 115 C. C. A., xxv; Hopkins, Eq. Rules (2d Ed.) 172), complainants allege: That they were shareholders of the company at the time of the transactions mentioned, of which they complain. That the suit is not a collusive one to confer jurisdiction of the District Court of the United States for the Western District of North Carolina, of which said court would not otherwise have jurisdiction, but it is instituted in good faith for the purposes herein stated. That they brought the transactions of which they complained to the attention of said Edward D. Adams, Geo. L. Adams, and Wm. F. Decker, as officers of and directors of said Brevard Tannin Company, as they would have full opportunity to redress said wrongs; but said officers and directors failed and refused to do so, and assumed the same antagonistic and partisan attitude as that theretofore manifested by them towards plaintiffs." *Krouse v. Brevard Tannin Co.*, C. C. A., 249 Fed. 538, 539, 540. See *Dana v. Morgan*, 219 Fed. 313; *Heublein et al. v. Wight*, 227 Fed. 667.

The following allegations were held to be not sufficient: "Turning now to the bill of complaint, it alleges, in substance, mostly on information and belief, as far as is necessary to determine the present motion, that the defendant company is a New Jersey corporation, incorporated on March 11, 1899, with power, *inter alia*, to carry on the business of manufacturing, gather-

ing, storing, preserving, buying, and selling all kinds of ice; that by an amended certificate of incorporation authorized about May 13, 1907, its capital stock was reduced to \$40,000,000, divided into \$25,000,000 of common and \$15,000,000 of preferred, 250,000 and 150,000 shares, respectively; that complainant is the owner of 300 shares of the common stock and 100 shares of the preferred stock, the latter bearing a fixed 6 per cent. yearly dividend, payable before any dividend shall be paid on the common stock; that such a dividend is cumulative, and that holders of such preferred stock, in case of liquidation or dissolution of the company, are entitled to be paid in full, both of principal and all earned and unpaid dividends, before any amount shall be paid on the common stock; that complainant has been such a shareholder for upwards of 12 years; that up to July 1901, dividends on the preferred stock were paid at the agreed rate, but that little has been paid since in such dividends, although the company was amply able to pay from its net profits an annual dividend of at least 2 per cent. on its preferred stock without injuring its business; that on October 31, 1912, the unpaid dividends on such stock amounted to at least 50 per cent., aggregating more than \$7,500,000; that a large majority of the common stock and more than 96.2 per cent. of the outstanding preferred stock is owned by the American Ice Securities Company; that the Securities Company was organized to give complete control of the de-

fendant company, and to 'freeze out' the minority stockholders; that the defendant company has accumulated profits, not reserved for working capital, of upwards of \$2,000,000 and a surplus of upwards of \$3,000,000; that with few exceptions (named) such profits have been put into improvements, maintenance, and equipment, the payment of large salaries, and in surplus, and that at least three-fourths of the accumulated earnings are not required in the prosecution of the business; that during the past three years the defendant company has expended for maintenance, improvement and equipment, upwards of \$1,500,000, and that during such period an annual expenditure of \$100,000 would have been more than sufficient for the necessary repairs and improvements, aside from the acquisition of new plants and the payment of moneys for the purpose of acquiring new business; that the defendant company, by substituting a new bond issue, at a higher rate of interest, for an old one, more than a year and a half before the latter became due, occasioned a loss to the company of nearly \$1,000,000; that the defendant company now has a surplus and sufficient accumulated net earnings to pay a dividend on its preferred stock of at least 20 per cent. over and above any duly authorized reserve for working capital; that failure to declare and pay dividends is not due to the exercise of a just discretion by the directors, but to their desire to extend business at the expense of the minority stockholders, and to compel them to dis-

pose of their holdings or become stockholders of the Securities Company; that in several instances in recent years the directors' failure to declare dividends on the preferred stock was due in part to the desire of the majority of the common stockholders to apply the profits, sufficient to pay such dividends, but not on both common and preferred, to repairs and improvements for their general benefit, rather than to the payment of dividends on the preferred stock; that it would be useless to apply to the stockholders or directors of the defendant company to take action to declare dividends upon such stock, for the reason that the majority of each of the stockholders and directors are opposed to such declaration, and that the majority of the stockholders and directors who now control the affairs of such company have refrained from declaring any dividends for the last ten years, except as stated; that the complainant has demanded of such directors that dividends on such stock be declared, and has frequently demanded declaration and payment of dividends on his preferred stock, and that such demands have never been complied with, except as stated, though meetings of the stockholders and directors have been held since such demands; that the complainant has never consented to any by-law permitting the directors to desist from declaring dividends on the common or preferred stock.

"The bill thereupon prays for a decree enjoining the defendant company to pay a dividend of 20 per cent. on the outstanding preferred stock, and for discovery, ac-

counting, and a receiver in aid of such payment, etc. It is apparent from this recital that, while the bill covers much ground, its statements, in essentials, are of the most general character. An articulated array of generalities, no matter how well sounding, will not satisfy the requirement that the ultimate facts upon which the prayer for relief is founded must be stated fully, distinctly, and with particularity.

"(5) The bill does not set out the original or amended certificate of incorporation, or any of the company's by-laws, nor does it allege that none of these contain any provision regulating the matter of reserving working capital from the net profits; and one is left in the dark concerning whether the incorporators, in the original certificate, or the stockholders, in the amended certificate or by-laws, have formulated any policy in regard to working capital. For aught that appears the directors, in declining to declare dividends out of the profits in question, acted in strict accordance with the provisions in such certificates and by-laws, and in that respect were only carrying out the duly authorized business policy of the corporation. This omission alone, in my judgment, is fatal. The presumption is that the directors' action in that respect is authorized, and it is not overcome by mere general allegations such as:

" 'There are accumulated profits which are not reserved for working capital.' 'At least three-fourths of said accumulated earnings are not required in the prosecution of the business.' 'Company is amply able to declare and pay large por-

Tangible facts to sustain such averments must be pleaded.⁸⁸

It has been said that as much certainty is required in a bill by a stockholder to enforce a corporate right as in a bill by a corporation for the same purpose.⁸⁹ A motion for a bill of particulars may in a proper case be granted, if the bill is deficient in certainty.⁹⁰

It has been said that the allegations required by the rule are jurisdictional and cannot be supplied by amendment;⁹¹ but the question as to the sufficiency of a bill, under this rule, cannot be certified directly from the District Court to the Supreme Court of the United States,⁹² and it has been held that it is waived unless specifically raised by a motion to dismiss.⁹³ An allegation that complainant is the bona fide and lawful owner "of record" of a specified number of shares of the stock of the corporation, is a sufficient averment that the complainant is a stockholder.⁹⁴ It was held that an omission of the date upon which the complainants became shareholders was not a cause for dismissing the bill but justified a motion for further and better particulars.⁹⁵

It has been held: that such a bill must contain an allegation that the complainant and his predecessors in title, since the transaction which he seeks to set aside, have not acquiesced in the same;⁹⁶ that a stockholder cannot, in the same suit, seek, on his

tions of all due and unpaid dividends.' 'The company has assets sufficient to pay the same without injuring its business.' And (even this on information and belief): 'Complainant "has never consented to any by-law permitting the directors to desist from declaring dividends."' " Wilson v. Amer. Ice Co., 206 Fed. 736, 739-741. See Marks v. Merrill Paper Co., C. C. A., 203 Fed. 16; Rice v. Wilson, 225 Fed. 159.

⁸⁸ Schell v. Alston Mfg. Co., 149 Fed. 439; Smith v. Chase & Baker Piano Mfg. Co., 197 Fed. 466; Continental & C. Tr. & S. Bank v. Allis-Chalmers Co., 200 Fed. 600, 611. See *supra*, § 137.

⁸⁹ Whitney v. Fairbanks, 54 Fed. 985.

⁹⁰ Whitaker v. Whitaker Iron Co., 238 Fed. 980; Krouse v. Brevard Tannin Co., 249 Fed. 538.

⁹¹ Dickinson v. Consol. Traction Co., 114 Fed. 232, 242.

⁹² Venner v. Great Northern Railway Co., 209 U. S. 24, 52 L. ed. 666.

⁹³ Granite Brick Co. v. Titus, O. C. A., 226 Fed. 557.

⁹⁴ Continental Securities Co. v. Interborough R. T. Co., 165 Fed. 945, 963.

⁹⁵ Krouse v. Brevard Tannin Co., C. C. A., 249 Fed. 538.

⁹⁶ Venner v. Atchison, T. & S. F. Ry. Co., 28 Fed. 581, 591; Trimble

own behalf, to cancel stock which he holds, and also, on behalf of all the stockholders, to set aside corporate transactions,⁹⁷ but that he can pray in the same bill for a cancellation of an illegal issue of stock to others, an injunction restraining the transferee from voting upon the same and a receiver of the corporation;⁹⁸ or for an injunction against an illegal issue of bonds and when the corporation is insolvent also for a public sale of its assets and their distribution among the creditors.⁹⁹ Under the former rules there were rulings that an equitable owner of stock, whose title was contested, could not maintain such a suit.¹⁰⁰ But the soundness of these decisions may be doubted. Under the new rules, the doctrine that equity having once obtained jurisdiction will afford relief, may be enforced; and there can be little doubt that the holder of a certificate of stock, endorsed in blank, may bring such a suit before the stock has been transferred to him upon the books of the corporation, although out of abundant caution it might be prudent to join as a party the person in whose name the stock is registered.¹⁰¹

The maxim that he who seeks equity must do equity¹⁰² is applied to stockholders' bills¹⁰³ and it has been held: that when it is sought to set aside a mortgage securing bonds an offer to return the money received from the bondholders is required¹⁰⁴ but that every tender or offer need not be made or alleged, which might be necessary if the suit were brought by the corporation.¹⁰⁵

v. American Sugar Refining Co., 61 N. J. Eq. 340. See *Church v. Citizens' St. R. Co.*, 78 Fed. 526. *Contra*, *Brazill v. Isham*, 12 N. Y. 9, 17; *Pollitz v. Gould*, 202 N. Y. 11, 38 L.R.A. (N.S.) 988, Ann. Cas. 1912D, 1098; *Coatsworth v. Lehigh Valley Ry. Co.*, 115 App. Div. (N. Y.) 7; *Continental Securities Co. v. Belmont*, 75 Misc. (N. Y.) 234, 250.

⁹⁷ *Church v. Citizens' St. R. Co.*, 78 Fed. 526.

⁹⁸ *Howard v. National Telephone Co.*, 182 Fed. 215.

⁹⁹ *Granite Brick Co. v. Titus*, C. C. A., 226 Fed. 557, 561, 564.

¹⁰⁰ *Inman v. New York Interurban*

Water Co., 131 Fed. 997, 999; *Witherbee v. Bowles*, 142 App. Div. (N. Y.) 407, 417; *U. S. Steel Corporation v. Hodge*, 64 N. J. Eq. 807, 809, 60 L.R.A. 742. *Contra*, *Weber v. Wallerstein*, No. 1, 111 App. Div. (N. Y.) 693; *Brown v. Duluth & N. Ry. Co.*, 53 Fed. 889, 894.

¹⁰¹ See §§ 113, 120, *supra*.

¹⁰² See *supra*, § 79a.

¹⁰³ *Collins v. Penn-Wyoming Copper Co.*, 203 Fed. 726.

¹⁰⁴ *Ibid*.

¹⁰⁵ *Edwards v. Mercantile Trust Co.*, 124 Fed. 381, 391; *Citizens' Sav. & Tr. Co. v. Illinois Cent. R. Co.*, C. C. A., 182 Fed. 607.

It has been said that the maxim that he who seeks equity must come with clean hands¹⁰⁶ does not apply to such a suit unless it would have been applicable to a suit by the corporation.¹⁰⁷

It has been held that where the cause of action is one which the corporation might enforce at common law, the statute of limitations applicable to such suits at common law must be applied thereto.¹⁰⁸ A delay of twelve years to recover for injuries from the negligence of the directors was held to be such laches as to prevent recovery,¹⁰⁹ but when the transaction sought to be set aside had been concealed, it was held that there could be no laches by delay before its discovery.¹¹⁰ A stockholder who had failed to intervene in a former stockholders' bill of which he had knowledge was held to be bound by the judgment therein rendered.¹¹¹ The suit must be brought in equity, even when it is brought to recover damages for an injury through violations of the Anti-Trust Laws.¹¹² Unless a receiver has been appointed, the corporation is an indispensable party to the suit.¹¹³ When the joinder of some of the directors would oust the jurisdiction, they are not indispensable parties, although the bill seeks relief because of transactions in which they took part with other directors who are made defendants.¹¹⁴ In a stockholder's suit, a corporation, if it is not alleged to be under the control of the defendant or to resist the relief sought should be aligned as a complainant for the purpose of ascertaining the diversity of citizenship which determines the jurisdiction.¹¹⁵ In a stockholder's suit to enforce a right of his corporation, where it is shown that the corporation is under the control of the other defendants, it will be treated as upon the same side of the controversy that they are, for the purpose of determining the juris-

¹⁰⁶ *Supra*, § 79b.

¹⁰⁷ *Luther v. Garnsey*, N. Y. Sun. Ct. Sp. Tm., N. Y. L. J. Feb. 28, 1914.

¹⁰⁸ *Kelly v. Dolan*, C. C. A., 233 Fed. 635.

¹⁰⁹ *Kelly v. Dolan*, C. C. A., 233 Fed. 635.

¹¹⁰ *Elder v. Western Min. Co.*, C. C. A., 237 Fed. 966.

¹¹¹ *Dana v. Morgan*, 219 Fed. 313. See *supra*, § 114-116, *infra*, § 186.

¹¹² *United Copper Securities Co. v. Amalgamated Copper Co.*, 244 U. S. 261. See *Kelly v. Dolan*, C. C. A., 233 Fed. 635.

¹¹³ *Porter v. Sabin*, 149 U. S. 473, 37 L. ed. 815, *supra*, § 120.

¹¹⁴ *Krouse v. Brevard Tannin Co.*, C. C. A., 249 Fed. 558.

¹¹⁵ *Iron Moulders' Union v. Niles-Bement-Pond Co.*, C. C. A., 258 Fed. 408, reversing 246 Fed. 851. See § 41 *supra*.

diction.¹¹⁶ In one to prevent the majority of the stockholders from causing the deportation to act in fraud of the minority, the corporation is to be aligned on the same side as the majority stockholders.¹¹⁷ It has been held: that in a stockholders suit, where the plaintiff has failed to comply with the equity rules by showing efforts to secure action by the other stockholders on an excuse for such failure, the corporation is to be treated as upon the same side of the controversy as the complainants.¹¹⁸ Where the controversy for the control of the corporation transcends the rivalry of those claiming to be members of its board of control and the corporation itself is a mere instrumentality or holder of the title, it is properly made a party defendant and should not be aligned as a plaintiff merely because the plaintiffs belong to the faction that claims the power to appoint the members of the board.¹¹⁹ In such a case, it has been held that trustees of the corporation, although in sympathy with the complainant should be aligned with the defendant.¹²⁰ In a stockholder's suit to recover assets of a corporation it was held that a statutory

¹¹⁶ *Doctor v. Harrington*, 196 U. S. 579, 49 L. ed. 606, overruling a number of decisions of the lower courts to the contrary. *Hyams v. Calumet & Hecla Min. Co.*, 221 Fed. 529; *Whitaker v. Whitaker Iron Co.*, 238 Fed. 980; *Cutting v. Woodward*, C. C. A., 255 Fed. 637. See *Woolsey v. Dodge* Fed. Cas. No. 18,032, 6 McLean, 142; s. c., as *Dodge v. Woolsey*, 18 How. 331, 15 L. ed. 401; *De Neufville v. New York & N. R. Co.*, C. C. A., 81 Fed. 10; *MacGinnias v. Boston & M. Consol. Copper & Silver Min Co.*, 119 Fed. 96, 55 C. C. A. 648; *Redfield v. Baltimore & O. R. R. Co.*, 124 Fed. 929; *Mills v. City of Chicago*, 127 Fed. 731; *Groel v. United Electric Co. of New Jersey*, 132 Fed. 252; *Howard v. Nat. Telephone Co.*, 182 Fed. 215; *Crawford v. Seattle, R. & S. Ry. Co.*, 198 Fed. 920. Before the decision of *Doctor v. Harrington*, 196 U. S. 579, 49 L. ed. 606, it was held: that

where a stockholder's bill did not conform to the requirement of the equity rules, by showing efforts made to secure action by the stockholders, or an excuse for such failure, the corporation must be aligned with the complainants. *Waller v. Coler*, 125 Fed. 821.

¹¹⁷ *De Neufville v. New York & N. Ry. Co.*, C. C. A., 81 Fed. 10; *Redfield v. Baltimore & O. R. Co.*, 124 Fed. 929; *Elkins v. Chicago*, 119 Fed. 957.

¹¹⁸ *Waller v. Coler*, 125 Fed. 821; *Groel v. United El. Co.*, 132 Fed. 252. These cases were decided before *Doctor v. Harrington*, 196 U. S. 579, 49 L. ed. 606. A similar ruling has been made since that decision. *Gage v. Riverside Trust Co.*, 156 Fed. 1002, 1007.

¹¹⁹ *Helm v. Zarecor*, 222 U. S. 32, 56 L. ed. 77. But see *Stephens v. Smartt*, 172 Fed. 466.

¹²⁰ *Kelly v. Dolan*, 218 Fed. 966.

receiver who had been made a defendant was on the plaintiff's side of the controversy.¹²¹

It has been said: that where a small minority of the stockholders have been injured by a sale, it will not always be rescinded; but that the court may direct a valuation of the complainants' stock and the payment to them of the same under such a penalty as will give them ample security.¹²² A statute which provides that stockholders who do not consent to a sale or consolidation shall be paid the value of their shares does not afford an adequate remedy at law which will prevent a dissident from enjoining such a consolidation or sale in violation of the statutory requirements.¹²³ Where an injunction is denied, the court may retain jurisdiction to grant any equitable relief to which the complainants may appear to be entitled after the effect of the consolidation is known.¹²⁴ In a stockholders' suit to recover property fraudulently transferred, to wind up the affairs of a corporation and to distribute its funds among all the stockholders, the creditors must be given an opportunity to come in and enforce their claim against these funds.¹²⁵ Where, pending a stockholder's suit against the company and the other stockholders, the latter paid into court a sum of money to abide its order and satisfy the complainant's demand, he was allowed to recover the entire amount after the reduction of costs.¹²⁶ The stockholder's bill to enforce a cause of action owned by his corporation is for the benefit of the corporation and not for the benefit of the stockholders. Ordinarily no relief will be granted which would not be for the benefit of the corporation.¹²⁷ Where a majority of the stockholders have authorized a sale of the assets to a new company in which they received shares, but the minority do not; the burden of proving that the purchase price was the value of the property rests upon

¹²¹ *Sharpe v. Bonham*, 224 U. S. 241, L. ed. 747.

¹²² *Binney v. Cumberland Ely Copper Co.*, 183 Fed. 650, 653.

¹²³ *General Inv. Co. v. L. S. & M. S. Ry. Co., C. C. A.*, 250 Fed. 160.

¹²⁴ *Simon Borg & Co. v. New Orleans City R. Co.*, 244 Fed. 617.

¹²⁵ *In re Dennett*, 221 Fed. 350.

¹²⁶ *Beltz v. Great Western Lead Mfg. Co.*, 251 Fed. 696.

¹²⁷ *Collins v. Penn-Wyoming Copper Co.; Continental & Commercial Trust & Savings Bank v. same*, 203 Fed. 726.

them.¹²⁸ In other cases, when the dissenter who files the bill does not offer to bid more for the assets than was paid at the sale which he seeks to set aside; the court may direct that the property be sold at public sale, no bid to be accepted for less than what has been already paid.¹²⁹ Where the property has become so confused with the property of the vendee that it is practically impossible to place matters in statu quo, the court may declare the vendee a trustee and impress a lien upon the property for the benefit of unpaid stockholders and creditors.¹³⁰

A statute, which provides compensation to be paid to a stockholder who refuses to join in a consolidation, refers to one authorized by law and affords no adequate remedy to a stockholder who seeks to enjoin an illegal consolidation.¹³¹ When a stockholder sued to enjoin a consolidation, it was held that he was entitled to an accounting of all the earnings from the assets of his company made by the corporation into which it had been consolidated.¹³²

In certain cases, where a small minority of stockholders have been injured by a fraud the sale will not always be rescinded; but the court may direct a valuation of the complainant's stock and the payment of this amount to them under such a penalty as will give them ample security.¹³³ This will not be done where such a valuation is impracticable.¹³⁴ When the contract attacked transferred the assets directly or indirectly to a new company in which the complainants were given no interest, the court may award to them such interest in the stock of the new company as would give them full compensation.¹³⁵

§ 146. Bills to enjoin the infringement of patents. According to the rules of pleading which were in force before the adoption of the equity rules of 1912: a bill to restrain the

¹²⁸ *Stebbins v. Michigan Wheelbarrow & Truck Co.*, C. C. A., 212 Fed. 19.

¹²⁹ *Geddes v. Anaconda Copper Mining Co.*, 222 Fed. 120.

¹³⁰ *Re Dennett*, 221 Fed. 350.

¹³¹ *General Inv. Co. v. Lake Shore & M. S. Ry. Co.*, C. C. A., 250 Fed. 160.

¹³² *Miller v. Chicago & A. R. Co.*, C. C. A., 204 Fed. 436.

¹³³ *Binney v. Cumberland Ely Copper Co.*, 183 Fed. 650, 653. See *Jones v. Missouri-Edison Electric Co.*, C. C. A., 203 Fed. 945.

¹³⁴ *Jones v. Missouri Edison El. Co.*, C. C. A., 203 Fed. 945.

¹³⁵ *Bogert v. Southern Pac. Co.*, 250 U. S. 483.

infringement of a patent must allege: that the complainant or the person through whom he claims was the inventor or discoverer of the thing or process patented;¹ that it has not been previously patented, nor described in any printed publication;² in this or in any foreign country;³ nor patented in any foreign country in the twelve months, or in the case of a design patent, in the four months, prior to the application;⁴ that it was not in public use nor on sale for more than two years before the application.⁵ It must show that the patent was duly issued;⁶ that the plaintiff has and had, at the time when the bill was filed,⁷ a title to the patent, or such an interest in the same as gives him the right to the protection from the court;⁸ and that the

§ 146. ¹ *Sullivan v. Redfield*, 1 Paine, 441; *Am. Graphophone Co. v. Nat. Phonograph Co.*, 127 Fed. 349. For a precedent of a bill for the infringement by the original patentee, see *McCoy v. Nelson*, 121 U. S. 484, 30 L. ed. 1017.

An allegation in a bill for infringement that a person named was "within the meaning of the statutes of the United States then in force the inventor" of the patented process, while informal, is equivalent to an allegation that he was the original and first inventor or discoverer. *Schaum & Uhlinger, Inc., v. Copley-Plaza Operating Co.*, 243 Fed. 924. See § 29, *supra*, § 277, *infra*.

² *Hutton v. Star S. S. Co.*, 60 Fed. 747; *Diamond Match Co. v. Ohio W. Co.*, 80 Fed. 117; *Goebel v. Am. Ry. Supply Co.*, 55 Fed. 825; *Rubber T. W. Co. v. Davis*, 100 Fed. 85; *Am. Graphophone Co. v. Nat. Phonograph Co.*, 127 Fed. 349; *Bayley & Sons v. Braunstein Bros. Co.*, 237 Fed. 671.

³ *Moss v. McConway Torley Co.*, 144 Fed. 128; *Elliott & Hatch Book Typewriter Co. v. Fisher Typewriter Co.*, 109 Fed. 330, 331; *Bayley & Sons v. Braunstein Bros. Co.*, 237 Fed. 671.

⁴ U. S. R. S. § 4887, as amended, 29 St. at L. 693, 32 St. at L. 1225, Comp. St. 9431; *Moss v. McConway Torley Co.*, 144 Fed. 128; *Victor Talking Mach. Co. v. Leeds & Catlin Co.*, 165 Fed. 931; *Elliott & Hatch Book Typewriter Co. v. Fisher Typewriter Co.*, 109 Fed. 330.

⁵ *Blessing v. John Traeger S. C. Works*, 34 Fed. 753; *Krick v. Jansen*, 52 Fed. 823; *Am. Graphophone Co. v. Nat. Phonograph Co.*, 127 Fed. 349; *Hayes-Young T. P. Co. v. St. Louis Transit Co.*, 130 Fed. 900. An allegation that it had not been so used or sold with the consent of the inventor is insufficient. *Ibid.* The bill need not allege that the invention was not abandoned before the application for the patent. *Warren F. Co. v. Warner Bros. Co.*, 92 Fed. 990; *Bayley & Sons v. Braunstein Bros. Co.*, 237 Fed. 671.

⁶ It has been held; that an allegation that a patent was duly issued, upon application to the "proper department of the government," is insufficient. *Vant Woud Rubber Co. v. Sternau*, 145 Fed. 197.

⁷ *Krick v. Jansen*, 52 Fed. 823. But see *Arrott v. Standard Mfg. Co.*, 113 Fed. 1014.

⁸ *Krick v. Jansen*, 52 Fed. 823;

defendant has infringed, and still infringes, the patent;⁹ or threatens to infringe the same.¹⁰ When the bill alleges: that a patent was issued, it is unnecessary to allege that an application was made. The filing of the application in due form commensurate with the grant is presumed from the issue of the patent.¹¹ When, to meet a defense of prior public use, the plaintiff relied upon a former application which had been abandoned, it was said that the date and facts concerning the same should have been pleaded in the bill.¹²

It is the safer practice still to comply with these rules of pleading.¹³ It has been held, however, that an allegation that the patentee has complied with all of the requirements of the statutes of the United States obviates the necessity of specifically pleading a compliance with each of such requirements.¹⁴ It has also been held, that when the bill sets forth the issue of certain properly described letters patent to a person named as inventor, there is no need of alleging: that the invention was new, novel or useful; that the patentee was the first and true inventor thereof; that it was not patented nor described in any

Am. Graphophone Co. v. Nat. Phonograph Co., 127 Fed. 349. It has been held insufficient to aver simply the issue to complainant of the patent and that the letters-patent are in his possession. *Lettelier v. Mann*, 79 Fed. 81. But see *Arrott v. Standard Mfg. Co.*, 113 Fed. 1014. When a bill alleged "that the patentee was the original, first and sole inventor of a certain new and useful improvement in the construction of cable railways, fully described in the specification of the said letters-patent, which had not been patented to himself or to others, with his knowledge or consent, in any country, and had not, to his or the orator's knowledge, been in public use or on sale in the United States for more than two years prior to his invention and discovery thereof, and application for letters-patent of the United States therefor" it was

held sufficient. *American Cable Ry. Co. v. City of N. Y.*, 42 Fed. 60.

⁹ *Western El. Instrument Co. v. Valee Bros. El. Co.*, 145 Fed. 534.

¹⁰ *Bowers v. Bucyrus Co.*, 132 Fed. 39.

¹¹ *Bowers v. Bucyrus Co.*, 132 Fed. 39; *Maxwell Steel Vault Co. v. Nat. Casket Co.*, 205 Fed. 515, 525.

¹² *Corrington v. Westinghouse Air Brake Co., C. C. A.*, 178 Fed. 711.

¹³ *Schaum & Uhlinger, Inc., v. Copley Plaza Operating Co.*, 243 Fed. 924; *Maxwell Steel Vault Co. v. Nat. Casket Co.*, 205 Fed. 515; *Bayley & Sons v. Braunstein Bros. Co.*, 237 Fed. 671. But see *Zenith Carbureter Co. v. Stromberg Motor Devices Co.*, 205 Fed. 128.

¹⁴ *Zenith Carbureter Co. v. Stromberg Motor Devices Co.*, 205 Fed. 128; *General Bakelite Co. v. Nikolas*, 207 Fed. 111, 114.

printed publication in this or any foreign country before his invention and discovery thereof, since such matters are presumed and inferred from the issue of the patent.¹⁵

The bill must also contain a substantial description of the patent or else set out the patent itself, or have the same annexed as an exhibit.¹⁶

Profert of the patent will, however, suffice,¹⁷ and will supply any deficiencies concerning its contents or signature which therein appear.¹⁸ In such a case, only its title need be set forth.¹⁹ It is insufficient to allege: "as by the said letters patent and specifications, all in due form of law, ready in court to be produced, will fully appear;"²⁰ but it is the safer practice also to state the number of the patent, and the volume and page of its

¹⁵ *Maxwell Steel Vault Co. v. Nat. Casket Co.*, 205 Fed. 515, 524.

¹⁶ *Stirrat v. Excelsior Mfg. Co.*, 44 Fed. 142.

¹⁷ *Wilder v. McCormack*, 2 Blatchf. 31; *McMillin v. St. Louis & Miss. Valley Transportation Co.*, 18 Fed. 260; *Dickerson v. Green*, 53 Fed. 247; *Bogart v. Hinds*, 25 Fed. 484; *Hildreth v. Bee Candy Mfg. Co.*, 162 Fed. 40; *Fichtel v. Barthel*, 173 Fed. 489. "The demurrer says that the bill should make 'profert' of the letters patent, and the plaintiff replies the 'profert' is unknown to equity pleadings. Technically this may be so, but the equivalent of 'profert' is known; and whenever the law pleadings must make 'profert,' the equity pleadings must allege and prove with fullness enough to give all the benefit the 'profert' would give, and under a rule the production of the document would be compelled." *Hammond, J., in Electrolibration Co. v. Jackson*, 52 Fed. 773, 776. It has been held to be sufficient allegation for the plaintiff to allege that he "was the true, original and first inventor of a

certain new and useful improved application of steam power to the captain of vessels, not known or used before," that a description or specification of the aforesaid improvement was given in his schedule to the aforesaid letters-patent annexed, accompanied by certain drawing referred to in said last mentioned schedule, and forming parts of said letters-patent,—the said letters-patent and the said specification thereto annexed (which, your orators will produce, which, or an exemplified copy of which, as your honors may direct) were duly recorded in the patent office." *McMillin v. St. Louis & Mississippi Valley Transp. Co.*, 18 Fed. 260. See *supra*, § 136, *infra*, § 366.

¹⁸ *Fichtel v. Barthel*, 173 Fed. 489.

¹⁹ *McMillin v. St. Louis & Miss. Valley Transportation Co.*, 18 Fed. 260. See *Dickerson v. Greene*, 53 Fed. 247.

²⁰ *Wilder v. McCormick*, 2 Blatchf. 31; *Dickerson v. Greene*, 53 Fed. 247; *Bogart v. Hinds*, 25 Fed. 484. See *infra*, § 366.

record in the patent office;²¹ together with its title. An allegation of the date, without profert, is insufficient.²² It has been held: that the mention, in a bill, of prior patents to the same patentee, does not amount to a profert of such patents, so as to bring them before the court for consideration on a demurrer.²³ In case of a profert, the document thus offered may be retained in the custody of the pleader until the hearing.²⁴

Under the practice in the Second Circuit, complainant in a suit for infringement may declare on the patent generally and postpone the statement of the particular claims relied on until the taking of the testimony begins.²⁵ If the patent is not set forth at length nor profert thereof made, it is the safer practice to allege, that it was issued in the name of the United States under the seal of the patent office or that it was signed by the Commissioner.²⁶ Where the patentee and licensee joined as complainants, and there was a demurrer for misjoinder it was held, that the complainants must produce the license upon the argument of the demurrer, since it was not set out in the bill.²⁷

The bill must show the plaintiff's title to the patent when he was not the original patentee.²⁸ An averment that the patent was "by various mesne assignments duly assigned" to complainants without specifying such assignments was held to be insufficient.²⁹ Where a bill by the assignee of a patent seeks damages and profits for past infringement, it must state the date of the assignment, and that the right of recovery for past damages and profits was included therein.³⁰ Where the bill alleged that the patent was issued to a different person from the applicant as assignee, it was held that it might be presumed that an assign-

²¹ *Electrolibration Co. v. Jackson*, 52 Fed. 773, 776. See *Welsbach L. Co. v. Rex I. L. Co.*, 87 Fed. 477.

²² *Ibid.*

²³ *Bowers v. Bucyrus Co.*, 132 Fed. 39.

²⁴ *Germain v. Wilgus, C. C. A.*, 67 Fed. 597.

²⁵ *General El. Co. v. Am. Brass & Copper Co.*, 209 Fed. 237.

²⁶ *Schaum & Uhlinger v. Copley-Plaza Operating Co.*, 243 Fed. 924. See *supra* note 10.

²⁷ *Dyer v. Cryder*, 153 Fed. 767.

²⁸ *Schaum & Uhlinger, Inc., v. Copley-Plaza Operating Co.*, 243 Fed. 924; *Zenith Carbureter Co. v. Stromberg Motor Devices Co.*, 205 Fed. 158.

²⁹ *Schaum & Uhlinger, Inc., v. Copley-Plaza Operating Co.*, 243 Fed. 924.

³⁰ *Vant Woud Rubber Co. v. Sternan*, 145 Fed. 197.

ment sufficient to pass title was before the Patent Office.³¹ The complainant need not state in his bill the date of the invention.³²

The bill must also show an infringement of the patent.³³ It has been held that a simple averment that the defendant has infringed the patent above described is sufficient.³⁴ An allegation that "the defendant has manufactured and offered for sale varnish embodying the inventions" was held to be insufficient.^{34a} When the defendant is a licensee, the bill must

³¹ *Schaum & Uhlinger, Inc., v. Copley-Plaza Operating Co.*, 243 Fed. 924.

³² *Todd v. Whitaker*, 217 Fed. 319.

³³ *Zenith Carbureter Co. v. Stromberg Motor Devices Co.*, 205 Fed. 158; *Gen. Bakelite Co. v. Nikolas*, 207 Fed. 111.

³⁴ *Am. Bell Tel. Co. v. Sou. Tel. Co.*, 34 Fed. 803; *Fichtel v. Barthel*, 173 Fed. 489. See also *McMillin v. St. Louis & M. V. Tr. Co.*, 18 Fed. 260; *McCoy v. Nelson*, 121 U. S. 484, 30 L. ed. 1017; *Cleveland F. & B. Co. v. U. S. Rolling S. Co.*, 41 Fed. 476; *Peters v. Chicago Biscuit Co.*, 142 Fed. 779. See *Thomson-Houston El. Co. v. Electrose Mfg. Co.*, 15 Fed. 543. But see *Am. S. L. B. Co. v. Empire S. N. Co.*, 50 Fed. 929. It is enough to aver: "that the defendant is now constructing, using, and selling steam-power capstans for vessels in some parts thereof substantially the same in construction and operation as in the said letters-patent mentioned." *McMillin v. St. Louis & Mississippi Valley Transportation Co.*, 18 Fed. 260, 261. See *McCoy v. Nelson*, 121 U. S. 484, 30 L. ed. 1017. A bill for an injunction and an accounting was held to be good on demurrer, although it did not allege that the complainant was engaged in using the invention patented, or that it was a source of profit

to him, when it alleged that the defendant had made profits by the use of the invention. *Wirt v. Hicks*, 46 Fed. 71. A bill which alleged the issue of a patent for a "process" of making furniture nails, which it set forth, alleged that the defendant, "in infringement of the aforesaid letters-patent," did wrongfully "make, use, and vend to others to be used, furniture nails embracing the improvement set forth and claimed in the aforesaid letters-patent," was held demurrable as not containing sufficient averment of infringement. *Am. S. L. B. Co. v. Empire S. N. Co.*, 50 Fed. 929. It has been held that in a suit against two or more for the infringement of a patent, a general allegation of infringement is sufficient without a specific allegation that they are joint infringers. *Indurated F. I. Co. v. Grace*, 52 Fed. 124, 127; *Diamond Match Co. v. Ohio Match Co.*, 80 Fed. 117. *Contra*, *Shickle v. Foundry Co.*, 22 Fed. 105; *Fitchel v. Barthel*, 173 Fed. 489. A bill to enjoin the infringement of a patent by the use of a machine need not state what articles the defendant has made by the use of the machine. *Fischer v. Hayes*, 6 Fed. 76, 78. An allegation that the defendant "since the date of said patent" had infringed was held upon demurrer not to signify "ever since," but "after or subsequently

show clearly whether the suit is for an infringement of a patent or for damages for the breach of a contract in relation to a patent.³⁵

In such a case where three causes of action for infringement are set forth because the ruling of damage might differ, each must be complete and unequivocal.³⁶

The Revised Statutes provide: "Whenever, through inadvertence, accident, or mistake, and without any willful default or intent to defraud or mislead the public, a patentee has, in his specification, claimed to be the original and first inventor or discoverer of any material or substantial part of the thing patented, of which he was not the original and first inventor or discoverer, every such patentee, his executors, administrators, and assigns, whether of the whole or any sectional interest in the patent, may maintain a suit at law or in equity, for the infringement of any part thereof, which was bona fide his own, if it is a material and substantial part of the thing patented, and definitely distinguishable from the parts claimed without right, notwithstanding the specifications may embrace more than that of which the patentee was the first inventor or discoverer. But in every such case in which a judgment or decree shall be rendered for the plaintiff no costs shall be recovered unless the

to" that date. *Brush El. Co. v. Ball El. Light Co.*, 43 Fed. 899. Where the bill alleged infringement subsequent to the date of the patent and more than six years before the filing of the bill, it was held not to be defective because it failed to allege such infringement had continued. *Fitchel v. Barthel*, 173 Fed. 489, 491. A bill which alleged that a complainant had obtained a certain patent, that the defendant had obtained patents of a later date which interfered with complainant's rights, and that defendant is making and selling machines under his patents, and has in other ways disturbed complainant in the use and enjoyment of the rights granted by his patent, was held to charge interference sufficiently. *Stone-*

metz P. M. Co. v. Brown F. M. Co., 46 Fed. 72. It has been held: that where a bill charges the infringement of a patent generally, it may be construed as charging the infringement of all the claims and that the complainant cannot be required to amend by specifying the claims, with respect to which the infringement is claimed, and the parts of defendant's machine or structure, which are claimed to infringe. *Morton Tr. Co. v. Am. Car & Foundry Co.*, C. C. A., 129 Fed. 916.

^{34a} *General Bakelite Co. v. Nikolas*, 207 Fed. 111.

³⁵ *Schrade v. Camillus Co.*, 242 Fed. 523.

³⁶ *Ibid.*

proper disclaimer has been entered at the Patent-Office before the commencement of the suit. But no patentee shall be entitled to the benefits of this section if he has unreasonably neglected or delayed to enter a disclaimer."³⁷ It has been held that when one of the claims under a patent has been held to be void, a disclaimer of the same must be filed before the final decree in an infringement suit.³⁸ Where in a previous suit for infringement so much of the bill as related to a claim was dismissed without any decision upon the validity thereof it was held that in a later suit where such claim was not involved a disclaimer need not be filed.³⁹ Where the complainants sued as joint owners of a patent and as such prayed for an accounting, adding thereto the prayer for general relief, it was held that profits due to a single one of them, as exclusive licensee for a certain territory, could not be recovered in the absence of an averment concerning his license in the bill.⁴⁰ But the better practice is not to require a disclaimer until the entry of the final decree after any accounting that may be ordered has been terminated, in order that the complainant may have the right to have so much of the adjudication as is against him reviewed upon appeal.⁴¹ A disclaimer filed 107 days after a decision of the Supreme Court adjudging the claims therein described to be invalid and which confirmed to the language of the decision was held to be timely and sufficient.⁴²

Where damages for an infringement are prayed, the bill must show that notice to the public was given by the plaintiff, by affixing the word "patented," together with the day and year the patent was granted, upon each patented article made or sold by him, which is covered by the patent in suit, or when, from the character of the article, this could not be done, by affixing to it, or to the enclosing package, a label containing the same notice; or else that the defendant was duly notified of the infringement and continued after the notice to make, use or vend the article so patented.⁴³ Such notice is not essential where the plaintiff

³⁷ U. S. R. S., § 4922, 5 Fed. St. Co. v. Bredin, C. C. A., 186 Fed. Ann. 598, Pierce's Fed. Code 490. (1910), p. 1652, § 8789.

³⁸ Suddard v. Am. Motor Co., 163 Fed. 852.

³⁹ Todd Protectograph Co. v. New Era Mfg. Co., 236 Fed. 768.

⁴⁰ National Metal Weather Strip

⁴¹ Page Mach. Co. v. Dow, Jones & Co., C. C. A., 168 Fed. 703.

⁴² Minerals Separation v. Butte & Superior Min. Co., 245 Fed. 577.

⁴³ U. S. R. S., § 4900. Sprague v. Bramhall-Deane Co., 133 Fed.

seeks an injunction without any demand for profits or damages; ⁴⁴ and without such marking or any allegations concerning the same, an accounting may be decreed because of infringements committed after the filing of the bill. ⁴⁵

The Revised Statutes provide: "Any person who has an interest in an invention or discovery, whether as inventor, discoverer, or assignee, for which a patent was ordered to issue upon the payment of the final fee, but who fails to make payment thereof within six months from the time at which it was passed and allowed, and notice thereof was sent to the applicant or his agent, shall have a right to make an application for a patent for such invention or discovery the same as in the case of an original application. But such second application must be made within two years after the allowance of the original application. But no person shall be held responsible in damages for the manufacture or use of any article or thing for which a patent was ordered to issue under such renewed application prior to the issue of the patent. And upon the hearing of renewed applications preferred under this section, abandonment shall be considered as a question of fact." ⁴⁶

This does not prevent damages for subsequent use nor an injunction in case of the same. ⁴⁷

The history of the invention, and a description of patents issued to the complainant before that sued upon, were held to

738; *Streat v. Finch, Young & McConville*, 154 Fed. 378; *G. Heileman Brewing Co. v. Independent Brewing Co.*, C. C. A., 191 Fed. 491. *Gibson v. American Graphophone Co.*, C. C. A., 234 Fed. 633. Where the bill admitted that the complainant had made and sold the patented articles, without alleging compliance with the statutory requirement concerning marking the same; but alleged that defendant continued to infringe after due notice, and omitted to give the date of such notice; it was held: that an admission by the defendant of notice did not relieve complainant from the burden of

proving the date; and that where that question was not adjudicated by an interlocutory decree finding infringement and directing an accounting, the date must be proved before the Master to afford any basis for an accounting. *Lorain Steel C. v. N. Y. Switch & Crossing Co.*, 153 Fed. 205.

⁴⁴ *Morton Tr. Co. v. Am. Car. & Foundry Co.*, 161 Fed. 546.

⁴⁵ *Maimen v. Union Special Mach. Co.*, C. C. A., 165 Fed. 440.

⁴⁶ U. S. R. S. § 4897, Comp. St. § 9443.

⁴⁷ *Detroit Iron & Steel Co. v. Carey*, C. C. A., 236 Fed. 924.

be proper averments.⁴⁸ So were the grant of foreign patents for the same invention and acquiescence therein in this and other countries.⁴⁹ It was also held proper to describe previous litigation over the same or similar patents.⁵⁰ The bill need not allege that the invention had not been abandoned before the grant of the patent.⁵¹

It was held at circuit that in a bill founded upon a reissued patent it is not necessary to aver specifically the ground upon which the original patent was surrendered;⁵² but if such a bill shows a delay of more than two years in the application for the reissue;⁵³ or in the patent office,⁵⁴ it must allege sufficient excuse for the delay.

Where the bill shows such a relation between the defendants

⁴⁸ *Steam G. & L. Co. v. McRoberts*, 26 Fed. 765.

⁴⁹ *Peters v. Chicago Biscuit Co.*, 142 Fed. 779. See *Bayley & Sons v. Blumberg*, C. C. A., 254 Fed. 696.

⁵⁰ *Steam G. & L. Co. v. McRoberts*, 26 Fed. 765; *Am. Bell Tel. Co. v. So. Tel. Co.*, 34 Fed. 803. But see *Western El. Co. v. Williams-Abbott El. Co.*, 83 Fed. 842.

⁵¹ *Fichtel v. Barthel*, 173 Fed. 489.

⁵² *Spaeth v. Barney*, 22 Fed. 828. Upon a demurrer for both uncertainty and want of equity to a bill founded upon a reissued patent, when the only allegations concerning the reissue were "that said Charles T. Day having, for good and lawful cause and with the consent and approbation of your orator, surrendered said letters-patent to the Commissioner of Patents, and having made due application therefor, and having in all things complied with the acts of Congress in such case made and provided, did, on the eighteenth of February, 1879, obtain new letters-patent, being reissued letters-patent, for the same invention for the

residue of said term, and which were marked 'reissue, No. 8,590,' and were issued in due form of law to your orator, as assignee, under the seal of the patent office of the United States, signed by the Secretary of the Interior and countersigned by the Commissioner of Patents, and hearing date the day and year aforesaid, as by the last mentioned reissued letters-patent, ready here in court to be produced, will appear;" it was held that the bill was not objectionable. The court then said: "It is not necessary to aver, specifically, the ground on which the original patent was surrendered. The reissue of letters-patent by the Commissioner is *prima facie* evidence that such reissue is founded on sufficient cause, and is in accordance with law. It is also presumed that the Commissioner acted within his statutory authority until the contrary is proved." *Ibid.*

⁵³ *Wollensak v. Reiher*, 115 U. S. 96, 29 L. ed. 350; *Thermos Bottle Co. v. Semple*, 222 Fed. 942.

⁵⁴ *Gandy v. Marble*, 122 U. S. 432, 30 L. ed. 1223.

and the patentees as to estop the former from denying the validity of the patent, a specific allegation of such estoppel is not necessary.⁵⁵

The objection, that a bill for infringement does not show upon which of the claims of the patent complainant relies, is not a ground for dismissing the bill, but should be raised by a motion to require the complainant to specify such claims.⁵⁶

When there is no other ground for equitable relief, the court of equity has no jurisdiction of a suit upon a contract for royalties,⁵⁷ nor for an accounting by an infringement of a patent.⁵⁸ Consequently, after the expiration of a patent, when an injunction can no longer be granted against further infringements, a bill for an accounting by an infringer will not be sustained.⁵⁹ But where infringing articles, made when the patent was in force, are in the defendant's possession, equity may take jurisdiction, since the right to an injunction there exists.⁶⁰ Where a bill filed after the expiration of the patent⁶¹ or within a few days before⁶² shows that during the six years immediately preceding complainant had not made, used or sold the patented invention nor sustained any actual damage thereto, from the infringement of the invention by others; it has been held that the complainant could only recover nominal damages at law which was an inadequate remedy and that he might consequently sue in equity for an accounting of the profits made by the defendant. A bill praying an injunction and an accounting, filed only a few

⁵⁵ *Climax Lock & Ventilator Co. v. Ajax Hardware Mfg. Co.*, 192 Fed. 126.

⁵⁶ *Marconi Wireless Tel. Co. v. New England Nev. Co.*, 191 Fed. 194.

⁵⁷ *Safford v. Ensign Mfg. Co.*, C. C. A., 120 Fed. 480; *Allen v. Consol. Fruit Jar Co.*, 145 Fed. 948, where the cancellation of patents was also prayed.

⁵⁸ *Root v. Railway Co.*, 105 U. S. 189, 26 L. ed. 975; *Brooks v. Miller*, 28 Fed. 615, 617.

⁵⁹ *Ibid.*

⁶⁰ *New Jersey Patent Co. v. Martin*, 172 Fed. 760; *Motion Picture*

Patents Co. v. Centaur Film Co., 217 Fed. 247. *Root v. Railway Co.*, 105 U. S. 189, 26 L. ed. 975; *Clark v. Wooster*, 119 U. S. 322, 325, 30 L. ed. 392, 393; *N. Y. Belting & Packing Co. v. Magowan*, 27 Fed. 111; *American D. R. B. Co. v. Rutland Marble Co.*, 2 Fed. 356; *American D. R. B. Co. v. Sheldon*, 1 Fed. 870; *Crossley v. Derby Gas Light Co.*, 4 L. J. Ch. (N.S.) 25. But see *Westinghouse v. Carpenter*, 43 Fed. 894, and *infra*, § 277.

⁶¹ *Tompkins v. St. Regis Co.*, C. C. A., 236 Fed. 221.

⁶² *Tompkins v. International Paper Co.*, C. C. A., 183 Fed. 773.

days before the expiration of a patent, may, in the discretion of the court, be sustained by a decree for an accounting only, although the patent has expired before the hearing, provided that it was possible to obtain equitable relief during the life of the patent.⁶³ It has been so held of bills filed four months and five days,⁶⁴ between two and three months,⁶⁵ "a few weeks,"⁶⁶ forty-eight days,⁶⁷ fifteen days,⁶⁸ two days,⁶⁹ before the patent's expiration; or even one day before, when the bill alleged that complainant had not used its patent and had sustained no actual damages by the infringement; although it did not appear that any motion for a preliminary injunction was made.⁷⁰ On the other hand, bills were dismissed when no applications for preliminary injunctions were made and the suits were begun within two months,⁷¹ twenty-nine days,⁷² twenty-two days,⁷³ fourteen days,⁷⁴ thirteen days,⁷⁵ eleven days,⁷⁶ ten days,⁷⁷ and five days,⁷⁸ respectively, before the expiration of the patent. The fact that, under the practice of the court requiring a certain notice, no

⁶³ *Beedle v. Bennett*, 122 U. S. 71, 30 L. ed. 1074; *Clark v. Wooster*, 119 U. S. 322, 30 L. ed. 392; *Busch v. Jones*, 184 U. S. 598, 46 L. ed. 707; *Westinghouse Air Brake Co. v. Carpenter*, 32 Fed. 484, per *Brewer, J.*; *Kittle v. De Graaf*, 30 Fed. 689, per *Coxe, J.*; *Adams v. Bridgewater Iron Co.*, 26 Fed. 324; *Brooks v. Miller*, 28 Fed. 615, 617; *Russell v. Kern*, C. C. A., 69 Fed. 94.

⁶⁴ *Chinnoek v. Patterson, P. & S. Tel. Co.*, C. C. A., Third Circuit, 112 Fed. 531.

⁶⁵ *Ross v. Fort Wayne, C. C. A.*, Seventh Circuit, 63 Fed. 466; *Carnegie Steel Co. v. Colorado Fuel & Iron Co.*, C. C. A., 165 Fed. 195.

⁶⁶ *Huntington Dry Pulverizer Co. v. Virginia, Carolina Chemical Co.*, 130 Fed. 558 (D. N. J.).

⁶⁷ *Am. Sulphite Pulp Co. v. Crown-Columbia Pulp & Paper Co.*, 169 Fed. 140.

⁶⁸ *Clark v. Wooster*, 119 U. S. 322, 30 L. ed. 392.

⁶⁹ *Motion Picture Patents Co. v. Centaur Film Co.*, 217 Fed. 247.

⁷⁰ *Tompkins v. International Paper Co.*, C. C. A., 183 Fed. 773.

⁷¹ *Racine Seeder Co. v. Joliet Wire Check Rower Co.*, 27 Fed. 367.

⁷² *Keyes v. Eureka Con. Min. Co.*, 158 U. S. 150, 153, 39 L. ed. 929, 930; affirming 45 Fed. 199.

⁷³ *McDonald v. Miller*, 84 Fed. 344.

⁷⁴ *Am. Cable Ry. Co. v. Chicago City Ry. Co.*, 41 Fed. 522.

⁷⁵ *Miller v. Schwarner*, 130 Fed. 561.

⁷⁶ *Diamond Stone Sawing Machine Co. v. Seus*, 159 Fed. 497; *Beid-Areher Co. v. North Amer. Chemical & Eng. et al.*, 147 Fed. 746.

⁷⁷ *Overweight Counterbalance Elevator Co. v. Standard Elevator & Mfg. Co.*, 96 Fed. 231.

⁷⁸ *Burdell v. Comstock*, 15 Fed. 395.

injunction could possibly have been obtained before the expiration of the patent, may justify the dismissal of the bill.⁷⁹ It has been said that in such a case where the bill was filed before the expiration of the patent the question is not one of jurisdiction but of discretion in the exercise of jurisdiction.⁸⁰ Where a patent has expired during the pendency of the suit, although an injunction will not be granted, damages or an accounting of the profits may be awarded for the infringement while it was in force.⁸¹ Where a bill charged the joint infringement of two patents and one expired immediately after the bill was filed, it was held that the court had jurisdiction to grant relief because of the infringement of the other.⁸²

Allegations that complainant derives his benefit from the patent through a limited granting of licenses does not deprive equity of jurisdiction by showing that he has an adequate remedy at law, when it appears that there is no established license fee for all users,⁸³ and even, it has been held, when there is no allegation upon the subject in the bill.⁸⁴

The discontinuance of the infringement shortly before the commencement of the suit does not deprive the complainant of his remedy for an injunction and accounting of the profits previously made.⁸⁵ But where the defendant has ceased to infringe months before the suit was brought does not threaten further infringement and has shown by his acts that he does not intend continuance thereof, the bill may be dismissed.⁸⁶

⁷⁹ *Clark v. Wooster*, 119 U. S. 322, 324, 30 L. ed. 392; *American Cable Ry. Co. v. Citizens' Ry. Co.*, 44 Fed. 484; *Keyes v. Eureka Con. Min. Co.*, 45 Fed. 199; *American Cable Ry. Co. v. Chicago City Ry. Co.*, 41 Fed. 522; *Russell v. Kern*, C. C. A., 64 Fed. 581; s. c., 69 Fed. 94; *McDonald v. Miller*, 84 Fed. 344.

⁸⁰ *W. W. Sly Mfg. Co. v. Central Iron Works*, C. C. A., 201 Fed. 683.

⁸¹ *Keystone Type Foundry v. Wynkoop*, 239 Fed. 355.

⁸² *W. W. Sly Mfg. Co. v. Central Iron Works*, 201 Fed. 683.

⁸³ *Am. Sulphite Pulp Co. v. Crown-Columbia Pulp & Paper Co.*, 169 Fed. 140.

⁸⁴ *Peters v. Chicago Biscuit Co.*, 142 Fed. 779.

⁸⁵ *Saxlehner v. Eisner*, 140 Fed. 938.

⁸⁶ *Chadeloid Chem. Co. v. Johnston*, C. C. A., 203 Fed. 993; *Goshen Mfg. Co. v. Hubert A. Myers Mfg. Co.*, C. C. A., 215 Fed. 594 (where defendant had sold its physical assets and stopped business); *Munger Laundry Co. v. National Marking Mach. Co.*, C. C. A., 252 Fed. 144.

All persons who have acted jointly in the infringement of a patent may be made defendants in the same suit.⁸⁷ Persons who are acting in concert as employees of the same corporation in the infringement of a patent may be joined as defendants to the same bill.⁸⁸ The bills should then aver that they are jointly acting and cooperating in the infringement.⁸⁹ An averment that two parties, one of whom is an officer of the other, have infringed a patent, is a sufficient allegation that their infringement was joint.⁹⁰ It has been held that an improper joinder of applicants for a patent is a purely technical defense which should not be favored after the patent has been assigned;⁹¹ but it was held that, in the same bill, complainant could not join a prayer for relief against interference with a request that the Commissioner grant a reissue of a patent,⁹² nor a prayer for an injunction against infringement with one for specific performance of an agreement by a licensee.⁹³

A bill to enjoin the infringement of several distinct patents under the former practice was held multifarious;⁹⁴ but if all the patents are infringed in the use of or manufacture of a single machine, process, manufacture or composition of matter and it is so alleged, the bill is good;⁹⁵ even if one has expired;⁹⁶ and

⁸⁷ Climax Lock & Ventilator Co. v. Ajax Hardware Mfg. Co., 192 Fed. 126, corporations who had acted jointly with the patentees, who had assigned their patents to them.

⁸⁸ Popenhusen v. Falke, 4 Blatchf. 493.

⁸⁹ Swift v. Inland Nav. Co., 243 Fed. 375.

⁹⁰ Thomson-Houston El. Co. v. Electrose Mfg. Co., 155 Fed. 543.

⁹¹ Sieber & Trussel Mfg. Co. v. Chicago Finder & File Co., 177 Fed. 439.

⁹² Gold v. Gold, 181 Fed. 544.

⁹³ Indiana Mfg. Co. v. Nichols & Shepard Co., 190 Fed. 579.

⁹⁴ Quoted with approval in Robinson v. Chicago Rys. Co., C. C. A., 174 Fed. 40, 42; Hayes v. Dayton,

8, Fed. 702; Shickle v. South St. Louis F. Co., 22 Fed. 105; Thomas H. El. Co. v. Sperry, 46 Fed. 75; Loudon M. Co. v. Montgomery W. & Co., 96 Fed. 232. But see Eq. Rule 26, *supra*, § 139.

⁹⁵ Quoted with approval in Robinson v. Chicago Rys. Co., C. C. A., 174 Fed. 40, 42; Nourse v. Allen, 4 Blatchf. C. C. 376; Perry v. Corning, 7 Blatchf. C. C. 195; Case v. Redfield, 4 McLean, 526; Gamewell F. A. Tel. Co. v. Chilli-cothe, 7 Fed. 351; Nellis v. McLanahan, 6 Fisher's Pat. Cas. 286; Diamond Match Co. v. Ohio M. Co., 80 Fed. 117; Edison Phon. Co. v. Victor Talking Mach. Co., 120 Fed. 305; American Graphophone Co. v. Leeds & Catlin Co., 131 Fed. 281; Lagonda Mfg. Co. v. Elliott Co.,

although one is for a process and the other for a product.⁹⁷ It has been said that the complainant "should aver that said inventions are capable of conjoint as well as separate use, and are so used by the defendant,"⁹⁸ but, before the new Equity Rules, a general allegation of their infringement collectively was usually held to be sufficient.⁹⁹ An amendment adding such an averment will be allowed.¹⁰⁰ Since these rules it has been held that the plaintiff may join in one bill causes of action for the infringement of several patents.¹⁰¹ A charge of infringement, and a prayer for an injunction and accounting accordingly, may be joined with a charge of interference and a prayer for relief against the same.¹⁰² A bill seeking an injunction with damages against the infringement of a patent, and an injunction with damages against the publication of libelous circulars affecting plaintiff's patent has been held multifarious.¹⁰³ A bill seeking an injunction against the infringement of a patent and the infringement of a trade-mark was held not multifarious when the allegations as to both related to the same subject-matter;¹⁰⁴ but, it was held, that a complainant could not join a cause of action for the infringement of a patent with another for unfair competition in trade, though both related to the same subject-matter,¹⁰⁵ although this might be done irre-

C. C. A., 214 Fed. 578. See U. S. v. Am. Bell Tel. Co., 128 U. S. 315, 32 L. ed. 450.

⁹⁶ *Hunting Dry Pulverizer Co. v. Virginia-Carolina Chemical Co.*, 130 Fed. 558.

⁹⁷ *Am. Graphophone Co. v. Leeds & Catlin Co.*, 131 Fed. 281.

⁹⁸ *Gamewell F. A. Tel. Co. v. ChHlicothe*, 7 Fed. 351; *Nellis v. McLanahan*, 6 *Fisher's Pat. Cas.* 286; *Robinson v. Chicago Rys. Co.*, C. C. A., 174 Fed. 40, 42.

⁹⁹ *Luten v. Sharp*, 200 Fed. 151.

¹⁰⁰ *Union L. & S. Co. v. Philadelphia R. Co.*, 68 Fed. 914; *Electric Goods Mfg. Co. v. Benjamin Electric Mfg. Co.*, 169 Fed. 832.

¹⁰¹ *Crysal Percolator Co. v. Landers*, 258 Fed. 28, *supra*, § 142.

¹⁰² *Leach v. Chandler*, 18 Fed. 202; *Holiday v. Pickhardt*, 29 Fed. 853; *Swift v. Jenks*, 29 Fed. 642; *American Roll Paper Co. v. Knopp*, 44 Fed. 609, 612; *Stonemetz P. M. Co. v. Brown F. M. Co.*, 46 Fed. 72.

¹⁰³ *Fougeres v. Murbarger*, 44 Fed. 292. See *International T. C. Co. v. Carmichael*, 44 Fed. 349.

¹⁰⁴ *Jaros H. U. Co. v. Fleece H. U. Co.*, 60 Fed. 622; *Adam v. Folger*, 120 Fed. 260; *Globe-Wernicke Co. v. Fred Macey Co.*, C. C. A., 119 Fed. 696, 703, 56 C. C. A. 304; *T. B. Woods Sons Co. v. Valley Iron Works*, 168 Fed. 770. *Contra*, *Cushman v. Atlantis Fountain Pen Co.*, 164 Fed. 94; *Macky v. Grabowski*, 177 Fed. 591. See *supra*, §§ 24, 142.

¹⁰⁵ *Ball & S. F. Co. v. Cohen*, 90

spective of the citizenship of the parties when the unfair competition was incidental to the infringement.¹⁰⁶ For example, an imitation of the form¹⁰⁷ and design,¹⁰⁸ and of pictures of the device in catalogues.¹⁰⁹ When the requisite diversity of citizenship exists, a bill seeking these two kinds of relief can be sustained.¹¹⁰ But not, when neither party is a resident of the district and the acts of unfair competition were committed elsewhere.¹¹¹ Where there was no diversity of citizenship it was held when the patent was sustained and its infringement found, that profits and damages for unfair competition might be included in the accounting.¹¹² But where relief because of alleged infringement of a patent was denied, courts have held that they had no jurisdiction to consider a cause of action founded upon unfair competition¹¹³ in the same. Under the former practice

Fed. 664; *C. L. King & Co. v. Inlander*, 133 Fed. 416; *Cushman v. Atlantis Fountain Pen Co.*, 164 Fed. 94; *Mecky v. Grabowski*, 177 Fed. 591; *National Casket Co. v. N. Y. & Brooklyn Casket Co.*, 185 Fed. 533; *Mallinson v. Ryan*, 242 Fed. 951. See *supra*, §§ 24, 142. See, however, *Keasby & Mattison Co. v. Phillip Cary Mfg. Co.*, 113 Fed. 432; *C. L. King & Co. v. Inlander*, 133 Fed. 416.

¹⁰⁶ *T. B. Woods Sons Co. v. Valley Iron Works*, 166 Fed. 770; *Lovell-McConnell Mfg. Co. v. Automobile Supply Co.*, 193 Fed. 658; *Climax Lock & Ventilator Co. v. Ajax Hardware Mfg. Co.*, 192 Fed. 126; *Sayre v. McGill Ticket Punch Co.*, C. C. A., 200 Fed. 771. *Farmers' Handy Wagon Co. v. Beaver Silo & Box Mfg. Co.*, C. C. A., 236 Fed. 731. *K. W. Ignition Co. v. Temco El. Motor Co.*, C. C. A., 243 Fed. 588; *Detroit Show Case Co. v. Kawneer Mfg. Co.*, C. C. A., 250 Fed. 234. *Contra*, *H. D. Smith & Co. v. Southington Mfg. Co.*, 235 Fed. 160; *Schrauger & Johnston v. Phillip Bernard Co.*, 240 Fed. 131;

Unit Const. Co. v. Huskey Mfg. Co., 241 Fed. 129; *Mallinson v. Ryan*, 242 Fed. 951.

¹⁰⁷ *T. B. Woods Sons Co. v. Valley Iron Works*, 166 Fed. 770; *Lovell-McConnell Mfg. Co. v. Automobile Supply Mfg. Co.*, 193 Fed. 658. *Contra*, *H. D. Smith & Co. v. Southington Mfg. Co.*, 235 Fed. 160.

¹⁰⁸ *Lovell-McConnell Mfg. Co. v. Automobile Supply Mfg. Co.*, 193 Fed. 658.

¹⁰⁹ *Climax Lock & Ventilator Co. v. Ajax Hardware Mfg. Co.*, 192 Fed. 126.

¹¹⁰ *Miller Rubber Co. v. Behrend*, C. C. A., 242 Fed. 515.

¹¹¹ *Woerheide v. H. W. Johns-Manville Co.*, 199 Fed. 535.

¹¹² *K. W. Ignition Co. v. Temco El. Motor Co.*, C. C. A., 243 Fed. 588; *Detroit Showcase Co. v. Kawneer Mfg. Co.*, C. C. A., 250 Fed. 234; *Geneva Furniture Mfg. Co. v. S. Karpen & Bros.*, 238 U. S. 254.

¹¹³ *New Departure Mfg. Co. v. Sargent & Co.*, C. C. A., 127 Fed. 152, 155, 62 C. C. A. 266; *Schiebel Toy & Novelty Co. v. Clark*, 217

it was held as follows: A bill to set aside a contract for a partnership in royalties, which also prayed an account of matters collected under a verbal understanding before the date of the contract, is not multifarious;¹¹⁴ nor a bill for an infringement, which also pleads a contract, in which it is alleged that defendants have agreed not to contest the validity of the patent.¹¹⁵ A supplemental bill against a new defendant, to whom the original defendant had transferred its property, pending the suit, which prayed an injunction against the use of plaintiff's patents, and that it be obliged to pay the damages caused by its predecessor's infringement; was multifarious.¹¹⁶ Where a bill set out a contract relating to certain patents, and asked specific performance thereof against several parties, but also contained expressions looking to relief, as in a suit for infringement, it could not be sustained as a bill with a double aspect; because the determination of who are proper parties must be made from different standpoints in the two kinds of bills.¹¹⁷

The Act of October 6, 1917, against Trading with the Enemy provides: "The owner of any patent, trade-mark, print, label, or copyright under which a license is granted hereunder may, after the end of the war and until the expiration of one year thereafter, file a bill in equity against the licensee in the District Court of the United States for the district in which the said licensee resides, or, if a corporation, in which it has its principal place of business (to which suit the Treasurer of the United States shall be made a party), for recovery from the said licensee for all use and enjoyment of the said patented invention, trade-mark, print, label, or copyrighted matter: Provided, however, that whenever suit is brought, as above, notice shall be filed with the alien property custodian within thirty days after date of entry of suit: Provided, further, That the licensee may make any and all defenses which would be available were no license

Fed. 760; *H. D. Smith & Co. v. Southington Mfg. Co.*, 235 Fed. 160; *Detroit Showcase Co. v. Kawneer Mfg. Co.*, C. C. A., 250 Fed. 234. See *U. S. E. Bolt Co. v. H. G. Kroncke Hardware Co.*, C. C. A., 234 Fed. 868; *Koenig v. Morris*, 243 Fed. 619. Where after finding that there was no infringement the

court held it had no jurisdiction to direct a partnership accounting.

¹¹⁴ *Patton v. Glantz*, 56 Fed. 367.

¹¹⁵ *Dunham v. Bent*, 72 Fed. 60.

¹¹⁶ *Western Telephone Mfg. Co. v. Am. El. Tel. Co.*, 137 Fed. 603.

¹¹⁷ *American Box Mach. Co. v. Crosman*, C. C. A., 61 Fed. 888; *s. c.*, 57 Fed. 1021.

granted. The court on due proceedings had may adjudge and decree to the said owner payment of a reasonable royalty. The amount of said judgment and decree, when final, shall be paid on order of the court to the owner of the patent from the fund deposited by the licensee, so far as such deposit will satisfy said judgment and decree; and the said payment shall be in full or partial satisfaction of said judgment and decree, as the facts may appear; and if, after payment of all such judgments and decrees, there shall remain any balance of said deposit, such balance shall be repaid to the licensee on order of the alien property custodian. If no suit is brought within one year after the end of the war, or no notice is filed as above required, then the licensee shall not be liable to make any further deposits, and all funds deposited by him shall be repaid to him on order of the alien property custodian. Upon entry of suit and notice filed as above required, or upon repayment of funds as above provided, the liability of the licensee to make further reports to the President shall cease.

. If suit is brought as above provided, the court may, at any time, terminate the license, and may, in such event, issue an injunction to restrain the licensee from infringement thereafter, or the court, in case the licensee, prior to suit, shall have made investment of capital based on possession of the license, may continue the license for such period and upon such terms and with such royalties as it shall find to be just and reasonable.¹¹⁸

“Any enemy, or ally of enemy, may institute and prosecute suits in equity against any person other than a licensee under this Act to enjoin infringement of letters patent, trade-mark, print, label, and copyrights in the United States owned or controlled by said enemy or ally of enemy, in the same manner and to the extent that he would be entitled so to do if the United States was not at war: Provided, That no final judgment or decree shall be entered in favor of such enemy or ally of enemy by any court except after thirty days’ notice to the alien property custodian. Such notice shall be in writing and shall be served in the same manner as civil process of Federal courts.¹¹⁹

¹¹⁸ 40 St. at L. 416 Ch. 106, Comp.
St. § 3115½ ee (f).

¹¹⁹ *Ibid* g.

§ 147. Bills to compel the issue of patents and bills to obtain relief against interfering patents. Whenever a patent on application is refused, either by the Commissioner of Patents or by the Supreme Court of the District of Columbia upon appeal from the Commissioner, the applicant may have remedy by bill in equity; and the court having cognizance thereof, on notice to adverse parties and other due proceedings had, may adjudge that such applicant is entitled, according to law, to receive a patent for his invention, as specified in his claim, or any part thereof, as the facts in the case may appear. And such adjudication, if it be in favor of the right of the applicant, shall authorize the Commissioner to issue such patent on the applicant filing in the patent-office a copy of the adjudication, and otherwise complying with the requirements of law. In all cases, where there is no opposing party, a copy of the bill shall be served on the Commissioner; and all the expenses of the proceeding shall be paid by the applicant, whether the final decision is in his favor or not."¹

"Whenever there are interfering patents, any person interested in any one of them, or in the working of the invention claimed under either of them, may have relief against the interfering patentee, and all parties interested under him, by suit in equity against the owners of the interfering patent; and the court, on notice to adverse parties, and other due proceedings had according to the course of equity, may adjudge and declare either of the patents void in whole or in part, or inoperative, or invalid in any particular part of the United States, according to the interest of the parties in the patent or the invention patented. But no such judgment or adjudication shall affect the right of any person except the parties to the suit and those deriving title under them subsequent to the rendition of such judgment."² Such a suit may be brought where there is an interference between patents granted to the same inventor al-

¹ U. S. R. S., § 4915, 5 Fed. St. Ann. 507, Pierce's Fed. Code, § 8780; Runstetler v. Atkinson, 23 Off. Gaz. 1025; Greeley v. Commissioner, 6 Fisher, 675; s. c., 1 Holmes, 284; *Ex parte Arkell*, 15 Blatchf. 437; Butterworth v. Hill,

114 U. S. 128, 29 L. ed. 119; Hill v. Wooster, 132 U. S. 693, 33 L. ed. 502.

² U. S. R. S., § 4918, 5 Fed. St. Ann. 526, Pierce's Fed. Code, § 8783.

though an adjudication of such interference makes the latter patent void.³ The act creating the Court of Appeals for the District of Columbia, with power to entertain appeals from the decisions of the Commissioner of Patents in the cases mentioned in these two sections of the Revised Statutes, did not repeal them.⁴ Such a bill should not be brought until the determination of an appeal to the District Court of Appeals,⁵ and it is the safer practice not to file the same until after the Commissioner has obeyed the mandate of that appellate court.⁶ But where adverse decisions in interference proceedings have been made against an applicant for a patent by the examiners, the Patent Commissioner and the Court of Appeals of the District of Columbia on appeal, he may maintain a bill in equity in a District Court of the United States without waiting for the formal action of the Patent Office refusing his application.⁷

Where there is no opposing party, a copy of the bill should be served on the Commissioner, and it is the better practice to name him and perhaps also the Secretary of the Interior, as parties defendant.⁸ The Commissioner of Patents is not a necessary party when there is a party to oppose the bill to compel the issue of a patent,⁹ or in an interference case,¹⁰ but when the patent has been issued and assigned, the assignee is a necessary party.¹¹

When there is an opposing party, costs are usually awarded to the one who prevails.¹²

The fact that the two parties to the interference proceeding have united the interests, and neither of them has opposed the bill, does not deprive the District Court of jurisdiction, nor, at least when that matter is disclosed to it, does it render its decree subject to collateral attack.¹³

³ *Keystone Trading Co. v. Zapata Mfg. Co.*, 210 Fed. 456.

⁴ *McKnight v. Metal Volatilization Co.*, 128 Fed. 51; *Dover v. Greenwood*, 143 Fed. 136.

⁵ *Smith v. Muller*, 75 Fed. 612; *McKnight v. Volatilization Co.*, 122 Fed. 51.

⁶ *Bernardin v. Northall*, 77 Fed. 849.

⁷ *McKnight v. Metal Volatilization Co.*, 128 Fed. 51.

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⁸ *Gandy v. Marble*, 122 U. S. 432, 7 Sup. Ct. 1290, 30 L. ed. 1223; *Davis v. Garrett*, 152 Fed. 723, 725.

⁹ *Graham v. Teter*, 25 Fed. 555.

¹⁰ *Butler v. Shaw*, 21 Fed. 321.

¹¹ *Graham v. Teter*, 25 Fed. 555. See *Illingworth v. Atha*, 42 Fed. 141, 145.

¹² *Butler v. Shaw*, 21 Fed. 321.

¹³ *Schmertz Wire Glass Co. v. Western Glass Co.*, 178 Fed. 973; s. c., 178 Fed. 977.

Such a bill presents a case of original equitable jurisdiction; not an appeal.¹⁴

The statutes do not authorize an injunction against the issue of a patent by the Commissioner to some one other than the plaintiff.¹⁵ An interlocutory injunction has been issued restraining the defendant from transferring his patent without leave of the court.¹⁶ The suit is not an appeal from the decision of the Patent Office.¹⁷ It has been described as "something in the nature of a suit to set aside a judgment."¹⁸ The suit is a plenary suit in equity to which all the rules of practice and evidence in such suits apply.¹⁹ It has been held that the suit must be brought in the district in which the defendant is a resident.²⁰

Upon an application to compel the issue of a patent, when application is made to have the bill taken *pro confesso*, the court may require a copy of the proceedings in the patent-office and call for any competent evidence that the complainants may wish to offer.²¹

The testimony before the Patent Office is not competent evidence except in cases where the common law authorizes the introduction of secondary evidence.²²

Admissions of the parties made in such proceedings are competent.²³

Statements of witnesses before the patent office may be used upon cross examination and of contradiction when their attention has been called to them.²⁴

The record of the proceedings in the patent office is also not competent except as above stated and that the plaintiff may show

¹⁴ *Wheaton v. Kendall*, 85 Fed. 666, 671; *Appert v. Brownsville Plate Glass Co.*, 144 Fed. 115.

¹⁵ *Illingworth v. Atha*, 42 Fed. 141, 144.

¹⁶ *Keystone Trading Co. v. Zapota Mfg. Co.*, 210 Fed. 456.

¹⁷ *Morgan v. Daniels*, 153 U. S. 120, 124, 14 Sup. Ct. 772, 38 L. ed. 657; *Sutton v. Wentworth*, C. C. A., 247 Fed. 493.

¹⁸ *Morgan v. Daniels*, 153 U. S. 120, 124, 14 Sup. Ct. 772, 38 L. ed. 657.

¹⁹ *Dover v. Greenwood*, 177 Fed. 946, reversed on another point, *Greenwood v. Dover Mach. Co.*, C. Fed. 91.

²⁰ *Arbetter Felling Mach. Co. v. Lewis Blind Stitch Mach. Co.*, C. C. A., 230 Fed. 992.

²¹ *Davis v. Garrett*, 152 Fed. 723, 725.

²² *Sutton v. Wentworth*, 247 Fed. 493.

²³ *Ibid.*

²⁴ *Ibid.*

that a judgment of priority has been rendered against him in order to establish his right to maintain his bill.²⁵

The decision is subject to the ordinary Equity Rules that the evidence must be relevant to the issues made by the pleading, and proof cannot be admitted which tends only to show that, because of the prior state of the art, neither party is entitled to a patent.²⁶

The court has power to decide the questions of priority without any exceptions or limitations; and when the decision of the patent office is based upon questions of law rather than upon any distinct finding of priority, the District Court of the United States will make an independent examination of the testimony and reach its own conclusions.²⁷

Issues not raised in the Patent Office such as the patentability of the invention may then be considered.²⁸

The order and proceedings of the Patent Office upon a prior application founded upon interference between the same parties cannot be considered by the court unless they are duly offered in evidence.²⁹

It has been said: that such decision must be given weight in the nature of a departmental decision, and, to overcome it, the evidence must be of such character, and sufficient at least to require a clear conviction that it was erroneous.³⁰

Where the question decided in the Patent Office was upon conflicting evidence the decision there made must be accepted as controlling upon that question of fact in any subsequent suit between the same parties unless the contrary is established by testimony which in character and amount carries through conviction.³¹ The fact that there was a diversity of opinion between the members of the Circuit Court of Appeals was held to be a sufficient reason for following the decision in the Patent Office which had been affirmed by the District Court of Appeals when

²⁵ *Ibid.*

²⁶ *Richards v. Meissner*, 163 Fed. 957.

²⁷ *Wheaton v. Kendall*, 85 Fed. 666.

²⁸ *Hansen v. Slick*, 216 Fed. 164, 170.

²⁹ *Sutton v. Wentworth*, 247 Fed. 493.

³⁰ *Greenwood v. Dover*, C. C. A., 194 Fed. 91.

³¹ *Morgan v. Daniels*, 153 U. S. 120, 125, 14 Sup. Ct. 772, 38 L. ed. 657; *Gen. El. Co. v. Steinberger*, 208 Fed. 699; *Gold v. Newton*, C. C. A., 254 Fed. 824; *Richards v. Meissner*, 163 Fed. 957.

there was no testimony materially changing the record.³³ It has been held: that where the evidence is identical the decision in the Patent Office is not conclusive;³³ but that when affirmed by the District Court of Appeals, it must be followed by a court which is not clearly convinced that the decision is wrong.³⁴

The rule does not apply where the finding in the Patent Office was based on the absence of evidence upon the subject.³⁵

It has been said that the rule applies to the decision of questions peculiar to the patent law such as the construction and scope of the application for the patent.³⁶

In a suit to compel the issue of a patent, the court may construe the claims in issue; but cannot properly alter these claims since an alteration might affect the decision in a suit founded upon an interference.³⁷ It has been held that a bill to compel the issue of a patent which has been refused, must be filed within one year after the refusal.³⁸

§ 148. Bills to restrain infringements of trade marks and unfair competition. The Trade Mark Act amongst other things provides: "That the Circuit 'now the District' and Territorial Courts of the United States and the Supreme Court of the District of Columbia shall have original jurisdiction, and the Circuit Courts of Appeal of the United States and the Court of Appeals of the District of Columbia shall have appellate jurisdiction of all suits at law or in equity respecting trade-marks registered in accordance with the provisions of this Act, arising under the present Act, without regard to the amount in controversy."¹

"The owner of a trade-mark used in commerce with foreign nations, or among the several States, or with Indian tribes, provided such owner shall be domiciled within the territory of the United States, or resides in or is located in any foreign

³³ Gold v. Newton, C. C. A., 245 Fed. 824.

³⁴ Gold v. Gold, C. C. A., 237 Fed. 84, 85.

³⁵ Hercules Powder Co. v. Newton, C. C. A., 254 Fed. 906.

³⁶ Courson v. O'Gonor, C. C. A., 227 Fed. 890.

³⁷ Gold v. Gold, C. C. A., 227 Fed. 84, 86.

³⁸ Gen. El. Co. v. Steinberger, 208 Fed. 699.

³⁸ Westinghouse El. & Mfg. Co. v. Ohio Brass Co, 186 Fed. 518; citing U. S. R. S., § 4894, as amended 29 St. at L. 692, § 4, 5 Fed. St. Ann. 488, Comp. St. 3384, Pierce Fed. Code, § 8760.

§ 148. 133 St. at L. ch. 592, § 17; Comp. St. § 9502. See § 30 *supra*, § 279 *infra*.

country which, by treaty, convention, or law, affords similar privileges to the citizens of the United States, may obtain registration for such trade-mark by complying with the following requirements: First, by filing in the Patent Office an application therefor, in writing, addressed to the Commissioner of Patents, signed by the applicant, specifying his name, domicile, location and citizenship; the class of merchandise and the particular description of goods comprised in such class to which the trade-mark is appropriated; a statement of the mode in which the same is applied and affixed to goods, and the length of time during which the trade-mark has been used; a description of the trade-mark itself shall be included, if desired by the applicant or required by the Commissioner, provided such description is of a character to meet the approval of the Commissioner. With this statement shall be filed a drawing of the trade-mark, signed by the applicant or his attorney, and such number of specimens of the trade-mark as actually used as may be required by the Commissioner of Patents. Second, by paying into the Treasury of the United States the sum of ten dollars, and otherwise complying with the requirements of this Act and such regulations as may be prescribed by the Commissioner of Patents.”²

“The application prescribed in the foregoing section, in order to create any right whatever in favor of the party filing it, must be accorded, so far as the registration and protection of trade-marks used on the products of such establishment are concerned, the same rights and privileges that are accorded to owners of trade-marks domiciled within the territory of the United States by the Act entitled ‘An Act to authorize the registration of trade-marks used in commerce with foreign nations or among the several States or with Indian tribes, and to protect the same,’ approved February twentieth, nineteen hundred and five.”³

“The application prescribed in the foregoing section, in order to create any right whatever in favor of the party filing it, must be accompanied by a written declaration verified by the applicant, or by a member of the firm or an officer of the corporation or association applying, to the effect that the applicant believes himself or the firm, corporation, or association in whose behalf

² 33 St. at L. 724, § 1 as amended ³ 34 St. at L. 169, Comp. St.
34 St. at L. 728; 35 St. at L. 728 § 9486.
(28) f., Comp. St. § 9485.

he makes the application to be the owner of the trade-mark sought to be registered, and that no other person, firm, corporation, or association, to the best of the applicant's knowledge and belief, has the right to use such trade-mark in the United States, either in the identical form or in such near resemblance thereto as might be calculated to deceive; that such trade-mark is used in commerce among the several States, or with foreign nations, or with Indian tribes, and that the description and drawing presented truly represent the trade-mark sought to be registered. If the applicant resides or is located in a foreign country, the statement required shall, in addition to the foregoing, set forth that the trade-mark has been registered by the applicant, or that an application for the registration thereof has been filed by him in the foreign country in which he resides or is located, and shall give the date of such registration, or the application therefor, as the case may be, except that in the application in such cases it shall not be necessary to state that the mark has been used in commerce with the United States or among the States thereof. The verification required by this section may be made before any person within the United States authorized by law to administer oaths, or, when the applicant resides in a foreign country, before any minister, charge d'affaires, consul, or commercial agent holding commission under the Government of the United States, or before any notary public, judge, or magistrate having an official seal and authorized to administer oaths in the foreign country in which the applicant may be whose authority shall be proved by a certificate of a diplomatic or consular officer of the United States."⁴

"Every applicant for registration of a trade-mark, or for renewal of registration of a trade-mark, who is not domiciled within the United States, shall before the issuance of the certificate of registration, as hereinafter provided for, designated, by a notice in writing, filed in the Patent Office, some person residing within the United States on whom process or notice of proceedings affecting the right of ownership of trade-mark of which such applicant may claim to be the owner, brought under the provisions of this Act or under other laws of the United

⁴ 33 St. at L. 724, § 2 as amended, *Swift v. Inland Nav. Co.*, 234 Fed. 35 St. at L. 627; Comp. St. § 9487; 375.

States, may be served, with the same force and effect as if served upon the applicant or registrant in person. For the purpose of this Act it shall be deemed sufficient to serve such notice upon such applicant, registrant, or representative by leaving a copy of such process or notice addressed to him at the last address of which the Commissioner of Patents has been notified.”⁵

“An application for registration of a trade-mark filed in this country by any person who has previously regularly filed in any foreign country which, by treaty, convention, or law, affords similar privileges to citizens of the United States an application for registration of the same trade-mark shall be accorded the same force and effect as would be accorded to the same application if filed in this country on the date on which application for registration of the same trade-mark was first filed in such foreign country: Provided, That such application is filed in this country within four months from the date on which the application was first filed in such foreign country: And provided, That certificate of registration shall not be issued for any mark for registration of which application has been filed by an applicant located in a foreign country until such mark has been actually registered by the applicant in the country in which he is located.”⁶

The proceedings in the Patent Office are not the subject of this work.

“The registration of a trade-mark under the provisions of this Act shall be prima facie evidence of ownership. Any person who shall, without the consent of the owner thereof, reproduce, counterfeit, copy, or colorably imitate any such trade-mark and affix the same to merchandise of substantially the same descriptive properties as those set forth in the registration, or to labels, signs, prints, packages, wrappers, or receptacles intended to be used upon or in connection with the sale of merchandise of substantially the same descriptive properties as those set forth in such registration, and shall use, or shall have used, such reproduction, counterfeit, copy, or colorable imitation in commerce among the several States, or with a foreign nation, or with the Indian tribes, shall be liable to an action for damages therefor at the suit of the owner thereof; and whenever in any such action

⁵ 33 St. at L. 725, ch. 592, § 3, Comp. St. § 9488.

⁶ 33 St. at L. 725, ch. 592, § 415, Comp. St. § 9489.

a verdict is rendered for the plaintiff, the court may enter judgment therein for any sum above the amount found by the verdict as the actual damages, according to the circumstances of the case, not exceeding three times the amount of such verdict, together with the costs." 7

"That the several courts vested with jurisdiction of cases arising under the present Act shall have power to grant injunctions, according to the course and principles of equity, to prevent the violation of any right of the owner of a trade-mark registered under this Act on such terms as the court may deem reasonable; and upon a decree being rendered in any such case for wrongful use of a trade-mark the complainant shall be entitled to recover, in addition to the profits to be accounted for by the defendant, the damages the complainant has sustained thereby, and the court shall assess the same or cause the same to be assessed under its direction. The court shall have the same power to increase such damages, in its discretion, as is given by section sixteen of this Act for increasing damages found by verdict in actions of law; and in assessing profits the plaintiff shall be required to prove defendant's sales only; defendant must prove all elements of cost which are claimed."

"That in any case involving the right to a trade-mark registered in accordance with the provisions of this Act, in which the verdict has been found for the plaintiff, or an injunction issued, the court may order that all labels, signs, prints, packages, wrappers, or receptacles in the possession of the defendant, bearing the trade-mark of the plaintiff or complainant, or any reproduction, counterfeit, copy, or colorable imitation thereof, shall be delivered up and destroyed. Any injunction that may be granted upon hearing, after notice to the defendant, to prevent the violation of any right of the owner of a trade-mark registered in accordance with the provisions of this Act, by any Circuit Court of the United States, or by a judge thereof, may be served on the parties against whom such injunction may be granted anywhere in the United States where they may be found, and shall be operative, and may be enforced by proceedings to punish for contempt, or otherwise, by the court by

⁷ 33 St. at L. 728; ch. 592, § 16,
Comp. St. § 9501.

which such injunction was granted, or by any other Circuit Court, or judge thereof, in the United States, or by the Supreme Court of the District of Columbia, or a judge thereof. The said courts, or judges thereof, shall have jurisdiction to enforce said injunction, as herein provided, as fully as if the injunction had been granted by the Circuit Court in which it is sought to be enforced. The clerk of the court or judge granting the injunction shall, when required to do so by the court before which application to enforce said injunction is made, transfer without delay to said court a certified copy of all the papers on which the said injunction was granted that are on file in his office.”⁸

“That no action or suit shall be maintained under the provisions of this Act in any case when the trade-mark is used in unlawful business, or upon any article injurious in itself, or which mark has been used with the design of deceiving the public in the purchase of merchandise, or has been abandoned, or upon any certificate of registration fraudulently obtained.”⁹

“That nothing in this Act shall prevent, lessen, impeach, or avoid any remedy at law or in equity which any party aggrieved by any wrongful use of any trade-mark might have had if the provisions of this Act had not been passed.”¹⁰

“That in any case involving the right to a trade-mark registered in accordance with the provisions of this Act, in which the verdict has been found for the plaintiff, or an injunction issued, the court may order that all labels, signs, prints, packages, wrappers, or receptacles in the possession of the defendant, bearing the trade-mark of the plaintiff or complainant, or any reproduction, counterfeit, copy, or colorable imitation thereof, shall be delivered up and destroyed. Any injunction that may be granted upon hearing, after notice to the defendant, to prevent the violation of any right of the owner of a trade-mark registered in accordance with the provisions of this Act, by any Circuit” now District “Court of the United States, or by a judge thereof, may be served on the parties against whom such injunction may be granted anywhere in the United States where they may be found, and shall be operative, and may be enforced

⁸ 33 St. at L. 729, ch. 592, § 19,
Comp. St. § 9505.

⁹ 33 St. at L. 729, ch. 592, § 21,
Comp. St. § 9506.

¹⁰ 33 St. at L. 730, ch. 592, § 23,
Comp. St. § 9508.

by proceedings to punish for contempt, or otherwise, by the court by which such injunction was granted, or by any other Circuit" now District "Court, or judge thereof, in the United States, or by the Supreme Court of the District of Columbia, or a judge thereof. The said courts, or judges thereof, shall have jurisdiction to enforce said injunction, as herein provided, as fully as if the injunction had been granted by the Circuit" now District "Court in which it is sought to be enforced. The clerk of the court or judge granting the injunction shall, when required to do so by the court before which application to enforce said injunction is made, transfer without delay to said court a certified copy of all the papers on which the said injunction was granted that are on file in his office."¹¹

The bill must show that the trade-mark was used in commerce with foreign nations among the several States or with the Indian tribes.¹² Where the only averment that the trade-mark was used in interstate commerce was that the mark was registered under an Act of Congress, and that under such trade-mark complainant's product had been known throughout the country, and that defendant's violation thereof had caused within the district and elsewhere through the United States great and irreparable injury to complainant, it was held that the bill did not aver interstate use sufficiently as to confer jurisdiction.¹³ It was said: "It would seem that the allegation that the defendant is 'palming off its own product upon the public as that of your orator's' might be a sufficient charge of unfair competition."¹⁴ The

¹¹ 33 St. at L. 729, ch. 592, § 20, Comp. St. § 9505.

¹² 34 St. at L. 1251, § 20. Pierce Fed. Code, § 8826. See Trade-Mark Cases, 100 U. S. 82, 25 L. ed. 550, and *supra*, §§ 30, 44, 137, 151.

¹³ *Bernstein v. Danwitz*, 190 Fed. 604; *Schrauger & Johnson v. Phillip Bernard Co.*, 247 Fed. 547.

¹⁴ *Louis Bergdoll Brewing Co. v. Bergdoll Brewing Co.*, 218 Fed. 131.

In *Sayre v. McGill Ticket Punch Co.*, 200 Fed. 771, 773. The following allegations were held to be a

sufficient charge of unfair competition:

"* * * Your orator further averring upon information and belief that a certain number of dealers in chewing gum, both the wholesale jobber, the retail dealer and the street fakir, can be found who have purchased the said packages of chewing gum from the defendant for the purpose of 'palming off' the defendant's goods upon the public as the goods of your orator, and that this defendant has found, as a matter of fact, that

question whether, in the same bill, relief can be prayed against trade-mark and unfair competition, both parties being citizens of the same State, is still *sub judice*. It has been held that where the trade-mark is invalid,¹⁵ the court cannot then consider the question of unfair competition, nor when it is valid, but not infringed.¹⁶ It has been held that where the trade-mark is valid and has been infringed, and the acts of unfair trade are not separate and distinct from the acts of infringement, that then an injunction against them may be joined with the decree for-

the purchasing public makes no distinguishment between the packages of your orator and the Spearmint packages of this defendant, and that the Spearmint product of this defendant can be palmed off on the public and trade generally as the goods and product of your orator.

"That your orator avers, upon information and belief, that the said defendant is preparing to rush and flood the trade with vast quantities of chewing gum having the exact trade-dress as your orator, and that unless the honorable court shall grant an immediate injunction or restraining order preventing the sale or delivery of said packages that said defendant will at once utilize such delay and put upon the market his fraudulent imitation of your orator's trade-dress, as above set forth, to the great and irreparable damage of your orator, your orator averring that said chewing gum product known as 'Helmet Spearmint' and as made by the defendant, is of an inferior grade or quality to the product of your orator, is not of the same flavor as your orator's product, and is calculated and intended to and does, as a matter of fact, greatly injure the high reputation, charac-

ter, and quality of your orator's goods.

"And your orator avers that this defendant has simulated style of lettering, shape of package, peculiar markings, form of wrapper and general color scheme, thereby producing and giving to its style of package, carton, and wrappers, the peculiar visual appearance that was adopted by your orator and your orator's predecessors in the year 1894 and through long years of usage has become the predominating means for distinguishing your orator's well-known Spearmint product from other gum products upon the market. * * *'' *Helmet Company v. William Wrigley, Jr., Co.*, C. C. A., 245 Fed. 824, 825.

¹⁵ *Elgin Watch Co. v. Illinois Watch Co.*, 179 U. S. 665, 21 Sup. Ct. 270, 45 L. ed. 365; *Leschen Rope Co. v. Broderick*, 201 U. S. 166, 26 Sup. Ct. 424, 50 L. ed. 710; *Bernstein v. Danwitz*, 190 Fed. 604; *Diederich v. W. Schneider Wholesale Wine & Liquor Co.*, C. C. A., 195 Fed. 35. See *supra*, § 146.

¹⁶ *Burt v. Smith*, C. C. A., 71 Fed. 161, 17 C. C. A. 573; *Hutchinson v. Loewy*, C. C. A., 163 Fed. 42, 90 C. C. A.; *Bernstein v. Danwitz*, 190 Fed. 604; *Sprigg v. Fisher*, 222 Fed. 964. See §§ 24, 132, 146, *supra*.

bidding the infringement of the trade-mark;¹⁷ but that the rule is otherwise when they are separate and distinct acts,¹⁸ unless the jurisdictional diversity of citizenship exists; in which case if the value of the matter in dispute exceeds the jurisdictional amount, the court may grant such relief and also relief against infringement of common law rights to trade-marks which do not depend on transactions in interstate or international commerce, although the infringements consist of separate and distinct acts.¹⁹

§ 149. Bills to obtain relief against interfering trade marks.

"That whenever there are interfering registered trade-marks, any person interested in any one of them may have relief against the interfering registrant, and all persons interested under him, by suit in equity against the said registrant; and the court, on notice to adverse parties and other due proceedings had according to the course of equity, may adjudge and declare either of the registrations void in whole or in part according to the interest of the parties in the trade-mark, and may order the certificate of registration to be delivered up to the Commissioner of Patents for cancellation."¹ The pleading and practice under bills of this sort is substantially similar to that of bills to obtain relief against interfering patents.² The suit must be brought within a year after final action thereupon in the Patent Office or the determination of any appeal from its decision, unless it is shown that the delay is unavoidable.³ It was held to be insufficient to

¹⁷ *Globe-Wernicke Co. v. Fred Macey Co.*, C. C. A., 119 Fed. 696, 703, 56 C. C. A. 304 (a patent case); *T. B. Woods Sons Co. v. Valley Iron Works*, 166 Fed. 770 (a patent case); *Ross v. H. S. Geer Co.*, 188 Fed. 731, 734. See *Saxlehner v. Eisner & Mendelson Co.*, 179 U. S. 19, 37, 41, 21 Sup. Ct. 7, 45 L. ed. 60; s. c., C. C. A., 147 Fed. 189, 77 C. C. A. 417, s. c., C. C. A., 25 Fed. 1; *Stark Bros. Nurseries & Orchards Co. v. Stark*, 248 Fed. 143, *supra*, § 147. *Contra*, *Cushman v. Atlantis Fountain Pen Co.*, 164 Fed. 94 (a patent case); *Mecky v. Grabowski*, 177 Fed. 591 (a patent case).

¹⁸ *Ross v. H. S. Geer Co.*, 188 Fed. 731, 734; *C. L. King & Co. v. Inlander*, 133 Fed. 416; *Cushman v. Atlantis Fountain Pen Co.*, 164 Fed. 94; *Mecky v. Grabowski*, 177 Fed. 591; *National Casket Co. v. N. Y. & Brooklyn Casket Co.*, 185 Fed. 533; the four last cases were patent cases.

¹⁹ *Ingersoll v. Doyle*, 247 Fed. 620, *supra*, § 146.

§ 149. ¹ Act of March 2, 1907, 34 St. at L. 1251, § 22, *Pierce Fed. Code*, § 8828.

² *Supra*, § 146.

³ U. S. R. S., § 4969, 2 Fed. St. Ann. 271, *Pierce Fed. Code*, § 8862.

aver that complainants brought suit within the year against the party who succeeded in the Patent Office, and several months thereafter, after learning for the first time that the defendant had assigned the patent, dismissed such suit, and brought the present one against the assignee; there being no allegation that the assignment was not recorded, nor that the complainant had no means of ascertaining that it had been made.⁴ When the decision of the Patent Office has been affirmed or approved by the District Court of Appeals, it will be followed by other courts in suits to enjoin infringements unless they are clearly convinced that it is not correct.⁵

§ 150. Bills to restrain infringement of copyrights. The Copyright Act of March 4, 1909, provides: "That if any person shall infringe the copyright in any work protected under the copyright laws of the United States such person shall be liable:

(a) To an injunction restraining such infringement;

(b) To pay to the copyright proprietor such damages as the copyright proprietor may have suffered due to the infringement, as well as all the profits which the infringer shall have made from such infringement, and in proving profits the plaintiff shall be required to prove sales only and the defendant shall be required to prove every element of cost which he claims, or in lieu of actual damages and profits such damages as to the court shall appear to be just, and in assessing such damages the court may, in its discretion, allow the amounts as hereinafter stated, but in the case of a newspaper reproduction of a copyrighted photograph such damages shall not exceed the sum of two hundred dollars nor be less than the sum of fifty dollars, and such damages shall in no other case exceed the sum of five thousand dollars nor be less than the sum of two hundred and fifty dollars, and shall not be regarded as a penalty: First. In the case of a painting, statue, or sculpture, ten dollars for every infringing copy made or sold by or found in the possession of the infringer or his agents or employees; Second. In the case of any work enumerated in section five of this Act, except a painting, statue, or sculpture, one dollar for every infringing copy made or sold

⁴ Westinghouse El. & Mfg. Co. v. Ohio Brass Co., 186 Fed. 518.

⁵ Gold v. Newton, C. C. A., 254 Fed. 824.

by or found in the possession of the infringer or his agents or employees; Third. In the case of a lecture, sermon, or address, fifty dollars for every infringing delivery; Fourth. In the case of a dramatic or dramatico-musical or a choral or orchestral composition, one hundred dollars for the first and fifty dollars for every subsequent infringing performance; in the case of other musical compositions, ten dollars for every infringing performance;

(c) To deliver up on oath, to be impounded during the pendency of the action, upon such terms and conditions as the court may prescribe, all articles alleged to infringe a copyright;

(d) To deliver up on oath for destruction all the infringing copies or devices, as well as all plates, molds, matrices, or other means for making such infringing copies as the court may order;

(e) Whenever the owner of a musical copyright has used or permitted the use of the copyrighted work upon the parts of musical instruments serving to reproduce mechanically the musical work, then in case of infringement of such copyright by the unauthorized manufacture, use, or sale of interchangeable parts, such as disks, rolls, bands, or cylinders for use in mechanical music-producing machines adapted to reproduce the copyrighted music, no criminal action shall be brought, but in a civil action an injunction may be granted upon such terms as the court may impose, and the plaintiff shall be entitled to recover in lieu of profits and damages a royalty as provided in section one, subsection (e), of this Act: Provided also, That whenever any person, in the absence of a license agreement, intends to use a copyrighted musical composition upon the parts of instruments serving to reproduce mechanically the musical work, relying upon the compulsory license provision of this Act, he shall serve notice of such intention, by registered mail, upon the copyright proprietor at his last address disclosed by the records of the copyright office sending to the copyright office a duplicate of such notice; and in case of his failure so to do the court may, in its discretion, in addition to sums hereinabove mentioned, award the complainant a further sum, not to exceed three times the amount provided by section one, subsection (e), by way of damages, and not as a penalty, and also a temporary injunction until the full award is paid. Rules and regulations

for practice and procedure under this section shall be prescribed by the Supreme Court of the United States."¹

"Any court given jurisdiction under section thirty-four of this Act may proceed in any action, suit, or proceeding instituted for violation of any provision hereof to enter a judgment or decree enforcing the remedies herein provided."²

"That the proceedings for an injunction, damages, and profits, and those for the seizure of infringing copies, plates, molds, matrices, and so forth, aforementioned, may be united in one action."³ "That civil actions, suits, or proceedings arising under this Act may be instituted in the district of which the defendant or his agent is an inhabitant, or in which he may be found."⁴ "That any such court or judge thereof shall have power, upon bill in equity filed by any party aggrieved, to grant injunctions to prevent and restrain the violation of any right secured by said laws, according to the course and principles of courts of equity, on such terms as said court or judge may deem reasonable. Any injunction that may be granted restraining and enjoining the doing of anything forbidden by this Act may be served on the parties against whom such injunction may be granted anywhere in the United States, and shall be operative throughout the United States and be enforceable by proceedings in contempt or otherwise by any other court or judge possessing jurisdiction of the defendants."⁵

By the Act of December 22, 1896: "Any injunction that may be granted upon hearing after notice to the defendant by any Circuit Court of the United States or by a judge thereof, restraining and enjoining the performance or representation of any such dramatic or musical composition may be served on the parties against whom such injunction may be granted anywhere in the United States, and shall be operative and may be enforced by proceedings to punish for contempt or otherwise by any other Circuit Court or judge in the United States; but the defendants in said action, or any or either of them, may make a motion in any other circuit in which he or they may be engaged in performing or representing said dra-

¹ § 150. 136 St. at L. 1075, § 25, ³ Ibid., § 27.

Pierce Fed. Code Supp., § 1587. ⁴ Ibid., § 35; Pierce Fed. Code

² Ibid., § 26, 35 St. at L. 1082, Supp., § 1589.

Comp. St. § 9547. ⁵ Ibid., § 36.

matic or musical composition to dissolve or set aside the said injunction upon such reasonable notice to the plaintiff as the Circuit Court or the judge before whom said motion shall be made shall deem proper service of said motion to be made on the plaintiff in person or on his attorneys in the action. The Circuit Courts or judges then shall have jurisdiction to enforce said injunction and to hear and determine a motion to dissolve the same, as herein provided, as fully as if the action were pending or brought in the circuit in which said motion is made."

"The clerk of the court or judge granting the injunction, shall when required so to do by the court hearing the application to dissolve or enforce injunction, transmit without delay to said court a certified copy of all the papers on which the said injunction was granted that are on file in his office." ^{5a}

"That the clerk of the court, or judge granting the injunction, shall, when required so to do by the court hearing the application to enforce said injunction, transmit without delay to said court a certified copy of all the papers in said cause that are on file in his office." ⁶

"That where the copyright proprietor has sought to comply with the provisions of this Act with respect to notice, the omission by accident or mistake of the prescribed notice from a particular copy or copies shall not invalidate the copyright or prevent recovery for infringement against any person who, after actual notice of the copyright, begins an undertaking to infringe it, but shall prevent the recovery of damages against an innocent infringer who has been misled by the omission of the notice; and in a suit for infringement no permanent injunction shall be had unless the copyright proprietor shall reimburse to the innocent infringer his reasonable outlay innocently incurred if the court, in its discretion, shall so direct." ⁷ An infringer cannot escape liability because some copies were accidentally issued without the notice of copyright when he did not know of this until his infringement. ⁸

"Rules and regulations for practice and procedure in suits

^{5a} 29 St. at L. 481. It seems to be the opinion of the editor of the Compiled Statutes that this statute is obsolete.

⁶ Ibid., § 37.

⁷ Ibid., § 20, Pierce Fed. Code Supp., § 1584.

⁸ Stetcher Lithographic Co. v. Dunston Lithograph Co., 233 Fed. 601.

for an injunction damages or profits because of an infringement shall be prescribed by the Supreme Court of the United States."⁹

Whenever an injunction is prayed in the plaintiff's pleading the proceeding is to be considered as a suit in equity although the bill includes a prayer for damages and for seizure.¹⁰

The Copyright Rules provide: "1. The existing rules of equity practice, so far as they may be applicable, shall be enforced in proceedings instituted under section twenty-five (25) of the Act of March fourth, nineteen hundred and nine, entitled 'An Act to amend and consolidate the acts respecting copyright.' 2. A copy of the alleged infringement of Copyright, if actually made, and a copy of the work alleged to be infringed, should accompany the petition, or its absence be explained; except in cases of alleged infringement by the public performance of dramatic and dramatico-musical compositions, the delivery of lectures, sermons, addresses, and so forth, the infringement of copyright upon sculptures and other similar works and in any case where it is not feasible."¹¹ Where there was nothing in the bill to show that the matter copyrighted was a sculpture or other similar work or that the case fell within the other excepted classes, a motion was granted requiring the complainant to file with his petition a copy of the same.¹²

The performance of the statutory requirements should be alleged.¹³ Formerly the statement that the copyright was issued

⁹ 36 St. at L. 10 U. S. 25, as amended, 37 St. at L. 489, Comp. St. § 9546.

¹⁰ *L. A. Westermann Co. v. Dispatch Printing Co.*, C. C. A., 233 Fed. 609.

¹¹ 214 U. S. 536, 53 L. ed. 1074. When an incorrect copy of the work has been filed with the complaint, it was held that the terms upon which the complainant should be permitted to file a correct copy should be dealt with, not on a motion to dismiss, but upon the trial, when the court should determine whether the differences were of real

importance. *Tully v. Triangle Film Co.*, 229 Fed. 297.

¹² *Lesser v. George Berfeldt & Co.*, 188 Fed. 864.

¹³ *Waalburn v. Ingilby*, 1 M. & K. 61; *Atwill v. Ferrett*, 2 Blatchf. C. C. 39; *Chicago Music Co. v. J. W. Butler Paper Co.*, 19 Fed. 758; *Trow City Directory Co. v. Curtin*, 36 Fed. 829; *Ford v. Charles E. Blaney Amusement Co.*, 148 Fed. 642, 645. *Societe Des Films Menchen v. Vitagraph Co. of America*, C. C. A., 251 Fed. 250; *N. Y. Times Co. v. Sun Print. & Pub. Ass'n*, C. C. A., 204 Fed. 586. See § 146, *supra*.

was held to be insufficient.¹⁴ The bill should show that the copies required by the statute have been deposited in the copyrighted office or in the mails postage prepaid duly addressed to the Registrar of Copyrights.¹⁵ When the subject of the copyright is a moving picture play it is sufficient to describe it in the bill as a moving picture photograph or photoplay and to allege that "said moving picture photograph or photoplay not having been reproduced in copies for sale, the complainant deposited with the register of copyrights the claims for copyright, the title and description and prints from each scene or act of the drama" naming it "and received the certificate of registration."¹⁶ In such a case the owner of the film and the lessees of the rights in the district where the infringement was committed may be joined as complainants.¹⁷ An allegation in a bill to restrain the infringement of the copyrights in photographs, that the plaintiff's assignor filed two complete copies of photographs, was held to be insufficient because it omitted the averment that these were complete copies of the best edition then published.¹⁸ Such a bill must also show that the photographs were capable of copyright.¹⁹ The following allegation in a suit to enjoin the infringement of a copyright in a moving picture play was held to be sufficient: "that, said moving picture photograph or photoplay not having been reproduced in copies for sale, the complainant deposited with the register of copyrights the claims for copyright, the title and description and prints from each scene or act of the drama, 'The International Conspiracy,' and received the certificate of registration."²⁰

The owner of the copyright and his licensees or lessees within a certain territory may join in a suit to enjoin an infringement in such territory when the licensees or lessees have agreed to return the copyright upon the termination of their rights.²¹ The licensee of the playwright is ordinarily an improper party to a

¹⁴ Ibid.

¹⁵ N. Y. Times Co. v. Sun Print. & Pub. Ass'n, C. C. A., 204 Fed. 586; Crown Feature Film Co. v. Levy, 202 Fed. 805.

¹⁶ Gaumont Co. v. Hatch, 208 Fed. 378.

¹⁷ Ibid. *Supra*, § 112.

¹⁸ Crown Feature Co. v. Levy, 202 Fed. 805.

¹⁹ Ibid.

²⁰ Gaumont Co. v. Hatch, 208 Fed. 378.

²¹ Ibid.

suit to protect the moving picture rights.²³ When the copyrights to a series of pictures have been infringed, the complainant should join in a single suit his prayers for an injunction and profits or damages and if he bring separate suits founded on the infringement of the copyright on each separate picture it has been said that they should be consolidated.²³ All persons who have united in an infringement may be joined as defendants although they may not be jointly liable for all the profits.²⁴

The bill must further show that the person in whose name the copyright was obtained was the owner of the article copyrighted and was entitled to the copyright.²⁵

It was held sufficient to allege that the complainant's assignor was the sole and exclusive owner and proprietor of certain copyrighted productions without an allegation of the facts showing how the complainant became proprietor and his right to suit.²⁶ It has been held that an allegation that the sole right of printing and publishing has been sold, is not sufficient to show that the copyright has been transferred.²⁷

The copyright rules further provide:

"3. Upon the institution of any action, suit or proceeding, or at any time thereafter, and before the entry of final judgment or decree therein, the plaintiff or complainant, or his authorized agent or attorney, may file with the Clerk of any Court given jurisdiction under section 34 of the Act of March 4, 1909, an affidavit stating upon the best of his knowledge, information and belief, the number and location, as near as may be, of the alleged infringing copies, records, plates, molds, matrices, etc., or other means for making the copies alleged to infringe the copyright, and the value of the same, and with such affidavit shall file with the Clerk a bond executed by at least two sureties and approved by the Court or a Commissioner thereof.

"4. Such bond shall bind the sureties in a specified sum, to be

²³ Tully v. Triangle Film Co., 229 Fed. 297.

²³ L. A. Westermann Co. v. Dispatch Printing Co., C. C. A., 233 Fed. 609.

²⁴ Gross v. Van Dyk Gravure Co., 230 Fed. 412.

²⁵ Ford v. Charles E. Blaney

Amusement Co., 148 Fed. 642. See Photo Drama Motion Picture Co. v. Social Uplift Film Corp., 213 Fed. 374.

²⁶ Crown Feature Film Co. v. Levy, 202 Fed. 805.

²⁷ Ford v. Charles E. Blaney Amusement Co., 148 Fed. 642, 645.

fixed by the Court, but not less than twice the reasonable value of such infringing copies, plates, records, molds, matrices, or other means for making such infringing copies, and be conditioned for the prompt prosecution of the action, suit or proceeding; for the return of said articles to the defendant, if they or any of them are adjudged not to be infringements, or if the action abates, or is discontinued before they are returned to the defendant; and for the payment to the defendant of any damages which the Court may award to him against the plaintiff or complainant. Upon the filing of said affidavit and bond, and the approval of said bond, the clerk shall issue a writ directed to the Marshal of the district where the said infringing copies, plates, records, molds, matrices, etc., or other means of making such infringing copies shall be stated in said affidavit to be located, and generally to any Marshal of the United States, directing the said Marshal to forthwith seize and hold the same subject to the order of the Court issuing said writ, or of the Court of the district in which the seizure shall be made.

"5. The Marshal shall thereupon seize said articles or any smaller or larger part thereof he may then or thereafter find, using such force as may be reasonably necessary in the premises, and serve on the defendant a copy of the affidavit, writ and bond by delivering the same to him personally, if he can be found within the district, or if he cannot be found, to his agent, if any, or to the person from whose possession the articles are taken, or if the owner, agent, or such person cannot be found within the district, by leaving said copy at the usual place of abode of such owner or agent, with a person of suitable age and discretion, or at the place where said articles are found, and shall make immediate return of such seizure, or attempted seizure, to the Court. He shall also attach to said articles a tag or label stating the fact of such seizure and warning all persons from in any manner interfering therewith.

"6. A Marshal who has seized alleged infringing articles, shall retain them in his possession, keeping them in a secure place, subject to the order of the Court.

"7. Within three days after the articles are seized, and a copy of the affidavit, writ and bond are served as hereinbefore provided, the defendant shall serve upon the clerk a notice that he excepts to the amount of the penalty of the bond, or to the

sureties of the plaintiff or complainant, or both, otherwise he shall be deemed to have waived all objection to the amount of the penalty of the bond and the sufficiency of the sureties thereon. If the Court sustain the exceptions it may order a new bond to be executed by the plaintiff or complainant, or in default thereof within a time to be named by the Court, the property to be returned to the defendant.

"8. Within ten days after service of such notice, the attorney of the plaintiff or complainant shall serve upon the defendant or his attorney a notice of the justification of the sureties, and said sureties shall justify before the Court or a Judge thereof at the time therein stated.

"9. The defendant, if he does not except to the amount of the penalty of the bond or the sufficiency of the sureties of the plaintiff or complainant, may make application to the Court for the return to him of the articles seized, upon filing an affidavit stating all material facts and circumstances tending to show that the articles seized are not infringing copies, records, plates, molds, matrices, or means for making the copies alleged to infringe the copyright.

"10. Thereupon the Court in its discretion, after such hearing as it may direct, may order such return upon the filing by the defendant of a bond executed by at least two sureties, binding them in a specified sum to be fixed in the discretion of the Court, and conditioned for the delivery of said specified articles to abide the order of the Court. The plaintiff or complainant may require such sureties to justify within ten days of the filing of such bond.

"11. Upon the granting of such application and the justification of the sureties on the bond, the Marshal shall immediately deliver the articles seized to the defendant.

"12. Any service required to be performed by any Marshal may be performed by any deputy of such Marshal.

"13. For services in cases arising under this section, the Marshal shall be entitled to the same fees as are allowed for similar services in other cases." ²⁸

The court cannot grant an order to show cause why articles

²⁸ 214 U. S. 533, 53 L. ed. 1073.

See § 91, *supra*; § 278, *infra*.

thus impounded should not be returned except upon presentation of the affidavit required by copyright rule 9.²⁹ A defendant who moves for a larger bond by plaintiff and obtains the same waives any right he might otherwise have to vacate the writ of seizure and have the article returned.³⁰

§ 151. Bills in equity under the Interstate Commerce Law.

The appropriate courts of the United States have jurisdiction to entertain bills in equity to enforce, otherwise than by adjudication and collection of forfeiture or penalty or by infliction of criminal punishment, any order of the Interstate Commerce Commission other than for the payment of money.¹ Such suits may be brought by the United States,² and also by private individuals, for whose benefit the orders were made,³ such as an order awarding reparation to shipper for an unlawful charge.⁴ No court of the United States has jurisdiction of a suit to enjoin an unreasonable charge for transportation until the Interstate Commerce Commission has passed upon the question;⁵ but where, pending a suit to enjoin an unreasonable increase in freight rates, the complainants applied to the Interstate Commerce Commission, which decided in their favor, the court finally rendered a decree upon its findings and conclusions.⁶

The court formerly had jurisdiction to restrain a railroad company from refusing to accept and carry liquor because of an unconstitutional statute of the State into which the liquor was to be transported.⁷ Jurisdiction has been taken of a suit by citizens of a State engaged in the lawful sale of liquor there to enjoin an express company from accepting for transportation

²⁹ *Crown Feature Film Co. v. Bettis Amusement Co.*, 206 Fed. 362.

³⁰ *Universal Film Mfg. Co. v. Coperman*, 206 Fed. 69.

§ 151. 125 St. at L. 859; 32 St. at L. 847; *U. S. v. Michigan Cent. R. Co.*, 122 Fed. 544; *Jud. Code*, § 207, 36 St. at L. 1087. See *supra*.

² *U. S. v. Michigan Cent. R. Co.*, 122 Fed. 544.

³ *Chicago, B. & Q. R. Co. v. Feintuch, C. C. C.*, 191 Fed. 482.

⁴ *Ibid.*

⁵ *Southern Ry. Co. v. Tift*, 206 U. S. 428, 51 L. ed. 1124. *Cf. Macon*

Grocery Co. v. Atlantic C. L. R. Co., 163 Fed. 736, 738; *aff'd in 215 U. S. 501*, 54 L. ed. 300. But see *Jewett Bros. & Jewett v. Chicago, M. & St. P. Ry. Co.*, 156 Fed. 160; *Columbus Iron & Steel Co. v. Kanawha & M. Ry. Co.*, 171 Fed. 713; *Houston Coal & Coke Co. v. Norfolk & W. Ry. Co.*, 171 Fed. 723.

⁶ *Southern Ry. Co. v. Tift*, 206 U. S. 428, 51 L. ed. 1124.

⁷ *Clark Distilling Co. v. Western Maryland Ry. Co.*, 242 U. S. 311. See *Royal Brewing Co. v. Missouri K. & T. Ry. Co.*, 217 Fed. 146.

thither from another State liquor illegally sold to purchasers who were competitors of the complainant.⁸ It has been held: that an action against an interstate common carrier by rail, for damages caused by unjust discrimination in rates and charges against plaintiff as a shipper over its road, and in affording other shippers better facilities, and for unlawfully demanding and receiving extortionate rates from plaintiff, is an action arising under the Interstate Commerce law, although not in express terms based on that act, and, although an action would lie for the same cause at common law; and is removable, when the petition for removal sets up a defense under the act of Congress.⁹

The District Courts of the United States have jurisdiction of a suit to enjoin, set aside, annul, or sustain, in whole or in part, any order of the Interstate Commerce Commission.¹⁰ Such orders will be set aside when they deprive the complainants of their property without due process of law, or take their property without just compensation, or are beyond the powers of the commission, or the commission's power was exercised with gross unreasonableness.¹¹ For example, when it was made without any evidence to support it;¹² or without any substantial evidence¹³ or upon evidence of which the carrier was not apprised and was given no opportunity to meet¹⁴ except perhaps in the case of expert evidence¹⁵ or solely upon evidence, such as hearsay, which is clearly inadmissible¹⁶ or where the indisputable facts show that it was based upon an error or

⁸ Long v. Southern Express Co., 201 Fed. 441.

⁹ Lowry v. Chicago, B. & Q. Ry. Co., 46 Fed. 83.

¹⁰ Jud. Code, § 207, 36 St. at L. 1148, *supra*, § 100b.

¹¹ F. H. Peavey & Co. v. Union Pac. R. Co., 176 Fed. 409. *Cf.* Vandalia R. R. Co. v. Public Service Commission, 242 U. S. 255. But see Philadelphia & R. Ry. Co. v. Interstate Commerce Commission, 174 Fed. 687.

¹² Interstate Commerce Com. v. Louisville & Nashville Railroad Co.,

227 U. S. 88; St. Louis, I. M. & S. Ry. Co. et al v. United States (Interstate Commerce Commission), 217 Fed. 80; Chestnut Ridge Ry. Co. v. United States, 248 Fed. 792.

¹³ Louisville & N. R. Co. v. U. S. 216 Fed. 672; M'Lean Lumber Co. v. United States, 237 Fed. 460.

¹⁴ Atlantic Coast Line R. Co. v. Interstate Commerce Commission, Comm. Ct. 194 Fed. 449.

¹⁵ *Ibid.*

¹⁶ Atchison, T. & S. F. Ry. Co. v. Spiller, C. C. A., 246 Fed. 1.

law.¹⁷ Thus may be reviewed an order which awards reparation to a complainant.¹⁸ The Commerce Court had no jurisdiction to entertain a complaint because of the refusal of the Interstate Commerce Commission to act,¹⁹ such as a claim by a shipper to recover excessive freight charges which had been presented to the commission and rejected;²⁰ nor of a claim presented to the commission upon which it had not passed,²¹ nor to review the denial by the commission of a petition by a carrier for leave to refund an excessive freight charge.²² Where the commission has refused to act, the remedy, if any, is by mandamus.²³ An order which fixed a new schedule of rates which was lower than those proposed by the petitioner is not a negative order and in a proper case may be reviewed.²⁴ An interlocutory order such as the assignment of a cause for hearing²⁵ will rarely if ever, be reviewed. Even if the evidence is not contradicted the question of the reasonableness of a rate²⁶ or whether there has been an undue discrimination²⁷ is ordinarily one of fact with which the courts will not interfere.

Any party to an order of the Interstate Commerce Commission may sue to have the same set aside without joining other persons named in the order and similarly affected by the same.²⁸

A bill to set aside an order of the Interstate Commerce Com-

¹⁷ *Louisville & N. R. Co. v. United States*, 216 Fed. 672, s. c., 227 Fed. 258.

¹⁸ *Arkansas Fertilizer Co. v. U. S.*, Comm. Ct. 193 Fed. 667; *Southern Ry. Co. v. U. S.*, Comm. Ct. 193 Fed. 664.

¹⁹ *Procter & Gamble Co. v. U. S.*, 225 U. S. 282, 56 L. ed. 1091; reversing Comm. Ct. 188 Fed. 221; *Lehigh Valley R. R. Co. v. United States*, 243 U. S. 412, affirming 234 Fed. 682; *Manufacturers Ry. Co. v. United States*, 246 U. S. 247.

²⁰ *Ibid.*

²¹ *U. S. ex rel. Stony Fork Coal Co. v. Louisville & N. R. Co.*, Comm. Ct. 195 Fed. 88.

²² *Arkansas Fertilizer Co. v. U. S.*, Comm. Ct., 193 Fed. 667.

²³ *Interstate Commerce Commission v. U. S. ex rel. Humboldt S. S. Co.*, 224 U. S. 474, 56 L. ed. 849.

²⁴ *McLean Lumber Co. v. United States*, 237 Fed. 460.

²⁵ *United States v. Illinois Central R. R. Co.*, 244 U. S. 82.

²⁶ *Louisville & N. R. Co. v. United States*, 216 Fed. 672, s. c., 227 Fed. 258; *M'Lean v. United States*, 237 Fed. 460; *Florida East Coast Ry. Co. v. United States*, 200 Fed. 797.

²⁷ *United States v. Louisville & Nashville R. R. Co.*, 235 U. S. 314.

²⁸ *Atlantic Coast Line R. Co. v. Interstate Commerce Commission*, Comm. Ct. 194 Fed. 449.

mission or other board fixing the amount of charges for the transportation of freight or passengers, upon the ground that they do not afford reasonable compensation, must allege facts in support of such conclusions; such as the amount of revenue derived from the traffic affected and so far as possible the cost of the service, or other facts from which the court can determine for itself whether the rates fixed would produce a reasonable profit.²⁹ It seems, that it is insufficient to allege that the known loss resulting from the rate will be a specified amount without stating the facts from which such result is reached.³⁰ Where the ground of objection to such action by a State board is that it will affect interstate commerce, it is insufficient to allege that the railroad's principal business between the points affected consists of interstate commerce and that the road will be compelled to lower its interstate rates without showing what part of the predicted loss will be on the traffic affected as distinguished from the general body of traffic; and the bill should disclose facts showing with reasonable definiteness not only the present total value and gross revenue of the road affected, but also the gross revenue from each class of business, interstate and local, freight, passenger or other, and the proportionate property values devoted thereto, together with the gross operating expenses, and a proportionate application thereof to such different classes of traffic, so that the net revenue from each source may be thereby ascertained.³¹ It has been held to be insufficient to set forth the proceedings of the commission finding that the rates charged were unreasonable or discriminatory or otherwise in violation of the statute;³² and an allegation that "said commission agreeable to the provisions of law in that regard duly" caused a copy of its order to be delivered to the defendant, is not a sufficient allegation of the service of the same.³³

²⁹ *Atlantic Coast Line R. Co. v. Interstate Commerce Commission*, Comm. Ct. 194 Fed. 449; *Louisville N. R. Co. v. United States*, 225 Fed. 571.

³⁰ *Southern Pac. Co. v. Railroad Commission of California*, 193 Fed. 699; *Northern Pac. Ry. Co. v. Lee*, 199 Fed. 621.

³¹ *Southern Pac. Co. v. Railroad Commission of California*, 193 Fed. 699.

³² *Bear Bros. Mercantile Co. v. Denver & R. G. R. Co.*, 200 Fed. 614.

³³ *Ibid.*

Such relief cannot be granted upon a cross bill in a suit in a district where the complainant does not reside.³⁴ It has been held that in such a suit evidence not offered before the commission is inadmissible.³⁵ Persons not parties to the proceedings before the commission cannot apply to the courts for the review of an order within its jurisdiction until they have made a direct application to the commission for relief.³⁶ An application to the commission for a rehearing is sufficient.³⁷ But a person affected by an order beyond the statutory powers of the commission may sue to enjoin the enforcement thereof although he has made no application to the commission for redress.³⁸ Where the commission has refused to suspend the enforcement of a new rate pending a hearing to determine whether it is reasonable, the court will rarely³⁹ grant an injunction to restrain such enforcement; but pending an appeal from a decree changing the status quo the court may preserve such status until the appeal is determined.⁴⁰ An order against several railway companies based upon a finding of discrimination must be supported by evidence sufficient to warrant a separate finding against each of such companies.⁴¹ If the party seeking a review wishes to introduce further evidence he should apply to the commission for a rehearing.⁴² The court of review will consider no evidence which was not taken or offered before the commission.⁴³ It is the safer practice to submit to the court all evidence taken by the commission when it is contended that the evidence is insufficient to support its conclusion.⁴⁴ Technical objections and exceptions to the admission of improper evidence, such as hearsay, are not indispensable.⁴⁵ The petitioner must show that relief which he sought in an origi-

³⁴ *Illinois Cent. R. R. Co. v. Public Utilities Commission*, 245 U. S. 493.

³⁵ *Louisiana & P. Ry. Co. v. U. S.* 209 Fed. 244.

³⁶ *U. S. v. Merchants & Mfg'r's Traffic Ass'n*, 242 U. S. 178.

³⁷ *Ibid.*

³⁸ *Skinner & Eddy Corp. v. U. S.*, 249 U. S. 557.

³⁹ *M. C. Kiser Co. v. Cent. of Georgia Ry. Co.*, 236 Fed. 573.

⁴⁰ *Louisville & N. R. Co. v. U. S.*, 227 Fed. 273.

⁴¹ *St. Louis, I. M. & S. Ry. Co. v. United States*, 217 Fed. 80.

⁴² *Louisville & N. R. Co. v. United States*, 218 Fed. 89.

⁴³ *Ibid.*

⁴⁴ *Louisville & N. R. Co. v. United States*, 216 Fed. 672.

⁴⁵ *Atchison, T. & S. F. Ry. Co. v. Spiller, C. C. A.*, 246 Fed. 1, 19.

nal proceeding before the commission has been denied. A petition for a rehearing of an application by the carrier to which he was not a party will not justify the review of an order upon the suit of a shipper.⁴⁶

§ 151a. Bills under the Anti-Trust Laws. The Clayton Act of October 15, 1914, provides: "'Antitrust laws,' as used herein, includes the Act entitled 'An Act to protect trade and commerce against unlawful restraints and monopolies,' approved July second, eighteen hundred and ninety; sections seventy-three to seventy-seven, inclusive, of an Act entitled 'An Act to reduce taxation, to provide revenue for the Government, and for other purposes,' of August twenty-seventh, eighteen hundred and ninety-four; an Act entitled 'An Act to amend sections seventy-three and seventy-six of the Act of August twenty-seventh, eighteen hundred and ninety-four, entitled 'An Act to reduce taxation, to provide revenue for the Government and for other purposes,' approved February twelfth, nineteen hundred and thirteen; and also this Act.

"'Commerce,' as used herein, means trade or commerce among the several states and with foreign nations, or between the District of Columbia or any Territory of the United States and any State, Territory, or foreign nation or between any insular possessions or other places under the jurisdiction of the United States, or between any such possession or place and any State or Territory of the United States or the District of Columbia or any foreign nation, or within the District of Columbia or any Territory or any insular possession or other place under the jurisdiction of the United States: Provided, that nothing in this Act contained shall apply to the Philippine Islands.

"The word 'person' or 'persons' wherever used in this Act shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country."¹

"The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be con-

⁴⁶ United States v. Merchants & Mfr's Traffic Ass'n, 242 U. S. 178. 1914, ch. 323, § 1, 38 St. at L. 730. Comp. St. § 8835a.

§ 151a. 1 Act of October 15,

strued to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws."²

By the Act of July 2, 1890, "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."³

"Every contract, combination in form or trust or otherwise, or conspiracy, in restraint of trade or commerce in any Territory of the United States or of the District of Columbia, or in restraint of trade or commerce between any such Territory and another, or between any such Territory or Territories and any State or States or the District of Columbia, or with foreign nations, or between the District of Columbia and any State or States or foreign nations, is hereby declared illegal.⁴ Every

² Act of October 15, 1914, ch. 323, § 6, 38 St. at L. 731, Comp. St. § 8835f.

³ Act of July 2, 1890, ch. 647, § 2, 36 St. at L. 209, Comp. St. § 8821.

⁴ U. S. v. E. C. Knight Co., 156 U. S. 1, 39 L. ed. 325; U. S. v. Trans-Missouri Freight Ass'n, 166 U. S. 290, 319, 41 L. ed. 1007; U. S. v. Joint Traffic Ass'n, 171 U. S. 505, 43 L. ed. 259; Hopkins v. U. S., 171 U. S. 578, 586, 43 L. ed. 290, 293; Anderson v. U. S., 171 U. S. 604, 43 L. ed. 300; Addyston Pipe & Steel Co. v. U. S., 175 U. S. 211, 44 L. ed. 136; affirming U. S. v. Addyston Pipe & Steel Co., C. C. A., 46 L.R.A. 122, 85 Fed. 271; Montague

& Co. v. Lowry, 193 U. S. 38, 48 L. ed. 608; Northern Securities Co. v. U. S., 193 U. S. 197, 48 L. ed. 679; Minnesota v. Northern Securities Co., 194 U. S. 48, 48 L. ed. 870; Swift & Co. v. U. S., 196 U. S. 375, 49 L. ed. 518; Loewe v. Lawler, 208 U. S. 274, 52 L. ed. 488; Shawnee Compress Co. v. Anderson, 209 U. S. 423, 52 L. ed. 865; Continental Wall Paper Co. v. Voight & Sons Co., 212 U. S. 227, 53 L. ed. 486; Standard Oil Co. v. U. S., 221 U. S. 1, 55 L. ed. 619, 34 L.R.A. (N.S.) 834; U. S. v. Am. Tobacco Co., 221 U. S. 106, 55 L. ed. 663; U. S. v. Terminal R. R. Ass'n of St. Louis, 224 U. S. 383, 56 L. ed. 810; Stand-

person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."⁵

By the Act of February 12, 1913: "Every combination, conspiracy, trust, agreement, or contract is hereby declared to be contrary to public policy, illegal, and void when the same is made by or between two or more persons or corporations either of whom, as agent or principal, is engaged in importing any article from any foreign country into the United States, and when such combination, conspiracy, trust, agreement, or contract is intended to operate in restraint of lawful trade, or free competition in lawful trade or commerce, or to increase the market price in any part of the United States of any article or articles imported or intended to be imported into the United States, or of any manufacture into which such imported

ard Sanitary Mfg. Co. v. U. S., 226 U. S. 20, 57 L. ed. —; U. S. v. Union Pac. R. R. Co., 226 U. S. 61, 57 L. ed. 53; s. c., 226 U. S. 470, 57 L. ed. 90; U. S. v. Union Stock Yard Co. of Chicago, 226 U. S. 286, 57 L. ed. —; U. S. v. Patten, 226 U. S. 525, 57 L. ed. —; U. S. v. Jellico Mountain Coke & Coal Co., 43 Fed. 898; s. c., 12 L.R.A. 753, 46 Fed. 432; Bigelow v. Calumet & Hecla Min. Co., 155 Fed. 869. See U. S. v. Delaware & Hudson Co., 213 U. S. 366, 53 L. ed. 836; U. S. v. Lehigh Valley R. R. Co., 220 U. S. 257, 55 L. ed. 458; U. S. v. Reading Co., 226 U. S. 324, 57 L. ed. 90; American Biscuit & Mfg. Co. v. Klitz, 44 Fed. 721, 725, 726. U. S. v. Joint Traffic Ass'n, 171 U. S. 505, 43 L. ed. 259; Addyston Pipe & Steel Co. v. U. S., 175 U. S. 211, 44 L. ed. 136; Montague & Co. v. Lowry, 193 U. S. 38, 48 L. ed. 608; Northern Securities Co. v. U. S., 193 U. S. 197, 48 L. ed. 679; Minnesota v. Northern Securi-

ties Co., 194 U. S. 48, 48 L. ed. 870; Swift & Co. v. U. S., 196 U. S. 375, 49 L. ed. 518; Loewe v. Lawlor, 208 U. S. 274, 52 L. ed. 488; Shawnee Compress Co. v. Anderson, 209 U. S. 423, 52 L. ed. 865; Continental Wall Paper Co. v. Voight & Sons Co., 212 U. S. 227, 53 L. ed. 486; U. S. v. Lehigh Valley R. R. Co. 220 U. S. 257, 55 L. ed. 458; Standard Oil Co. v. U. S., 221 U. S. 1, 55 L. ed. 619, 34 L.R.A. (N.S.) 834; U. S. v. Am. Tobacco Co., 221 U. S. 106, 55 L. ed. 663; U. S. v. Union Pac. R. R. Co., 226 U. S. 61, 57 L. ed. 53; s. c., 226 U. S. 470, 57 L. ed. 90; U. S. v. Patten, 226 U. S. 525, 57 L. ed. —; U. S. v. Reading Co., 226 U. S. 324, 57 L. ed. 90; U. S. v. Jellico Mountain Coke & Coal Co., 43 Fed. 898; s. c., 12 L.R.A. 753, 46 Fed. 432; Bigelow v. Calumet & Hecla Min. Co., 155 Fed. 869. See American Biscuit & Mfg. Co. v. Klitz, 44 Fed. 721, 725, 726.

⁵ Act of July 2, 1890, ch. 647, § 3, 26 St. at L. 209, Comp. St. § 8822.

article enters or is intended to enter. Every person who is or shall hereafter be engaged in the importation of goods or any commodity from any foreign country in violation of this section of this Act, or who shall combine or conspire with another to violate the same, is guilty of a misdemeanor, and on conviction thereof in any court of the United States such person shall be fined in a sum not less than one hundred dollars and not exceeding five thousand dollars, and shall be further punished by imprisonment, in the discretion of the court, for a term not less than three months nor exceeding twelve months."⁶

By the Clayton Act: "Any person who shall be injured in his business or property by reason of anything forbidden in the anti-trust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."⁷ Such an action must be brought at common law.⁸ When brought by a stockholder it must be in equity,⁹ but it has been said that treble damages cannot be recovered in a stockholder's suit.¹⁰ The complainant must show that the plaintiff was injured by reason of a contract or combination in restraint of trade in violation of the act.¹¹ A complaint was held to state no cause of action where it alleged that "the bank of which plaintiff was the receiver entered into agreements with two other banking companies, whereby the three formed a combination to control the

⁶ Act of August 27, 1894, 28 St. at L. 570, ch. 349, § 73, as amended, 37 St. at L. 667, ch. 40, Comp. St. § 8831.

⁷ 38 St. at L. 731, ch. 323, § 4, Comp. St. § 8835d. *Supra*, § 61.

By the act of August 27, 1894, "Any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this Act may sue therefor in any circuit court of the United States in the district in which the defendant resides or is found, without respect to the amount in controversy, and shall re-

cover three-fold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee." (26 St. at L. 210, ch. 647, § 7, Comp. St. § 8829).

⁸ *Fleitmann v. Wellsbach St. Lighting Co.*, 240 U. S. 27.

⁹ *United Copper Securities Co. v. Amalgamated Copper Co.*, 244 U. S. 261, distinguishing and modifying; *Fleitman v. Wellsbach Street Lighting Co.*, 240 U. S. 27.

¹⁰ *Fleitman v. Wellsbach St. Lighting Co.*, 240 U. S. 27, affirming C. C. A., 211 Fed. 103.

¹¹ *Noyes v. Parsens*, C. C. A., 245 Fed. 689.

banking business at a particular point, that the corporation of which he was the receiver and another of the three acquired the stock of the third, and that ultimately the first, of which plaintiff was receiver, was absorbed by the second corporation. The complaint alleged as elements of damage the amount paid by the second bank to the stockholders of the first bank, of which he was receiver, which was in excess of the actual value of the stock, on the theory that the bank was deprived of some right, and as other items of damage alleged that it ultimately became insolvent;" that his corporation which previously had a surplus of \$110,000 above its liabilities to creditors, became insolvent so that its assets were reduced to more than \$500,000 below such liabilities.¹² Construing the pleadings, the court cannot take judicial notice of decisions in the State courts in actions by other plaintiffs to which the defendant was a party.¹³

By the Clayton Act: "The several circuit courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of § 73 of this Act; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violations shall be enjoined or otherwise prohibited. When the parties complained of shall have

¹² *Noyes v. Parsens*, C. C. A., 245 Fed. 689; *Homestead Co. v. Des Moines Electric Co.*, C. C. A., 248 Fed. 439, held that: "the complaint states facts sufficient to sustain an action in tort for damages under the statute. It sufficiently states like contemporaneous services to the job printing and photo-engraving plants of the two competitors, and like business situation and circumstances of the competitors and of their plants, and the charge and collection from one of rates $2\frac{1}{2}$ times the rates collected of the other, avers that this discrimination compelled the plaintiff to pay for substantially like service \$2,950.46 more than it would

have paid at the rates charged the Leader Company, that on account of its competitive relation with that Company it was compelled to sell the product of its job printing and photo-engraving business at the prices set by the Leader Company, and that, 'its overhead expenses being unduly increased by the unfair requirements of defendant, plaintiff was deprived of its fair and legitimate profit and damaged to the extent of said overcharge.' The complaint then 'demands damages against defendant for the sum of \$2,950.46 actual damages with interest thereon.' "

¹³ *Strout v. United Shoe Mach. Co.*, 208 Fed. 646, 653.

been duly notified of such petition, the court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such petition, and before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises. Whenever it shall appear to the court before which any such proceedings may be pending that the ends of justice require that other parties should be brought before the court, the court may cause them to be summoned whether they reside in the district in which the court is held or not, and subpoenas to that end may be served in any district by the marshal thereof."¹⁴ The order may be obtained as soon as the bill is filed before the issue of a subpoena for the resident defendant and without notice to him.¹⁵ The word "found" means that the corporation must be present in the district, or its officers or agents carrying on its business.¹⁶ What constitutes such a business as will subject a corporation to service of process depends upon the facts in each case.¹⁷ The general rule is that the business must be of such a nature as to warrant the inference that the corporation has subjected itself to the local jurisdiction.¹⁸ The ownership of stock in local corporations, the publication of advertisements within the district, and the presence there of agents without authority to sell, to collect, or to extend credit, who solicit orders which are filled by

¹⁴ Clayton Act, October 15, 1914, ch. 323, § 15. 38 St. at L. 736, Comp. St. 8835. The former statute was as follows: "The several (circuit courts) of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney-General, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. When the parties complained of shall have

been duly notified of such petition the court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such petition and before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises." July 2, 1890, ch. 647, § 4, 26 St. at L. 209.) See § 61, *supra*.

¹⁵ See *supra*, § 61.

¹⁶ *People's Tobacco Co. v. Am. Tobacco Co.*, 246 U. S. 79, 84; *U. S. v. Am. Bell Tel. Co.*, 29 Fed. 17, *infra*, § 164b.

¹⁷ *Ibid.* See *infra*, § 164b.

¹⁸ *Ibid.* *U. S. v. Am. Bell. Tel. Co.*, 29 Fed. 17.

jobbers who buy from the corporation, will not subject it to the service of process there.¹⁹

"Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections two, three, seven and eight of this Act, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue: Provided, That nothing herein contained shall be construed to entitle any person, firm, corporation, or association, except the United States, to bring suit in equity for injunctive relief against any common carrier subject to the provisions of the Act to regulate commerce, approved February fourth, eighteen hundred and eighty-seven, in respect of any matter subject to the regulation, supervision, or other jurisdiction of the Interstate Commerce Commission." ²⁰

The Clayton Act is not retrospective.²¹ Under the former law an individual could not maintain a suit for an injunction.²² No injunction can now be granted to parties not showing special injuries to themselves.²³ Under the former law it was held that such a suit could not be brought by a stockholder who had suffered no special injuries.²⁴

It has been held that the court will not enjoin a clause in an agreement between competitors in Interstate Commerce when there is no evidence that it has been put into effect or that preparations have been made for that purpose,²⁵ and that the Clayton

¹⁹ Ibid.

²⁰ 38 St. at L. 737, ch. 323, § 16. Comp. St. § 8350.

²¹ Ketcham v. Denver & R. G. R. Co., C. C. A., 248 Fed. 106.

²² Paine Lumber Co. v. Neal, 244 U. S. 459, 471.

²³ Venner v. Pennsylvania Steel Co., 250 Fed. 292.

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²⁴ Paine Lumber Co. v. Neal, 244 U. S. 459, 471; Ketcham v. Denver & R. G. R. Co., C. C. A., 248 Fed. 106.

²⁵ U. S. v. Prince Line, 220 Fed. 230.

Act is limited to suits seeking preventive relief and does not authorize a suit to annul a transaction which has been completed.²⁶

A bill to enjoin the consolidation of two corporations as being in violation of the Anti-Trust Laws of certain States was held to be insufficient when it did not show that any restraint was caused by the consolidation upon transportation exclusively in any one of such States.²⁷ It has been held that a stockholder who bought his stock with knowledge that a consolidation or combination of railway companies was contemplated cannot sue to enjoin the proceedings as in restraint of trade.²⁸

"Any suit, action, or proceeding under the antitrust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district where-in it may be found or transacts business; and all process in such cases may be served in the district in which it is an inhabitant, or wherever it may be found." ²⁹

Where the defendant transacts business within a district it may be sued in the District Court there held, although it has no agent within such district, service being made at the defendant's domicile.³⁰

It has been held that it cannot be sued in a district where it is not incorporated and transacts no business; although its agent is found there, when the latter is not acting in his representative capacity.³¹

The Act of July 2, 1890, provides: "Whenever it shall appear to the court before which any proceeding under section four of this act may be pending, that the ends of justice require that other parties should be brought before the court, the court may cause them to be summoned, whether they reside in the district

²⁶ *Venner v. Pennsylvania Steel Co.*, 250 Fed. 292.

²⁷ *De Koven v. Lake Shore & M. S. Ry. Co.*, 216 Fed. 955.

²⁸ *Continental Sec. Co. v. Interborough R. T. Co.*, 221 Fed. 44.

²⁹ 38 St. at L. 731, Comp. St. § 8835d, *supra*, § 61. By the Act of July 2nd, 1890, "Any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act, may sue therefor in

any circuit court of the United States in the district in which the defendant resides or is found, without respect to the amount in controversy, and shall recover three fold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee."

³⁰ *Southern Photo Material Co. v. Eastman Kodak Co.*, 234 Fed. 955.

³¹ *Frey & Son v. Cudahy Packing Co.*, 228 Fed. 209.

in which the court is held or not, and subpoenas to that end may be served in any district by the marshal thereof."³³

"A final judgment or decree hereafter rendered in any criminal prosecution or in any suit or proceeding in equity brought by or on behalf of the United States under the antitrust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant in any suit or proceeding brought by any other party against such defendant under said laws as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto: *Provided*, This section shall not apply to consent judgments or decrees entered before any testimony has been taken: *Provided further*, This section shall not apply to consent judgments or decrees rendered in criminal proceedings or suits in equity, now pending, in which the taking of testimony has been commenced but has not been concluded, provided such judgments or decrees are rendered before any further testimony is taken."³⁴

"Whenever any suit or proceeding in equity or criminal prosecution is instituted by the United States to prevent, restrain or punish violations of any of the antitrust laws, the running of the statute of limitations in respect of each and every private right of action arising under said laws and based in whole or in part on any matter complained of in said suit or proceeding shall be suspended during the pendency thereof."³⁵

This section of the statute is not retroactive either as regards the rule of evidence or the application of the statute of limitations which it provides.³⁶

By the Act of June 28, 1910:

"In any suit in equity pending or hereafter brought in any Circuit Court" now in any District Court "of the United States under the Act entitled 'An Act to protect trade and commerce against unlawful restraints and monopolies,' approved July second, eighteen hundred and ninety, 'An Act to regulate com-

³³ 26 St. at L. 210, ch. 647, § 5, ch. 114, 37 St. at L. 731, Comp. St. § 8827. § 8826.

³⁴ 38 St. at L. 731, ch. 323, § 5, ³⁵ 38 St. at L. 731, ch. 323, § 5, Comp. St. § 8835e. Comp. St. § 8835e. See *infra*, §§ 181a, 333p.

³⁶ *Buckeye Powder Co. v. E. I. Du Pont De Nemours Powder Co.*, 248 U. S. 55. Act of March 3, 1913,

merce,' approved February fourth, eighteen hundred and eighty-seven, or any other Acts having a like purpose that hereafter may be enacted, wherein the United States is complainant, the Attorney-General may file with the clerk of such court a certificate, that, in his opinion, the case is of general public importance, a copy of which shall be immediately furnished by such clerk to each of the (circuit) judges of the circuit in which the case is pending. Thereupon such case shall be given precedence over others in every way expedited, and be assigned for hearing at the earliest practicable day, before not less than three of the circuit judges of said circuit, if there be three or more; and if there be not more than two circuit judges, then before them and such district judge as they may select; or, in case the full court shall not at any time be made up by reason of the necessary absence or disqualification of one or more of the said circuit judges, the justice of the Supreme Court assigned to that circuit or the other circuit judge or judges may designate a district judge or judges within the circuit who shall be competent to sit in said court at the hearing of said suit. In the event the judges sitting in such case shall be equally divided in opinion as to the decision or disposition of said cause, or in the event that a majority of said judges shall be unable to agree upon the judgment, order, or decree finally disposing of said case in said court which should be entered in said cause, then they shall immediately certify that fact to the Chief Justice of the United States, who shall at once designate and appoint some circuit judge to sit with said judges and to assist in determining said cause. Such order of the Chief Justice shall be immediately transmitted to the clerk of the Circuit Court in which said cause is pending and shall be entered upon the minutes of said court. Thereupon said cause shall at once be set down for reargument and the parties thereto notified in writing by the clerk of said court of the action of the court and the date fixed for the reargument thereof. The provisions of this section shall apply to all causes and proceedings in all courts now pending, or which may hereafter be brought." ³⁶

This section of the earliest Act upon the subject was not repealed by the Judicial Code. ³⁷

³⁶ 36 St. at L. 854, ch. 428, Comp. St. § 8824.

⁵⁷ L. ed., setting aside U. S. v. Terminal Ass'n of St. Louis, 197

³⁷ *Ex parte* U. S., 226 U. S. 420,

Fed. 446, *infra*, §§ 373, 374.

It applies to the settlement of a decree upon the mandate of the Supreme Court.³⁸ It has been said that it does not require three judges to hear a motion for a preliminary injunction or for any interlocutory relief sought before the formal hearing.³⁹

"In the taking of depositions of witnesses for use in any suit in equity brought by the United States under the Act entitled 'An Act to protect trade and commerce against unlawful restraints and monopolies,' approved July second, eighteen hundred and ninety, and in the hearings before any examiner or special master appointed to take testimony therein, the proceedings shall be open to the public as freely as are trials in open court; and no order excluding the public from attendance on any such proceedings shall be valid or enforceable."⁴⁰ This statute was passed to obviate the effects of a ruling that the testimony might be taken in secret.⁴¹

§ 151b. Suits and proceedings to cancel certificates of citizenship and to set aside naturalization. A bill in equity will lie to set aside a certificate of citizenship or of naturalization obtained by fraud.¹ It has been held that such a suit cannot be maintained when there is an error in the proceedings but no willful misconduct on the part of the holder of the certificate or those who have acted on his behalf. Errors in proceedings for naturalization have been reviewed by writ of error² and appeal.³ The more usual remedy however is the institution of summary proceedings under the Act of June 29, 1906.⁴ This provides:

³⁸ Ibid.

³⁹ *Southern Pac. Terminal Co. v. Interstate Commerce Commission*, 166 Fed. 134, 136.

⁴⁰ 37 St. at L. 731, Comp. St. § 8826.

⁴¹ *U. S. v. United Shoe Machinery Co. of New Jersey*, 198 Fed. 870.

§ 151b. 1 *U. S. v. Norsch*, 42 Fed. 417. But see *U. S. v. Andersen*, 169 Fed. 20. *Contra*, *U. S. v. Schurr*, 163 Fed. 648; *U. S. v. Meyer*, 170 Fed. 983; *U. S. v. Plaistow*, 189 Fed. 1007; *U. S. v. Nisbit*, 168 Fed. 1005; *U. S. v. Vandermolen*, 163 Fed. 650. But see *Johanessen*, 225 U. S. 227, 240.

2 *U. S. v. Lenore*, 207 Fed. 866. See *U. S. v. Luria*, 184 Fed. 643, 646. *Contra*, *U. S. v. Nisbit*, 168 Fed. 1005; *U. S. v. Vandermolen*, 163 Fed. 650. See *U. S. v. Andersen*, 169 Fed. 201.

3 *U. S. v. Ozala*, C. C. A., 182 Fed. 51; *U. S. v. Balsara*, C. C. A., 180 Fed. 694; *Bessho v. U. S.*, C. C. A. 178 Fed. 245; *U. S. v. Poslusny*, C. C. A., 179 Fed. 836; *U. S. v. Martorana*, C. C. A., 171 Fed. 397; *U. S. v. Doyle*, C. C. A., 179 Fed. 687. See also *U. S. v. Lenore*, 207 Fed. 865; *U. S. v. Smith*, 247 Fed. 131; *U. S. v. Ozala*, C. C. A., 182 Fed. 51.

4 Ch. 3592, § 15, 34 St. at L. 601.

"It shall be the duty of the United States district attorney for the respective districts, upon affidavit showing good cause therefor, to institute proceedings in any court having jurisdiction to naturalize aliens in the judicial district in which the naturalized citizen may reside at the time of bringing the suit, for the purpose of setting aside and canceling the certificate of citizenship on the ground of fraud or on the ground that such certificate of citizenship was illegally procured. In any such proceedings the party holding the certificate of citizenship alleged to have been fraudulently or illegally procured shall have sixty days personal notice in which to make answer to the petition of the United States; and if the holder of such certificate be absent from the United States or from the district in which he last had his residence, such notice shall be given by publication in the manner provided for the service of summons by publication or upon absentees by the laws of the State or the place where such suit is brought.

"If any alien who shall have secured a certificate of citizenship under the provisions of this Act, shall, within five years after the issuance of such certificate, return to the country of his nativity, or go to any other foreign country, and take permanent residence therein, it shall be considered prima facie evidence of a lack of intention on the part of such alien to become a permanent citizen of the United States at the time of filing his application for citizenship, and, in the absence of countervailing evidence, it shall be sufficient in the proper proceeding to authorize the cancellation of his certificate of citizenship as fraudulent, and the diplomatic and consular officers of the United States in foreign countries shall from time to time, through the Department of State, furnish the Department of Justice with the names of those within their respective jurisdictions who have such certificates of citizenship and who have taken permanent residence in the country of their nativity; or in any other foreign country, and such statements, duly certified, shall be admissible in evidence in all courts in proceedings to cancel certificates of citizenship.

"Whenever any certificate of citizenship shall be set aside or cancelled, as herein provided, the court in which such judgment or decree is rendered shall make an order cancelling such certificate of citizenship and shall send a certified copy of such order

to the Bureau of Immigration, and Naturalization;⁵ and in case such certificate was not originally issued by the court making such order it shall direct the clerk of the court to transmit a copy of such order and judgment to the court out of which such certificate of citizenship shall have been originally issued. And it shall thereupon be the duty of the clerk of the court receiving such certified copy of the order and judgment of the court to enter the same of record and to cancel such original certificate of citizenship upon the records and to notify the (Bureau of Immigration) and Naturalization of such cancellation.

"The provisions of this section shall apply not only to certificates of citizenship issued under the provisions of this Act, but to all certificates of citizenship which may have been issued heretofore by any court exercising jurisdiction in naturalization proceedings under prior laws."⁶

This statute is constitutional,⁷ although it applies to naturalizations made before its enactment⁸ and establishes a presumption from facts previously existing.⁹ It is valid when the proceedings are directed at a certificate of naturalization granted without any appearance on the part of the United States.¹⁰ Whether it can be applied to a certificate issued after the Government has appeared and been heard is left open by the Supreme Court.¹¹ It has been held by District Courts, that they had jurisdiction in this manner to set aside certificates of State courts when no fraud was committed by the applicants for error in the construction of the statute,¹² even where the Government had appeared and objected to the original proceedings.¹³ This

⁵ 34 St. at L. 596, as amended, 36 St. at L. 830, 40 St. at L., Comp. St. §§ 4351, 4352, 4352a, 4352aa, 4353, 4354.

⁶ 34 St. at L. 601, Comp. St. § 4374. This has been transferred to the Department of Labor by the Act of March 4, 1913, ch. 141, § 3; 37 St. at L. 737, Comp. St. § 934.

⁷ *Luria v. U. S.*, 231 U. S. 9, 17; *Johanessen v. U. S.*, 225 U. S., 227, 32 Sup. Ct. 613, 56 L. ed. 1066.

⁸ *Johanessen v. U. S.*, 225 U. S. 227, 242, *Luria v. U. S.*, 231 U. S. 9, 17.

⁹ *Luria v. U. S.*, 231 U. S. 9, 17.

¹⁰ *Ibid.*

¹¹ *Johanessen v. U. S.*, 225 U. S. 227, 237, 32 Sup. Ct. 613, 56 L. ed. 1066.

¹² *U. S. v. Simon*, 170 Fed. 680; *U. S. v. Meyer*, 170 Fed. 983, 985; *U. S. v. Plaistow*, 189 Fed. 1006, 1009. *Contra*, *U. S. v. Andersen*, 169 Fed. 201, 205; *U. S. v. Lenore*, 207 Fed. 865, 868; *U. S. v. Aker-vik*, 180 Fed. 137, 147.

¹³ *U. S. v. Plaistow*, 189 Fed. 1006; *U. S. v. Albertini*, 206 Fed. 133.

was done where the hearing had taken place in chambers and not in open court.¹⁴

It has been held that the finding of fact by a State court when there was no fraud cannot be thus reviewed.¹⁵

Certificates were set aside because of fraud in testimony concerning the moral character of the applicants: when the petition for naturalization stated that the applicant was not a married man, but in fact he had abandoned his wife and children in Europe;¹⁶ where, when admitted, he was engaged in an immoral and illegal business, letting rooms for use in prostitution.¹⁷ When he admitted that he advocated the elimination by the power of the ballot of constitutional rights to property and the abolition of the existing political government as the result of a change from individual to common ownership of all land, buildings, and industrial institutions.¹⁸ When he expressed during the Great War his sympathy with Germany.¹⁹

The certificate was not set aside because of an error in the form of the signature of the petitioner.²⁰ Nor when the petitioner was under twenty-one years of age, there being no charge of fraud, concealment, or lack of knowledge by the State court of the date of the applicant's birth.²¹ Nor because of the failure to attach to the original papers the certificate by the Department of Commerce and Labor of the arrival of the defendant in the United States.²² But a mistake in a description of the nationality of the petitioner is fatal and cannot be corrected after the term at which the certificate is issued.²³ Nor can an error in his name be subsequently corrected.²⁴

¹⁴ U. S. v. Ginsberg, 243 U. S. 472.

¹⁵ U. S. v. Butikofer, 228 Fed. 918.

¹⁶ U. S. v. Albertini, 206 Fed. 133.

¹⁷ U. S. v. Raverat, 222 Fed. 1018.

¹⁸ U. S. v. Olszen, 196 Fed. 562. See *ex parte* Sauer, 81 Fed. 355, note; U. S. v. Swelgia, 254 Fed. 581.

¹⁹ U. S. v. Wursterbarth, 249 Fed. 908.

²⁰ U. S. v. Lenore, 207 Fed. 866.

²¹ U. S. v. Butikofer, 228 Fed. 918, 23; U. S. v. Ness, 217 Fed. 169.

²² U. S. v. Ness, 217 Fed. 169.

²³ U. S. v. Vogel, C. C. A., 262 Fed. 262, and cases cited, overruling U. S. v. Viatopulos, 221 Fed. 485; U. S. v. Orend, 221 Fed. 777; *Re* Denny, 240 Fed. 845.

²⁴ *Re* Perkins, 204 Fed. 350.

But it has been held that the certificate may be set aside when the application was made in the wrong district or county.²⁶ Or where the State court erred in overruling the objection of the government because of no previous declaration of intention to become a citizen when the applicant was a member of the United States Marine Corps;²⁷ or was the widow of an honorably discharged soldier;²⁸ or the court erred in considering depositions not authorized by the statute.²⁹ Or where the State court by a misconstruction of the statute granted the certificate before two years had expired following the date of the declaration of intention.³⁰

The residence described in the statute is one where the applicant has voluntarily sojourned.³¹ The Federal court of a district where the naturalized citizen is confined in a penitentiary has no jurisdiction to cancel a certificate of citizenship when at the time of the conviction he resided in another district.³²

The affidavit submitted to the District Attorney need not comply with the formalities of the statements in the pleadings,³³ and may be made upon information and belief.³⁴ But it has been held that an averment in a bill or petition that the certificate was "fraudulently and illegally procured" is a mere conclusion and ineffectual unless facts are alleged indicating such fraud or illegality.³⁵

An averment is insufficient which states that in the petition for naturalization the applicant, contrary to fact, represented that he had been in the United States for more than five years, there being attached to the petition of the Government as an exhibit an affidavit made by a special agent setting forth in

²⁶ U. S. v. Schurr, 163 Fed. 648.

²⁷ U. S. v. Plaistow, 189 Fed. 1006.

²⁸ U. S. v. Meyer, 170 Fed. 982.

²⁹ U. S. v. Nisbit, 168 Fed. 1005.

³⁰ U. S. v. Vandermolen, 163 Fed. 650.

³¹ U. S. v. Gronich, 211 Fed. 548.

³² Ibid.

³³ U. S. v. Leles, 227 Fed. 189.

³⁴ Ibid.

³⁵ U. S. v. Rose, 166 Fed. 999.

See U. S. v. Luria, 184 Fed. 643, aff'd 648; Luria v. U. S., 231 U. S. 9, 17; 34 Sup. Ct. 105, 58 L. ed. 101; U. S. v. Rockteschell, 208 Fed. 530.

detail the facts which support the charge, but there being no specific charge of fraud or perjury.³⁶

It has been held that the Federal court has no power to amend a declaration in a State court.³⁷ Nor after the expiration of the term to amend the proceedings in its own court so as to change the name of the person to whom the certificate was issued; when no contemporary record shows a mistake.³⁸ That no court can after the term enter *nunc pro tunc* an order of naturalization when no entry or memorandum appears in the record or files made at the term, when the judgment is directed to take effect.³⁹ But that it may, pending proceedings to cancel the certificate, amend a declaration so as to correct a mistake made in good faith concerning the sovereignty to which the applicant then owed allegiance.⁴⁰

The naturalized citizen is not entitled to a trial by jury.⁴¹

§ 151c. Creditors' bills after executions have been returned unsatisfied. A bill may be filed by a judgment creditor to apply to the satisfaction of his debt assets which cannot be reached by an execution.¹ A previous judgment is required in order to preserve the defendant's constitutional right to a trial by jury if he disputes the creditor's demand.²

Such bills have been sustained when filed by a judgment creditor to apply to the satisfaction of his debt an interest which his debtor may hold in a patent or copyright,³ or in a license to use a patented invention;⁴ by a judgment creditor against a city for an accounting of taxes collected by it which

³⁶ U. S. v. Rockteschell, 208 Fed. 530.

³⁷ U. S. v. Viaropulos, 221 Fed. 484, 492.

³⁸ U. S. v. Viaropulos, 221 Fed. 484, 492; *re* Perkins, 204 Fed. 350; *re* O'Sullivan (Mo. App., 1909), 117 S. W. 651.

³⁹ Gagnon v. U. S., 193 U. S. 451, 48 L. ed. 745, overruling; *re* Christern, 43 N. Y. Sup. Ct., 11 (J. & S.) 523, 56 How. Pr. 8. See U. S. v. Stoller, 180 Fed. 910.

⁴⁰ U. S. v. Viaropulos, 221 Fed. 484, 492.

⁴¹ Luria v. U. S., 231 U. S. 9, 17, 34 Sup. Ct. 10, 58 L. ed. 101, affirming, 184 Fed. 643.

§ 151c. ¹ Angell v. Draper, 1 Vern. 399; Scottish Am. Mtg. Co. v. Follansbee, 14 Fed. 125.

² U. S. v. Seward Peninsula Ry. Co., C. C. A., 203 Fed. 963; Williams v. Adler-Goldman Commission Co., C. C. A., 227 Fed. 374, affirming, 211 Fed. 530.

³ Ager v. Murray, 105 U. S. 126, 26 L. ed. 942. See Maitland v. Gibson, 79 Fed. 136.

⁴ Matthews v. Green, 19 Fed. 649.

had been pledged for the payment of complainant's demand.⁵ To enforce a decree for the payment of money, at least when made by another court of equity.⁶ To enforce the payment of alimony directed to be paid in the final judgment or decree of a State court.⁷

By a creditor, whose claim has not been reduced to judgment, against an insolvent corporation for the appointment of a receiver and the marshaling and distribution of its assets; when the corporation waives the objection that his claim has not been reduced to judgment.⁸ Or when the charter of the corporation has expired, or because of a sheriff's sale of its property and franchises, the officers last elected have become trustees to distribute its assets.⁹

Under ordinary circumstances a creditor cannot file a bill in equity to apply assets to the payment of his debt alone, unless he has obtained a judgment for his claim in a court of the same State or judicial district, and had the return of an execution issued thereon unsatisfied.¹⁰

The United States cannot sue in equity to recover a tax until it has obtained judgment against the taxpayer¹¹ unless a statute gives the Government a lien upon the property,¹² or under special circumstances.

A creditor who has not reduced his claim to judgment cannot collect his claim by a suit in equity on showing that the debtor is insolvent and has no property which can be reached

⁵ *City of New Orleans v. Fisher*, C. C. A., 91 Fed. 574.

⁶ *Shields v. Thomas*, 18 How. 253, 262, 15 L. ed. 368, 372. But see *Tilford v. Oakley*, Hempst. 197.

⁷ *Barber v. Barber*, 21 How. 582, 16 L. ed. 226; *Knapp v. Knapp*, 59 Fed. 641; *Israel v. Israel*, 130 Fed. 237; *Johnson v. Johnson*, 13 Fed. 193; *Bowman v. Bowman*, 30 Fed. 849.

⁸ *Re Metropolitan Railway Receivership*, 208 U. S. 90, 52 L. ed. 403; *Fink v. Patterson*, 21 Fed. 602.

⁹ *Am. Ice Co. v. Pocono Spring*

Water Ice Co., 165 Fed. 714. But see *Boomer v. Rose*, 244 Fed. 307.

¹⁰ *Case v. Beauregard*, 99 U. S. 119, 25 L. ed. 370; *Smith v. Railroad Co.*, 99 U. S. 398, 25 L. ed. 437; *Walser v. Seligman*, 13 Fed. 415; *Swan L. & C. Co. v. Frank*, 148 U. S. 603, 37 L. ed. 577; *Hollins v. Brierfield, C. & I. Co.*, 150 U. S. 371, 37 L. ed. 1113; *Maxwell v. M'Daniels*, C. C. A., 184 Fed. 311.

¹¹ *U. S. v. Seward*, *Peninsula Ry. Co.*, C. C. A., 203 Fed. 963.

¹² *U. S. v. Capital City Dairy Co.*, 252 Fed. 900.

by legal process.¹³ Nor in the absence of statutory authority because the debtor is about to make a fraudulent transfer of his property.¹⁴ Such a bill may be maintained, however, by the creditor before he has reduced his claim to judgment in order to enforce a right given him by a State statute.¹⁵ It has been held: that such a bill may be maintained in Virginia, by a creditor of an insolvent firm which is disposing of its assets in fraud of creditors, filed on behalf of the other creditors as well as himself, praying the appointment of a receiver, an injunction against any interference by others with the firm assets and the distribution of those assets among the creditors equally.¹⁶ A previous judgment and return of execution unsatisfied is not required where the creditor sues to enforce a trust or equitable right or lien.¹⁷

Under ordinary circumstances the creditor cannot sue in equity an executor to collect his claim from the estate before he has obtained a judgment at law.¹⁸ An order of a court of probate directing the executor to pay a claim may be enforced by a bill in equity against the executor,¹⁹ but not against his sureties until a judgment at law has been obtained against them.²⁰ When a discovery of assets from the executor is required the creditor may sue in equity for such discovery and the payment of his debt without obtaining a previous judgment at law.²¹

Where the creditor's attorney admitted that the debt was due the creditor and it appeared that debtor had no property anywhere subject to execution and had left the State where his equitable assets were located, a creditor's bill without the previous entry of a judgment was sustained.²² A bill may be filed

¹³ *Walser v. Seligman*, 13 Fed. 415; *Am. Creosote Works v. C. Lembeke & Co.*, 165 Fed. 809.

¹⁴ *Am. Creosote Works v. C. Lembeke & Co.*, 165 Fed. 809. But see *Murray v. Sioux Alaska Min. Co.*, C. C. A., 239 Fed. 818.

¹⁵ *Murray v. Sioux Alaska Min. Co.*, C. C. A., 239 Fed. 818.

¹⁶ *Fink v. Patterson*, 21 Fed. 602.

¹⁷ *Case v. Beauregard*, 101 U. S. 688, 690, 25 L. ed. 1004; *Merchants'*

Nat. Bank v. Chattanooga Constr. Co., 53 Fed. 314.

¹⁸ *U. S. v. Bitter Root Co.*, 200 U. S. 451, 475.

¹⁹ *Fraser v. Cole*, C. C. A., 214 Fed. 556. See *Gillispie v. Riggs*, 248 Fed. 843, *supra*, § 54.

²⁰ *Gillispie v. Riggs*, 248 Fed. 843.

²¹ *Green's Admx. v. Creighton*, 23 Howard 90; *Kennedy v. Creswell*, 101 U. S. 641.

²² *Williams v. Adler-Goldman*

by a creditor of a decedent to set aside a fraudulent conveyance of his estate made after his death by the order of court.²³ A judgment creditor in a foreign jurisdiction cannot ordinarily sue to recover equitable assets until he has recovered a judgment in the district where the suit is brought.²⁴ In such a case where execution has been issued in the jurisdiction where the judgment was recovered and the bill shows that he cannot be served with process within a jurisdiction where he possesses assets that cannot be reached by attachment, a bill in equity will be maintained without a previous judgment in the jurisdiction where it is filed.²⁵

It is not enough for such a bill to show that the defendant is a foreign corporation.²⁶ It must deny that it is transacting business within the State and aver that it has no agent there upon whom process can be served.²⁷ It has been held that the judgment debtor is not an indispensable party to such a suit to set aside a fraudulent conveyance by him.²⁸

It has been doubted whether a Federal court will entertain a creditors bill founded upon the judgment of a State court within the district. But the better opinion is that such a bill may be maintained.²⁹

When a judgment creditor has an adequate remedy at law, a bill in equity for the same relief cannot ordinarily be maintained. Thus it was held that a judgment creditor of a national bank cannot sue in equity to compel the receiver of the bank to recognize his judgment and to enjoin the receiver from refusing such recognition;³⁰ because he has an adequate remedy by an action at law in the Federal court against the receiver upon the judgment of the State court against the bank.³¹ But that the fact that he might have collected his

Commission Co., C. C. A., 227 Fed. 374, affirming, 211 Fed. 530.

²³ Johnson v. Waters, 111 U. S. 640, 28 L. ed. 547.

²⁴ Nat. Tube Works Co. v. Bal-lou, 146 U. S. 517, 13 Sup. Ct. 165, 36 L. ed. 1070.

²⁵ Bank of Commerce and Trusts v. McArthur, C. C. A., 256 Fed. 84.

²⁶ Edward Hines Lumber Co. v. Bowers, C. C. A., 238 Fed. 782.

²⁷ Bank of Commerce and Trusts v. McArthur, C. C. A., 256 Fed. 84.

²⁸ Ibid.

²⁹ Davis v. Davis, 65 Fed. 380.

³⁰ Bacon v. Harris, 62 Fed. 99; Bidwell v. Huff, 103 Fed. 362; Feid-ler v. Bartleson, C. C. A., 161 Fed. 30.

³¹ Denton v. Baker, 79 Fed. 189.

judgment by garnishee process does not deprive him of the right to seek relief in equity.³² It was said that a receiver, assignee in bankruptcy, or assignee under a voluntary general assignment, each of whom represents creditors as well as the debtor, cannot maintain a bill to enforce a collateral obligation given to a creditor or to a body of creditors by a third person for the payment of the debts of the insolvent.³³

§ 151d. Bills for accountings. Equity will entertain a bill to compel an accounting by persons standing in a trust relation to the plaintiff,¹ and by those against whom an action for account render would lie at common law,² namely, guardians in socage, bailiffs, receivers, and merchants in their dealings with each other,³ but not otherwise,⁴ unless the accounts are mutual,⁵ or very complicated and intricate,⁶ or the accounting is supplemental to some other equitable relief.⁷

³² Feidler v. Bartleson, 161 Fed. 30.

³³ Jacobson v. Allen, 12 Fed. 454.

¹ § 151d. ¹ Pacific R. of Mo. v. Atlantic & Pac. R. Co., 20 Fed. 277; Fowle v. Lawrason, 5 Pet. 494, 502, 8 L. ed. 204, 206; Littlefield v. Perry, 21 Wall. 205, 22 L. ed. 577; Providence Min. & Mill Co., v. Noeholson, C. C. A., 178 Fed. 29; Morris & Co. v. Whitley, C. C. A., 183 Fed. 764.

² Cited with approval by C. C. A. of the Fifth Circuit, Morris & Co. v. Whitley, C. C. A., 183 Fed. 764, 765; Mitchell v. Manufacturing Co., 2 Story, 648; Linson v. Hut-ton, 98 U. S. 79, 25 L. ed. 66; Fowle v. Lawrason, 5 Pet. 494, 502, 8 L. ed. 204, 206; U. S. v. Na-tional Bank, 73 Fed. 379.

³ Bispham's Equity, § 481; 1 Co. Litt. 90 b; 1 Co. Litt. 172 a; Bacon's Abr., Account, A.; Buller's Nisi Prius, 127; Earl of Devon-shire's Case, 11 Coke, 89.

⁴ Root v. Railway Co., 105 U. S. 189, 26 L. ed. 975; Consol. Safety Valve Co. v. Ashton Valve Co., 26

Fed. 319; Lord v. Whitehead, etc., Mach. Co., 24 Fed. 801; Gunn v. Brinckley Car Works & Mfg. Co., 66 Fed. 382.

⁵ Tenno v. Primrose, 116 Fed. 49; Fechteler et al. v. Palm Bros. & Co., C. C. A., 133 Fed. 462.

⁶ Cited with approval by Judge Hazel, Harvey v. Sellers, 115 Fed. 757, 758, and by C. C. A. of the Fifth Circuit, Morris & Co. v. Whit-ley, C. C. A., 183 Fed. 764, 765. Kil-bourn v. Sutherland, 130 U. S. 505, 32 L. ed. 1005; John Crossley Sons v. New Orleans, 20 Fed. 352; Pa-cific R. Co. v. Atlantic & Pac. R. Co., 20 Fed. 277; Gunn v. Brinck-ley C. W. & Mfg. Co., C. C. A., 66 Fed. 382; Baker v. Biddle Bald. 394; Blakeley v. Briscoe, Hempst. 114; Hattiesburg Lumber Co. v. Herrick, C. C. A., 212 Fed. 834. (Where relief obtainable at common law was also prayed.) But see Lord v. Whitehead, etc., Mach. Co., 24 Fed. 801; Adams v. Bridgewater Iron Co., 26 Fed. 324; Hagenbeck v. Hagenbeck Zoo A. Co., 59 Fed. 14. Hattiesburg Lumber Co. v.

It was held, that equity could take jurisdiction of a suit by the United States against the clerk of a court for an accounting of transaction during a period of seven years.⁸ That a judgment creditor may sue a city for an accounting of taxes collected by the defendant which had been pledged for the payment of the complainant's demand.⁹ A bill to compel an account by one partner to another will be sustained although an action for account rendered might lie at common law.¹⁰ A bill for an accounting may be filed, under a contract between two large mercantile houses, requiring each to render to the other, an annual account of its entire business, and to pay a certain percentage of its gross profits.¹¹ It has been held: that a factor, whose dealings with his principal were numerous, may file a bill for an accounting.¹²

It has been said that, wherever the State practice authorizes a reference of a complicate account in an action at law, the Federal court should take jurisdiction of the case in equity.¹³

An unsecured creditor upon allegations of fraudulent diversion of assets may sue for an accounting by a corporation which controls his corporate debtor.¹⁴

It has been held that there is jurisdiction in equity to open a closed account, although there is a remedy at law, in a case where, were the accounts still open, equity might have entertained a bill for an accounting.¹⁵ A bill in equity is the proper remedy to enforce a decree made by another court of equity for an accounting.¹⁶ A bill will not be sustained which seeks an accounting of commissions due an insurance agent upon premiums already paid although it also prays that defendant be required to account for the commissions that may become due on premiums

Herrick, C. C. A., 212 Fed. 834 (where relief obtainable at common law was also prayed).

⁷ Rubber Co. v. Goodyear, 9 Wall. 788; Root v. Railway Co., 105 U. S. 189, 26 L. ed. 975.

⁸ U. S. v. Harsha, 188 Fed. 759.

⁹ City of New Orleans v. Fisher, C. C. A., 91 Fed. 574.

¹⁰ Kebart v. Arkin, C. C. A., 232 Fed. 454 (a Pennsylvania partnership).

¹¹ Fechteler v. Palm Bros. & Co., C. C. A., 133 Fed. 462.

¹² Fenno v. Primrose, 116 Fed. 49.

¹³ McMullen Lumber Co. v. Strother, C. C. A., 136 Fed. 295.

¹⁴ Valley v. Denver & R. G. R. Co., C. C. A., 236 Fed. 176, 182.

¹⁵ Bischoffsheim v. Baltzer, 20 Fed. 890.

¹⁶ Collins v. Bradley Co., 227 Fed. 199.

to be paid in the future.¹⁷ A demurrer was sustained, to a bill to compel an account of profits made by a purchasing agent, who, it was charged, had sold to the complainant, large quantities of merchandise secretly owned by himself at a price greatly in advance of what he paid for the same; although the agent was a director of the complainant corporation, and the suit was brought against his personal representatives after his decease; when there was no allegation that the agent's books were fraudulently kept, nor that any different evidence or information could be obtainable in equity than that obtained at law; there being, however, an allegation that the accounts consisted of many thousands of items.¹⁸ It has been held that the holder of a tontine policy of life insurance cannot compel an accounting by his insurer except under special circumstances.^{18a}

Accountings in patent cases have been previously explained.¹⁹

When a settlement of accounts is attacked in a case where, had it not been for the settlement, the complainant would have been entitled to an accounting, if he sets aside the settlement, he is entitled to a full accounting without specification in the bill of the items of which he claims.²⁰ Where a bill alleged that the defendant was in wrongful possession of plaintiff's land and had continuously mined coal on the premises for eleven years and was still mining coal there, the exact quantity of what he had mined being unknown, but exceeding in value the sum of \$3,000 was held to be a "fishing bill" and insufficient to require an accounting.²¹

According to the later authorities, the bill need contain no offer by the complainant to pay the balance, if any, found due against him.²² Anciently such an offer was requisite.²³

Upon a bill for an accounting the defendant can obtain affirmative relief without a cross bill or a counterclaim.²⁴ After

¹⁷ Hicks v. Penn. Mut. Life Ins. Co., 210 Fed. 464.

¹⁸ American Spirits Mfg. Co. v. Easton, 120 Fed. 440.

^{18a} Hunton v. Eq. Life Ass'n S'y., 45 Fed. 661; Peters v. Eq. Life Ass'n S'y., 149 Fed. 290.

¹⁹ § 146, *supra*.

²⁰ Lovewell v. Schoolfield, 217 Fed. 689.

²¹ Childs v. Missouri K. & T. Ry. Co., 221 Fed. 219.

²² Columbian Government v. Rothschild, 1 Simons, 94, 103; Wells v. Strange, 5 Ga. 22.

²³ Godbolt v. Watts, 2 Anst. 543, *infra*, § 153.

²⁴ Fife v. Clayton, 13 Ves. 546; Stapylton v. Scott, 13 Ves. 425; Bradford v. Union Bank of Tenn.,

the right to an accounting has been adjudicated,²⁵ the accounts are usually referred to a master.²⁶ The Judge may himself, however, take the account.²⁷

The proceedings upon accountings are subsequently explained.²⁸

§ 151e. Bills for specific performance. Bills for specific performance of contracts to convey land are amongst the earliest forms of equitable relief. They were filed in the Court of Chancery as far back as the reign of Richard II.¹ They are supported on the ground that equity considers that done which ought to be done and holds the owner of the legal title to be trustee for him to whom he has agreed to convey the land.²

As no two pieces of land are exactly alike, equity considers that in no case can damages in money be adequate compensation for the breach of a covenant or other contract affecting land.³ Accordingly, the specific performance of contracts for the purchase or sale of land and of covenants affecting the same, will be specifically enforced with the aid of an injunction, whenever they are mutual,⁴ certain,⁵ not unconscionable,⁶ and their enforcement would be practicable.⁷

Equity hesitates before granting relief to enforce specific performance of contracts which do not affect land. When the

13 How. 57, 14 L. ed. 49; Northern B. Co. v. O. & L. C. R. Co., 18 Fed. 815. But see s. c., 20 Fed. 347. See Newton v. Gage, 155 Fed. 598; Detering v. Nordstrom, C. C. A., 148 Fed. 81.

²⁵ As to the preliminary proof required before a reference for an accounting, see *Columbian Eq. Co. v. Merc. Tr. & D. Co.*, C. C. A., 113 Fed. 28; § 389 *infra*.

²⁶ See §§ 384, 389 *infra*.

²⁷ *Pepper v. Addicks*, 153 Fed. 383.

²⁸ *Infra*, § 389.

§ 151e. 1 Ch. Cal. II, p. 2.

¹ *Tempore* Rich. II; Lord Scales v. Felbrigg, Ch. Cal. II, p. 26; *Tempore* Hen. VII; Bracton Lib. II, c. 27, fol. 61b.

² *Adderly v. Dixon*, 1 Sim. & Stu. 607; *Bispham's Eq.*, § 375.

³ *Dorsey v. Packwood*, 12 How. 126, 13 L. ed. 921; *Bispham's Eq.*, § 377.

⁴ *Colson v. Thompson*, 2 Wheat. 336, 4 L. ed. 253; *Bispham's Eq.*, § 377.

⁵ *Surget v. Byers*, Hempst. 715; *Roundtree v. McLain*, Hempst. 245; *Miss. & Mo. R. Co. v. Cromwell*, 91 U. S. 643, 23 L. ed. 367; *Bispham's Eq.* § 376. See *Randolph's Ex'r v. Quidnick Co.*, 135 U. S. 457, 34 L. ed. 200.

⁷ *Ross v. Union Pac. R. Co.*, 1 Woolw. 26; *Fallon v. Railroad Co.*, 1 Dill. 121; *Texas & Pac. Ry. Co. v. Marshall*, 136 U. S. 393, 34 L. ed. 385; *Bispham's Eq.*, § 377.

compulsion of the specific performance of a contract would compel the continuous supervision by the Court, equity will usually refuse to interfere.⁸ Thus, except perhaps under special circumstances, a court of equity will not compel specific performance by either party to a contract for the construction of a railroad.⁹ Nor to seize a man's property, and through its officers complete a bridge in pursuance of a contract which he has made.¹⁰ As early as the reign of Edward IV it was held that specific performance of a contract to build could be decreed.¹¹ But the adequacy of the plaintiff's remedy at law, as he could have the work done by a stranger to the contract, as well as the difficulty of supervision, afterwards led the courts to refuse to take jurisdiction in the case of an ordinary building contract.¹² Where, however, the building is to be done on land conveyed to the defendant as consideration the plaintiff can obtain the expected benefit in no other way; and in such cases the courts do not always find insurmountable the difficulty that supervision of the construction or even of indefinite maintenance is involved.¹³ Equity has refused to compel specific performance of a mining lease.¹⁴ Under ordinary circumstances equity will not compel a railway company to maintain its permanent terminus at a certain place.¹⁵ Bills were sustained: to compel specific performance of a covenant, to construct and to maintain a station upon land which the complainant had conveyed to a railroad company,¹⁶ and of a contract between a railroad and a telegraph company, authorizing the maintenance and operation of the telegraph line upon the railroad company's right of way,

⁸ *Errington v. Aynesly* (A. D. 1788), 2 Bro. Ch. 341; *Lucas v. Commerford* (A. D. 1790), 3 Bro. Ch. 166; *Blue Point Oyster Co. v. Haagenon*, 209 Fed. 278.

⁹ *Strang v. Richmond, P. & C. R. Co.*, 93 Fed. 71. See also *Fallon v. Railroad Co.*, 1 Dill. 121; *Ross v. Union Pac. Ry. Co.*, 1 Woolw. 26.

¹⁰ *Texas & St. Louis Ry. Co. v. Rust*, 17 Fed. 275.

¹¹ *Year Book*, 8 ed. IV. 4.

¹² *Errington v. Aynesly* (1788), 2 Bro. Ch. 341; *Lucas v. Commerford* (1790), 3 Bro. Ch. 166.

¹³ *Hood v. N. E. R. Co.* (1869), L. R. 8 Eq. 666; *Gregory v. Ingwersen* (1880), 32 N. J. Eq. 199; *Lawrence v. Saratoga Lake R. Co.* (1885), 36 Hun. 467; *Jones v. Parker* (1895), 163 Mass. 564, 47 Am. St. Rep. 485, 40 N. E. 1044.

¹⁴ *Browning v. Boswell, C. C. A.*, 215 Fed. 826.

¹⁵ *Texas & Pac. Ry. Co. v. Marshall*, 136 U. S. 393, 34 L. ed. 385.

¹⁶ *Murray v. Northwestern R. Co.*, 64 S. C. 520, 42 S. C. 617.

with a provision for free telegraph service to be given to the railroad company of the right to string and use a wire.¹⁷ But the court refused to condemn the right to maintain telegraph poles on a railway company's right of way although other equitable relief was prayed.¹⁸

Ordinarily equity will not enforce specific performance of a contract which contains a power of revocation by either party because it is then not mutual.¹⁹ It was so held of a contract between an express company and railroad company for the carriage of expressed goods.²⁰ A court of equity will not compel specific performance of a contract for personal services; for as said in leading case against an opera singer "the Court cannot make a bird sing."²¹ When, however, the contract is exclusive the court in a proper case may enforce an express or implied negative covenant not to perform similar service for other persons provided that the services of the defendant are of an extraordinary nature which cannot be supplied.²² Where such a contract is inequitable or not mutual such an injunction will not be granted.²³ Thus an injunction was denied when a contract for the defendant's employment as an actor in moving pictures gave the plaintiff the exclusive right to his services for five years with the right to dismiss him at plaintiff's pleasure giving defendant no right to compel plaintiff to perform and providing that he should receive no compensation when not acting.²⁴ But a State court has held that a provision that the employer may

¹⁷ *Murray v. Northwestern R. Co.*, 64 S. C. 520, 42 S. E. 617; *Western Union Tel. Co. v. Pennsylvania Co.*, C. C. A., 68 L.R.A. 968, 129 Fed. 849; *Pennsylvania R. Co. v. St. L., A. & T. H. R. Co.*, 118 U. S. 290, 30 L. ed. 83; *Franklin Tel. Co. v. Harrison*, 145 U. S. 459, 30 L. ed. 83; *St. Louis A. & T. H. R. Co. v. I. & St. L. R. Co.*, 9 Biss. 144; *Western Union Tel. Co. v. Pittsburgh, C., C. & St. L. Ry. Co.*, 137 Fed. 435.

¹⁸ *Western Un. Tel. Co. v. Ann Arbor R. Co.*, C. C. A., 90 Fed. 379, 386; *W. U. Tel. Co. v. Louisville &*

N. R. Co., C. C. A., 238 Fed. 26, 36; *W. U. Tel. Co. v. Nashville C. & St. L. Ry. Co.*, 243 Fed. 694.

¹⁹ *Express Co. v. Railroad Co.*, 99 U. S. 191, 25 L. ed. 319; *Kenyon v. Weissberger*, 240 Fed. 536.

²⁰ *Express Co. v. R. R. Co.*, 99 U. S. 191, 25 L. ed. 319.

²¹ *Lumley v. Wagner*, 1 De G. M. & G. 604.

²² *Ibid.* See *infra*, § 281.

²³ *Kenyon v. Weissberger*, 240 Fed. 536.

²⁴ *Kenyon v. Weissberger*, 240 Fed. 536.

terminate by ten days' notice a contract does not prevent his obtaining an injunction against its violation by the employee.²⁵

Since merchandise can usually be bought in the open market, contracts for the sale of personal property will usually not be enforced when the property has a market value.²⁶ This has been held in the case of a contract for the transfer of shares of stock in the corporation when, although the stock could not be bought in the market and related to a new enterprise, the facts which showed the value of the corporate franchise that it represented could be easily ascertained and proved before a jury.²⁷

When, however, the stock was not for sale upon the market and the business of the corporation was rapidly increasing, equity gave the relief.²⁸ When defendant is insolvent equity might possibly grant relief.²⁹

Equity will compel specific performance of a contract for the sale of a patent right,³⁰ of a contract to issue an insurance policy, and in the same suit to compel payment of the policy,³¹ of a contract for the purchase of an entire stock of general merchandise for a lump sum, that had been paid when it was alleged that defendant had delivered about two-thirds of the goods, but refused to deliver the remainder, which he had concealed, so that complainant could not obtain them by an action of replevin.³²

Where the contract provided that in case of default the plaintiff should be entitled to the writs of estrepment and scire facias that as an alternative to the writ of estrepment a receiver should

²⁵ Phila. Ball Club v. Lajoie, 202 Pa. 210, 58 L.R.A. 227, 90 Am. St. Rep. 627, 51 Atl. 973.

²⁶ Hyer v. Richmond Traction Co., 168 U. S. 471, 483, 28 Sup. Ct. 114, 42 L. ed. 547; Blue Point Oyster Co. v. Haggenson, 209 Fed. 278.

²⁷ Hyer v. Richmond Traction Co., 168 U. S. 471, 483, 28 Sup. Ct. 114, 42 L. ed. 543.

²⁸ Mutual Oil Co. v. Hills, C. C. A., 248 Fed. 257. For an extraordinary case where an interlocutory order was made directing the performance of a contract to manufacture automobiles, see Dail-Overlander Co. v. Willys-Overland, 263

Fed. 171, 179. There, however, the object of the order was to give the court jurisdiction to punish strikers who were also made defendants for interfering with the business of the manufacturer. See *infra*, § 276.

²⁹ Consolidated Fuel Co. v. St. Louis, S. W. Ry. Co., C. C. A., 240 Fed. 395.

³⁰ Hall v. Pitrat, 45 Fed. 94.

³¹ Tayloe v. Merchants' F. Ins. Co., 9 How. 390, 13 L. ed. 187; Hebert v. Mutual L. Ins. Co., 12 Fed. 807; Brugger v. State Inv. Co., 5 Saw. 304.

³² Raymond Syndicate v. Brown, 124 Fed. 80.

be appointed and that the property should be sold under execution; it was held that these remedies were more adequate than those which equity could perform and consequently a suit for specific performance could not be sustained.³³ Specific performance of a contract with a State will not be enforced either directly by suit against the State itself or indirectly by a proceeding against its officers.³⁴

The bill should contain an offer by the plaintiff to perform his part of the contract.³⁵ It has been said that where the plaintiff is married he need not affirmatively show his wife's willingness to join in the execution of the contract since this will be presumed.³⁶ The bill may contain a prayer that the agreement be either set aside as obtained by fraud or else specifically enforced.³⁷

In a bill to compel specific performance of a contract to convey real estate which gives to the parties therein mentioned distinct rights to separate lots it seems that they cannot join;³⁸ but in a bill to compel specific performance of a decree in a former suit, all the complainants in the first suit were allowed to join as plaintiffs although the decree sought to be enforced ordered the payment of specific sums severally to each of them.³⁹

A State is an indispensable party to a bill against its officers to compel specific performance by them for it of its contract for the sale of land.⁴⁰ Where the contract is made by an agent in his own name he is a necessary party to a suit by his principal for specific performance.⁴¹ In a suit against a corporation to enforce specific performance of a contract made by it in behalf of subsidiary companies, which it controlled through ownership of their stock, it was held that such subsidiary companies were not

³³ *Marian Coal Co. v. Peale*, C. C. A., 204 Fed. 161.

³⁴ *Ayers*, 123 U. S. 443, 502, 31 L. ed. 216, 228, *supra*, § 105c.

³⁵ *Staphyton v. Scott*, 13 Vesey, 425; *Fife v. Clayton*, 13 Vesey 546.

³⁶ *Dixon v. Anderson*, C. C. A., 252 Fed. 694.

³⁷ *Hardin v. Boyd*, 113 U. S. 756, 28 L. ed. 1141, *supra*, § 138.

³⁸ *Maiselis v. Morris & L. Co.*, 1 N. J. Eq. 31, 39.

³⁹ *Shields v. Thomas*, 18 Howard 253, 15 L. ed. 368, *supra*, § 140.

⁴⁰ *Preston v. Walsh*, 10 Fed. 315. See, also, *Walsh v. Preston*, 109 U. S. 297, 27 L. ed. 940.

⁴¹ *Pennsylvania & N. J. R. Co. v. Byerson*, 36 N. J. Eq. 112, 116.

indispensable, nor even necessary parties.⁴² To a bill to enforce specific performance of a contract; when filed, after the death of each by the personal representatives of the one as complainants against the heirs-at-law of the other as defendants; the executors of the defendants' ancestor are necessary if not indispensable parties defendant, and the heirs-at-law of the complainant's decedent are not.⁴³ It has been held that a tenant for life and the contingent remainderman in fee may represent the inheritance in a bill for specific performance, if the children of the remainderman will inherit if he does not.⁴⁴ Specific performance of a contract for the sale of land may be enforced against one of several joint tenants without joining the others with him as defendants.⁴⁵ In a suit in equity by the purchaser of coal rights in lands for a specific enforcement of the contract, the terms of which are in dispute between the parties, the defendant cannot by crossbill bring in as parties defendant the agents who made the contract, on his behalf and with his approval, to have their right to commissions determined, a controversy which

⁴² *Texas Co. v. Central Fuel Oil Co.*, C. C. A., 194 Fed. 1.

⁴³ *Seymour v. Freer*, 8 Wall. 218, 19 L. ed. 311. See *Prout v. Roby*, 15 Wall. 471, 21 L. ed. 58.

⁴⁴ *Sohier v. Williams*, 1 Curt. 479.

⁴⁵ *Stephen v. Beall*, 22 Wall. 329, 22 L. ed. 786. It has been held, that a corporation, which is not a party to a contract for the conveyance of certain property thereto, is not an indispensable party to a suit to compel specific performance, *Rogers v. Penobscot*, Min. Co., C. C. A., 154 Fed. 606; 616; and that corporations are not indispensable parties to a suit for specific performance of a contract to convey land owned by them, which was made on their behalf by a corporation which held the control of their stock, *Texas Co. v. Central Fuel Oil Co.*, C. C. A., 194 Fed. 1. A

railway company is not an indispensable party to a bill against its receiver to enforce specific performance of a contract made by it, *Express Co. v. Railroad Co.*, 99 U. S. 191, 25 L. ed. 319. To a bill to enjoin the execution of a judgment of ejectment and to decree a conveyance of lands, when the plaintiffs had an equitable title only, the persons whose legal title the complainants asserted were held properly omitted, when no relief was prayed against them, and their joinder would have ousted a court of jurisdiction, *Simms v. Guthrie* 9 Cranch, 19, 25, 3 L. ed. 642, 644. See also *Boon's Heirs v. Chiles*, 8 Pet. 532, 8 L. ed. 1034. But compare *Mallow v. Hinde*, 12 Wheat. 193, 6 L. ed. 599. A border case is *Elmendorf v. Taylor*, 10 Wheat. 152, 6 L. ed. 289.

has no relevancy to the principal suit, and in which complaint has no interest.⁴⁶

§ 151f. Bills to set aside clouds on title. When a written instrument, not void, upon its face,¹ creates an apparent defect in the title to real property,² or in some cases the title to personal property, in a man's possession³ or tends to make such property unmarketable; equity will entertain a bill to compel the cancellation of the papers or to obtain a decree declaring the instrument to be invalid. When a bill states a case for other equitable relief to which the removal of such a cloud is incidental, this relief may also be granted.⁴ Such bills have been sustained when filed.⁵ If the cloud does not affect the title to land, such a bill cannot be filed where the plaintiff has an adequate remedy at law.⁶ A bill in equity cannot be maintained by a party out of possession to remove a cloud upon his title to land,⁷ not even

⁴⁶ *Patton v. Marshall*, C. C. A., 26 L.R.A. (N.S.) 127, 173 Fed. 350.

¹ *Ritchie v. Sayers*, 100 Fed. 520; *Pierce v. Webb & Stalker*, note to *Ryan v. Mackmath*, 3 Bro. C. C. 15; *Peake v. Highfield*, 1 Russ. 559, and cases cited; *Bunce v. Gallagher*, 5 Blatchf. C. C. 481; *Quinby v. Consumers' Gas Trust Co.*, 140 Fed. 362; *Johnston v. Kramer Bros.*, 203 Fed. 733.

² *Crocker v. Ingersoll Eng. & Construction Co.*, 205 Fed. 99; *Elder v. Western Min. Co.*, C. C. A., 237 Fed. 966.

³ *Sharon v. Hill*, 20 Fed. 1; *General Film Co. v. Sampliner*, C. C. A., 252 Fed. 443.

⁴ *General Film Co. v. Lake Shore & M. S. Ry. Co.*, C. C. A., 250 Fed. 160.

⁵ To set aside a contract obtained by fraud, *Boyce v. Grundy*, 3 Pet. 210, 7 L. ed. 655. To set aside a conveyance obtained for a grossly inadequate consideration from a man in a state of intoxication, partly caused by the acts of the de-

fendant, *Thackrah v. Haas*, 119 U. S. 499, 30 L. ed. 486. By a creditor of a decedent to set aside a fraudulent conveyance of his estimate made after his death by the order of a court, *Johnson v. Waters*, 111 U. S. 640, 28 L. ed. 547. By a single man to have declared null and void a paper purporting to be a marriage contract executed by him, *Sharon v. Hill*, 20 Fed. 1. To set aside an invalid tax deed, or a deed executed under a decree of a court which had no jurisdiction over the matter; when the invalidity or want of jurisdiction must be made to appear by facts not apparent upon the deed itself, *Ritchie v. Sayers*, 100 Fed. 520. But see *Little Rock Junction Co. v. Burke*, C. C. A., 66 Fed. 83; *Morrison v. Marker*, 93 Fed. 692.

⁶ *Bronson v. Cook*, 247 Fed. 601; *General Film Co. v. Sampliner*, C. C. A., 252 Fed. 443.

⁷ *Whitehead v. Shattuck*, 138 U. S. 146, 34 L. ed. 873; *Wehrman v. Conklin*, 155 U. S. 314, 325, 39 L. ed. 167, 173; *Giberson v. Cook*, 124

when authorized by State Statute,⁸ unless the land is vacant and none of the parties are in possession, when the bill may be maintained if authorized by State statute,⁹ or in harmony with State decisions,¹⁰ and under special circumstances such a bill was sustained when filed by a mortgagee in the nature of a bill *quia timet* before default.¹¹

But not a bill to compel a public officer to perform a ministerial duty.¹² Nor to fix the freight rates charged by the railroads in intrastate commerce.¹³ Nor, in the absence of statutory authority for the collection of taxes.¹⁴ Nor a bill to compel municipal, county, or State officers to levy a tax,¹⁵ or to issue bonds even in the case of a contract;¹⁶ since the remedy, when it exists at all, is by mandamus. Nor a bill for the appointment of a receiver to levy taxes, or to collect taxes previously levied.¹⁷ Nor a bill to enjoin an insolvent municipality from expending its funds for other municipal purposes.¹⁸ In the case of an oil or gas lease where the law of the State did not authorize a suit and ejectment and there was consequently no adequate remedy at law, the Courts sustained jurisdiction of

Fed. 986; Union Pac. R. Co. v. Cunningham, 173 Fed. 90; Baum v. Longwell, 200 Fed. 450. See Klenk v. Byrne, 143 Fed. 1008. *Contra*, Farr v. Hebe-Peters Land Co. C. C. A., 188 Fed. 10; Rowe v. Hill, C. C. A., 215 Fed. 518, Ennis-Brown Co. v. Central Pac. Ry. Co., 223 Fed. 46, s. c., C. C. A., 235 Fed. 825.

⁸ Ibid.

⁹ Holland v. Challen, 110 U. S. 15, 28 L. ed. 52; Southern Pac. R. Co. v. Stanley, 49 Fed. 263; Field v. Barber Asphalt Co., 117 Fed. 925; Smith Oyster & Land Co. v. Darbee & Immel Oyster & Land Co., 149 Fed. 555. See *supra*, § 82.

¹⁰ Continental Trust Co. v. Tallahassee Falls Mfg. Co., 222 Fed. 694. But see Frost v. Spitley, 121 U. S. 552.

¹¹ Graves v. Ashburn, 215 U. S. 331, 334; 54 L. ed. 217.

¹² Craig v. Leitensdorfer, 123 U. S. 189, 31 L. ed. 114.

¹³ Montana, W. & S. R. Co. v. Morley, 198 Fed. 991.

¹⁴ Preston v. Chicago, St. L. & N. O. R. Co., 175 Fed. 487, *aff'd* as Preston v. Sturgis Milling Co., C. C. A., 183 Fed. 1.

¹⁵ Walkley v. Muscatine, 6 Wall. 481, 18 L. ed. 930.

¹⁶ Smith v. Bourbon County, 127 U. S. 105, 32 L. ed. 73.

¹⁷ Rees v. Watertown, 19 Wall. 107, 22 L. ed. 72; Heine v. Levee Com'rs, 19 Wall. 655, 22 L. ed. 223; Merriwether v. Garrett, 102 U. S. 472, 26 L. ed. 197.

¹⁸ Thompson v. Allen County, 115 U. S. 550, 29 L. ed. 472, Safe Deposit & T. Co. v. City of Anniston, 96 Fed. 661, 663.

a suit by the lessee to restrain those claiming under another lease from interference with the property.¹⁹ The bill should show affirmatively either that the complainant is in possession, or that he and the defendants are out of possession,²⁰ or the other facts which give jurisdiction under the statute.

Independently of statute, it was held that a Federal court had jurisdiction of a bill to quiet title by a complainant out of possession; where the questions in issue included the establishment of the fact of an administratorship and the interpretation and effect of an administrator's deed, under which the complainant claimed;²¹ and where the complainant alleged title to a tract of land embracing 147,000 acres against a number of defendants, each of whom claimed title to a separate portion thereof and was in possession of the same.²² But not solely for purposes that could be accomplished by an action in ejectment.²³ Possession of the surface is presumed to give possession of the mine below.²⁴ Where woodland was vacant and not enclosed, possession was presumed to be in the owner of the legal title.²⁵ A State statute giving a tenant under a lease for more than ten years the right to bring such a suit will be followed by the Federal courts.²⁶

Except perhaps under extraordinary circumstances, such a suit can not be maintained when the illegality or defect in the paper which it is sought to set aside does not appear upon its face.²⁷ A cloud upon a title must consist in some written instrument. A mere verbal assertion of ownership, although accompanied by trespasses, does not authorize a suit in equity un-

¹⁹ *Lancaster v. Kathleen Oil Co.*, 241 U. S. 551.

²⁰ *Southern Pac. v. Goodrich*, 57 Fed. 879.

²¹ *Butterfield v. Miller, C. C. A.*, 195 Fed. 200.

²² *Buchanan Co. v. Adkins, C. C. A.*, 175 Fed. 692. But see *supra*, § 141.

²³ *Hipp v. Babin*, 19 How. Pr. 271, 15 L. ed. 633; *Lewis v. Cocks*, 23 Wall. 466, 23 L. ed. 70; *Ellis v. Davis*, 109 U. S. 485, 27 L. ed. 1006; *Killian v. Effinghaus*, 110 U. S. 568, 28 L. ed. 246; *U. S. v. Wil-*

son, 118 U. S. 86, 30 L. ed. 110; *Speigle v. Meredith*, 4 Bliss. 120; *South Penn. Oil Co. v. Miller, C. C. A.*, 175 Fed. 729.

²⁴ *Lawson v. U. S. Min. Co.*, 207 U. S. 1.

²⁵ *Graves v. Ashburn*, 215 U. S. 331, 54 L. ed. 217.

²⁶ *N. Y. N. H. & H. R. Co. v. City of New York*, 145 Fed. 661.

²⁷ *Johnston v. Kramer Bros. & Co.*, 203 Fed. 733. But see *Williams v. Provident Life & Tr. Co.*, 242 Fed. 417.

less the facts are such as would support a bill of peace.²⁸ Where a mortgagee had delivered possession of part, but not of the whole, of land sold under foreclosure and claimed a statutory right of redemption to all the land; it was held that the purchaser might sue to quiet its title to the whole tract and incidentally to recover the part of which the mortgagor retained possession.²⁹ Where, in a suit to remove a cloud from the title to land there was a prayer for the recovery of the value of timber cut therefrom, upon the denial by the defendant that he claimed any interest in or title to the land, the whole bill was dismissed, leaving the complainant to his remedy at law to recover for the timber cut.³⁰

§ 151g. Taxpayers' bills. In the absence of any statutory restrictions, a taxpayer may bring a suit to prevent an illegal disposition of the money or of the property of a town or county where he pays taxes, or an illegal creation of a debt which he in common with the other owners of property there may be compelled to pay.¹ A suit by several taxpayers to enjoin the governor of Ohio from transmitting to the legislature the Eighteenth Amendment was dismissed.² It has been held that to a taxpayer's bill to prevent the levy of a tax for the payment of town bonds which are charged to be invalid, the trustees and treasurer of the township are necessary parties who are on the opposite side of the controversy to the plaintiff when the question of diversity of citizenship is to be decided.³

The Supreme Court of the District of Columbia has granted an injunction in a suit by Mr. W. R. Hearst to prevent an unlawful sale of property of the Government held by the United States Shipping Board.⁴

§ 152. The interrogatory clause. Under the old practice, discovery could not be obtained unless prayed in the bill.¹ The

²⁸ *Richardson v. Penn. Coal Co.*, 25 L. ed. 1070, 1071. Cf. *infra*, 203 Fed. 743. § 271b.

²⁹ *Conn. General Life Ins. Co. v. Weldon*, 246 Fed. 265.

² *Ohio v. Cox*, 257 Fed. 334.

³⁰ *Sloane v. Kramer Bros. & Co.*, 230 Fed. 727.

³ See *Sully v. Drennan*, 113 U. S. 287, 28 L. ed. 1007.

§ 151g. ¹ *Illinois Life Ins. Co. v. Newman*, 141 Fed. 449; *Crampton v. Zabriskie*, 101 U. S. 601, 609,

⁴ *Hearst v. Payne*, N. Y. American, April—1920.

§ 152. ¹ Eq. Rule 43, of March, 1842.

Equity Rules of November 4, 1912, omit any provision for these and provide that interrogatories may be filed by the plaintiff after the filing of the bill and not later than twenty-one days after the joinder of issue, and by the defendant at any time after filing his answer and not later than twenty-one days after the joinder of issue, or thereafter by leave of the court or judge.² The practice upon this subject is discussed in the subsequent chapter on "Evidence and Discovery."³

§ 153. Waivers and offers. It has been customary to insert in the prayer for relief, any waiver or offer which the plaintiff wishes to make,¹ although there is no reason why such should not be set forth in the narrative part of the bill.

Under the former rules, "If the complainant in his bill shall waive an answer in the oath, or shall only require an answer under oath with regard to certain specified interrogatories, the answer of the defendant, though under oath, except such part thereof as shall be directly responsive to such interrogatories, shall not be evidence in his favor, unless the cause be set down for hearing on bill and answer only; but may nevertheless be used as an affidavit, with the same effect as heretofore, on a motion to grant or dissolve an injunction, or on any other incidental motion in the cause. But this shall not prevent a defendant from becoming a witness in his own behalf under section three of the Act of Congress of July 2, 1864."² It rarely happened that advantage of this rule was not taken by a waiver inserted here, or more frequently in the prayer of process, in order to avoid the application of the doctrine, that otherwise an allegation responsive to the bill in a sworn answer was presumed to be true, unless rebutted by the testimony of two witnesses, or one witness and strong corroborating circumstances.³ The rule was a restatement of the former practice in chancery.⁴ It has not been copied in the rules promulgated in 1912, nor do they prescribe the effect of an answer under oath. Until the matter has been adjudicated, a prudent practitioner should

² Rule 58.

³ 348, *infra*.

¹ § 153. 1 Daniell's Ch. Pr., (2nd Am. ed.) 433.

² Eq. Rule 41, of 1842.

³ Vigel v. Hopp. 104, U. S. 441,

26 L. ed. 765; Coonrod v. Kelly, C. C. A., 119 Fed. 841; *infra*, § 331.

⁴ Bartlett v. Gale, 4 Paige (N. Y.) 503; Cooper's Eq. Pl., 325, 326; Story's Eq. Pl., § 874.

follow the former practice and insert, in this part of the bill, a waiver of an answer under oath, unless he wishes to examine the defendant upon interrogatories,⁵ the effect upon which of such a waiver is still unsettled.

In accordance with the maxim that he who seeks equity must do equity, a court of equity often refuses relief to one seeking its aid, unless upon condition that he shall do what it considers equitable to the defendant, or sometimes even to a third person.⁶ In some cases it enforces this by the entry of a conditional decree without reference to the pleadings.⁷ This seems to be the proper practice when the defendant, by his own conduct, has so complicated matters between himself and a party seeking rescission that complete restoration is impossible.⁸ The poverty of the complainant was held to be a sufficient justification for relieving him from a tender when the decree provided for its return or credit.⁹ When the evidence showed that the party, to whom a tender or return of money was due, had received from the property which he wrongfully held returns exceeding in value the amount due from the plaintiff, it was held that a tender or return was not necessary.¹⁰ In a case where the plaintiff had failed to make the tender, which was a prerequisite to his cause of action, his prayer of relief was granted; but he was obliged to pay costs to the defendants, although they had resisted the suit.¹¹ But the more usual practice is to insist that the plaintiff shall offer in his bill, which otherwise will be demurrable, to perform, or, in some cases, allege the performance of, the equitable act required of him. Thus, a bill to cancel

⁵ See *infra*, § 348.

⁶ *Fosdick v. Schall*, 99 U. S. 235 25 L. ed. 339. *Supra*, § 79a.

⁷ *Walden v. Bodley*, 14 Pet. 156, 164, 165, 10 L. ed. 398, 401, 402; *Farmers' L. & Tr. Co. v. Denver, L. & G. R. Co.*, C. C. A., 126 Fed. 46; *Johnston v. Forsyth Mercantile Co.*, 127 Fed. 845; *Andrews v. Conolly*, 145 Fed. 43; *Kley v. Healy*, 127 N. Y. 555; s. c., 149 N. Y. 346, 354; *Hay v. Hay*, 13 Hun. (N. Y.) 315; *Halpin v. Mutual Brewing Co.*, 20 App. Div. (N. Y.) 583, 590;

354; *Hay v. Hay*, 13 Hun. (N. Y.) 643; *Joslyn v. Empire State Degree of Honor*, 145 App. Div. (N. Y.) 14, 17, *infra*, §§ 197, 400.

⁸ *Heckscher v. Edenborn*, 203 N. Y. 210, 228.

⁹ *Lee Line Steamers Co. v. Robinson*, C. C. A., 232 Fed. 417.

¹⁰ *Smith v. Moore*, C. C. A., 199 Fed. 689.

¹¹ *Hosmer v. Wyoming Ry. & Iron Co.*, C. C. A., 129 Fed. 883. See *infra*, § 409.

securities claimed to be usurious, or otherwise rendered void by a statute, must, in the absence of a State statute to the contrary,¹² contain an offer by the plaintiff to pay the defendant with lawful interest the money he has received therefor.¹³ So a bill to redeem mortgaged,¹⁴ or pledged,¹⁵ property, must contain an offer to pay what is due thereon, though the particular sum need not be specified. A bill to set aside a judicial sale as void must be accompanied by a tender or offer of the purchase-money with interest, provided it was applied for the benefit of the estate; and this the court may require to be prepaid before the bill is filed.¹⁶ It seems that a bill to set aside a foreclosure of a railway mortgage should contain an offer of payment of the amount admitted to be due under the mortgage, and of the costs of the foreclosure suit, or at least show some reason why such an offer should not be required.¹⁷ In a bill to set aside a transaction for fraud, it is not necessary for the plaintiff to tender the payment of any expenses which the parties guilty of fraud have made. It is sufficient if the complaint offers to do equity, and the court can then adjust the rights of the parties by a conditional decree.¹⁸

A bill to set aside a tax sale ordinarily must contain an offer to repay the purchaser at least all legal taxes on the property paid by him, both those for which the property was sold and those subsequently levied thereupon and paid by him, with interest upon each sum.¹⁹ A bill to restrain the collection of

¹² *Mo., K. & T. Tr. Co. v. Krumseig*, 172 U. S. 351, 43 L. ed. 474.

¹³ *Mason v. Gardiner*, 4 Brown, C. C. 436; *Tupper v. Powell*, 1 J. Ch. (N. Y.) 439; *Matthews v. Warner*, 6 Fed. 461, 465; s. c., 112 U. S. 600, 28 L. ed. 851.

¹⁴ *Story's Eq. Pl.*, § 187a; *Harding v. Pingey*, 10 Jurist (N. S.), 872; *Perry v. Carr*, 41 N. H. 371; *Robinson v. Iron Ry. Co.*, 135 U. S. 522, 34 L. ed. 276; *Gordon v. Smith*, C. C. A., 62 Fed. 503.

¹⁵ *Uehling v. Lyon*, 134 Fed. 703.

¹⁶ *Davis v. Gaines*, 104 U. S. 386, 26 L. ed. 757. But see *Rush v.*

First Nat. Bank, C. C. A., 71 Fed. 102.

¹⁷ *Carey v. Houston & T. C. Ry. Co.*, 45 Fed. 438, 443.

¹⁸ *Gage v. Pumpelly*, 115 U. S. 454, 29 L. ed. 449. But see *Mendenhall v. Hall*, 134 U. S. 559, 569, 33 L. ed. 1012, 1015.

¹⁹ *State Railroad Tax Cases*, 92 U. S. 575, 617, 33 L. ed. 669, 674; *Albuquerque v. Perea*, 147 U. S. 87, 37 L. ed. 91. But see *Chicago, B. & Q. R. Co. v. Republic County*, C. C. A., 67 Fed. 411; *Chicago, B. & Q. R. Co. v. B. of C. of Norton County*, C. C. A., 67 Fed. 458; *Chi-*

State taxes must aver payment of what is conceded to be due, or what can be seen to be due on the face of the bill, or can be shown by affidavits, whether conceded or not, before the preliminary injunction should be granted.²⁰ If it is claimed that the whole tax is void as improperly assessed, the complainant must tender the amount he would owe if the proper assessment had been made;²¹ or, if it is impracticable to determine that sum, he should offer security for its payment;²² unless there is no right to assess the property at all, either because it is exempt from taxation, or because there is no law providing for the same.²³ In a case where the whole assessment was attacked for improper discrimination against the complainant in favor of the owners of similar property, the court required, as a condition precedent to the issue of an injunction, the payment of a tax, assessed at the same rate as that levied upon other property, and on corporations of the same class, within the State.²⁴ The rule has been applied to a suit to enjoin the collection of penalties for a failure to pay taxes due the United States.²⁵

The rule does not apply to a special enactment, which is fundamentally void and entirely illegal.²⁶ If the proper officer refuses to receive a part of the tax, it must be tendered without

ago, *M. & St. P. R. Co. v. Hartsborn*, 30 Fed. 541; *Tacoma Ry. & Power Co. v. Pierce County*, 193 Fed. 90. The same rule applies to a bill to enjoin the collection of a license, increased by a recent statute, where there is no allegation that the statute imposing the original license was invalid. *Morenci Copper Co. v. Freer*, 127 Fed. 199.

²⁰ *State Railroad Tax Cases*, 92 U. S. 575, 617, 23 L. ed. 669, 674; *National Bank v. Kimball*, 103 U. S. 732, 26 L. ed. 469; *People's Nat. Bank v. Marye*, 191 U. S. 272, 281, 48 L. ed. 180, 185; *Raymond v. Chicago Traction Co.*, 207 U. S. 20, 38, 52 L. ed. 78, 88; *Chicago Union Traction Co. v. State Board of Equalization*, 114 Fed. 557.

²¹ *Fargo v. Hart*, 193 U. S. 490,

503, 48 L. ed. 761, 767. But see *Ritterbusch v. Atchison, T. & S. F. Ry. Co.*, C. C. A., 198 Fed. 46.

²² *People's Nat. Bank v. Marye*, 191 U. S. 272, 281, 48 L. ed. 180, 185; *Fargo v. Hart*, 193 U. S. 490, 503, 48 L. ed. 761, 767.

²³ *Raymond v. Chicago Traction Co.*, 207 U. S. 20, 38, 52 L. ed. 78, 88; *Chicago Union Traction Co. v. State Board of Equalization*, 114 Fed. 557, 567.

²⁴ *Kohlhamer v. Smietanka*, 239 Fed. 408.

²⁵ *Valley v. Denver & R. G. R. Co.*, C. C. A., 236 Fed. 176, 182.

²⁶ *Norwood v. Baker*, 172 U. S. 269, 293, 43 L. ed. 443, 452; *Chalker v. Birmingham & N. W. Ry. Co.*, 249 U. S. 522.

the condition annexed of a receipt in full.²⁷ Ordinarily, where it is impracticable for the plaintiff to ascertain the amount actually due, and the defendant denies his right to any relief, a tender in the bill without a previous payment is sufficient;²⁸ and in such a case an offer to pay the money into court whenever so ordered is equivalent to a payment into court in the first instance.²⁹

Upon a bill to enjoin the enforcement of a statute reducing railroad fares, the injunction order was conditioned upon the execution of a bond by the corporation, to pay into the registry of the court from time to time as ordered, such sums of money as should be equal to the difference between the rate enjoined and the original rate, and to give to each purchaser of a ticket a coupon for the payment of that proportion of the difference, to which he was entitled in case the bill should finally be dismissed.³⁰ Upon a bill to enjoin a statutory reduction of the price of gas, it was required that the gas company pay into court the difference between the old and the new charges, the same to be there retained until the final determination of the case.³¹

A bill to compel the specific performance of a contract by a defendant should, it seems, contain an offer by the plaintiff to perform his part thereof.³²

And formerly it was,³³ but no longer is,³⁴ required that a bill for an account should contain an offer on the part of the plaintiff to pay the balance, if any, found due against him.

Upon a stockholder's bill, no tender is required;³⁵ although

²⁷ *State Railroad Tax Cases*, 92 U. S. 575, 617, 23 L. ed. 669, 674; *National Bank v. Kimball*, 103 U. S. 732, 26 L. ed. 469.

²⁸ *Gordon v. Smith*, C. C. A., 62 Fed. 503; *Butchers' & Drovers' S. Y. Co. v. Louisville & N. R. Co.*, C. C. A., 67 Fed. 35.

²⁹ *Cheney v. Bilby*, C. C. A., 74 Fed. 52.

³⁰ *Hunter v. Wood*, 209 U. S. 205, 52 L. ed. 747.

³¹ *Consolidated Gas Co. v. Mayer*,

146 Fed. 150; s. c., *Consolidated Gas Co. v. New York*, 157 Fed. 849.

³² *Stapylton v. Scott*, 13 Ves. 425; *Fife v. Clayton*, 13 Ves. 546.

³³ *Godbolt v. Watts*, 2 Anst. 543.

³⁴ *Columbian Government v. Rothschild*, 1 Simons, 94, 103; *Wells v. Strange*, 5 Ga. 22.

³⁵ *Edwards v. Mercantile Trust Co.*, 124 Fed. 381, 391. *Citizens' Sav. & Tr. Co. v. Illinois Cent. R. Co.*, C. C. A., 182 Fed. 607.

a payment by the corporation might be made a condition of the granting of the injunction.

A bill filed by the United States to vacate a patent for public lands as obtained by fraud, need not contain an offer to return the money paid therefor by the fraudulent patentee.³⁶ It has been held: that a bill by a trustee in bankruptcy, to set aside a fraudulent or a preferential sale, need not allege a tender of the purchase money.³⁷ The same rule applies to a suit by the United States to cancel a conveyance made by an Indian in violation of a statute.³⁸ But in a proper case a decree conditioned upon the return of the consideration might be made.³⁹ Nor need a bill to obtain relief against an infringement of a copyright contain a waiver of the complainant's statutory right to a forfeiture of the piratical plates.⁴⁰ It is, however, a rule in equity, that no person will be compelled to discover that which may expose him to a penalty or forfeiture.⁴¹ A discovery of such matters can only be compelled when the complainant is the only person who can enforce the penalty or forfeiture, and he is willing to waive it,⁴² as, for example, in a case of infringement of copyright.⁴³

An omission of a waiver, tender, or offer, whenever considered necessary, was formerly a ground for demurrer⁴⁴ and would now justify a dismissal of the bill,⁴⁵ but leave to amend is in such cases usually given.⁴⁶ And in many, but not all

³⁶ U. S. Minor, 114 U. S. 233, 29 L. ed. 110; U. S. v. Trinidad Coal & Coke Co., 137 U. S. 160, 34 L. ed. 640; U. S. v. Laam, 149 Fed. 581; U. S. v. Howard, C. C. A., 247 Fed. 455. See also Moffat v. U. S., 112 U. S. 24, 28 L. ed. 623; U. S. v. White, 17 Fed. 561, 565; U. S. v. Pratt C. & C. Co., 18 Fed. 708.

³⁷ Johnston v. Forsyth Mercantile Co., 127 Fed. 845.

³⁸ Heckman v. U. S., 224 U. S. 413, 56 L. ed. 820.

³⁹ Ibid.

⁴⁰ Farmer v. Calvert Lithog. Co., 1 Flippin, 228. But see Snow v. Mast, 63 Fed. 623.

⁴¹ Stewart v. Drasha, 4 McLean,

563; Atwill v. Ferrett, 2 Blatchf. 39; U. S. v. White, 17 Fed. 561, 565; Snow v. Mast, 63 Fed. 623.

⁴² Lord Uxbridge v. Staveland, 1 Ves. Sem. 566; Atwill v. Ferrett, 2 Blatchf. 39.

⁴³ Atwill v. Ferrett, 2 Blatchf. 39; Farmer v. Calver Lithog. Co., 1 Flippin, 228, 233; *infra*, § 348.

⁴⁴ U. S. v. Pratt C. & C. Co., 18 Fed. 708.

⁴⁵ See § 364, *infra*.

⁴⁶ Chicago, B. & Q. R. Co. v. Republic County, C. C. A., 67 Fed. 413; Chicago, B. & Q. R. Co. v. B. of C. Norton County, C. C. A., 67 Fed. 458.

cases,⁴⁷ when no actual tender is required, a general offer to do whatever equity requires in the premises seems to be sufficient.⁴⁸

§ 154. The prayer for relief. The Equity Rules of 1912 require that each bill shall contain "A statement of and prayer for any special relief pending the suit or on final hearing, which may be stated and sought in alternative forms."¹

There is no express provision in these rules for a prayer for general relief. It will, however, be the better practice to insert the same and to comply with the requirements of the former practice upon the subject. The prayer for general relief, Mr. Robbins, "an eminent counsel," used to say, was "the best prayer after the Lord's Prayer."² It is usually in one of the two following forms: "And that your orator shall have such other or further, or other and further, relief in the premises as to this court shall seem meet;" or "that your orator may be further and otherwise relieved in the premises according to equity and good conscience." Under the prayer for general relief the court will usually grant any relief justified by the evidence,³ other than an interlocutory order, which is consistent with, and a ground for which is included in, the allegations of the bill,⁴ and not inconsistent with the prayer for special relief or with the case made by the bill.⁵ Less relief than that

⁴⁷ *State Railroad Tax Cases*, 92 U. S. 575, 617, 23 L. ed. 663, 674.

⁴⁸ *Gordon v. Smith*, C. C. A., 67 Fed. 503.

§ 154. ¹ Eq. Rule 25. *Am. Graphophone Co. v. Nat. Phonograph Co.*, 127 Fed. 349; *Bloomfield v. Eyre*, 8 Beav. 250, 259.

² *Mansaton v. Molesworth*, 1 Eden; 26, note b; *Dormer v. Fortescue*, 3 Atk. 124; *Storey's Eq. Pl.*, § 41, n. 1.

³ *Taylor v. Merchant's Fire Ins. Co.*, 9 How. 390, 13 L. ed. 187; *Stewart v. Chesapeake & Ohio Canal Co.*, 1 Fed. 361; *County of Mobile v. Kimball*, 102 U. S. 691, 26 L. ed. 238; *Chicago, St. L. & N. O. R. Co. v. Macomb*, 2 Fed. 18; *Adams*

v. Kehler Milling Co., 36 Fed. 212. See *Butterfield v. Miller*, C. C. A., 195 Fed. 200; *Central Improvement Co. v. Cambria Steel Co.*, C. C. A., 210 Fed. 696; *Wright v. Barnard*, 248 Fed. 756.

⁴ *English v. Foxall*, 2 Pet. 595, 7 L. ed. 531; *Curry v. Lloyd*, 22 Fed. 258, 265; *Mackall v. Casilear*, 137 U. S. 556, 564, 34 L. ed. 776, 778.

⁵ *Hiern v. Mill*, 13 Ves. 118; *Soden v. Soden*, there cited; *Grimes v. French*, 2 Atk. 141; *Curry v. Lloyd*, 22 Fed. 258, 265; *Haggart v. Wilczinski*, C. C. A., 143 Fed. 22. See *Kerr v. Houthwick*, C. C. A., 120 Fed. 772. In the following cases relief not prayed in the bill was

denied. Where the stockholder's bill prayed that the defendant pay to the corporation the triple damages under the Sherman Law, it was held that there could not be a decree directing the corporation to sue, or if it failed to sue, permitting the plaintiff to sue in its name and on its behalf. *Fleitman v. Wellsbach Street Lighting Co.*, 240 U. S. 27. It was held that a prayer for general relief in a bill seeking a transfer of stock did not authorize a decree against the corporation for dividends paid to the holders of such stock pending the suit. *Georgia S. & F. Ry. v. Einstein*, C. C. A., 218 Fed. 55. Where the bill prayed an injunction against a waste and a trespass, that there could be no decree to remove a cloud upon the plaintiff's title to the property. *U. S. v. Brookshire Oil Co.*, 242 Fed. 718. Where a bill prayed that a statute be declared void, as a direct tax upon property forbidden by the State Constitution and a denial to the plaintiff of the equal protection of the laws, under the Federal Constitution the Court refused to consider the question whether the statute was in part invalid as an obstruction to interstate commerce. *Union Sulphur Co. v. Reed*, 249 Fed. 172. In a suit upon a bill praying an injunction against the erection and operation of coke ovens on a certain street, and for general relief, the appellate court modified the decree by striking out so much thereof as granted an injunction against the operation of coke ovens so near the plaintiff's premises as to injure them by the exhalations therefrom, on the ground that this was not agreeable to the case made by the bill.

Rainey v. Herbert, C. C. A., 55 Fed. 443. Under a bill to enjoin a postmaster from refusing to transmit a magazine at second-class rates, it was held that the court would not enjoin him from limiting the number of copies to a smaller number than the bill alleged that complainant was entitled to send, when, pending the suit, a new permit was granted with such a limitation. *Lewis Pub. Co. v. Wyman*, 168 Fed. 756. Under a bill for specific performance, the equity side of the court has no power to grant a judgment for a *quantum meruit*. *M'Kinney v. Big Horn Basin Development Co.*, C. C. A., 167 Fed. 770. Where a stockholder's bill prayed that a foreclosure sale be set aside for fraud and that the defendants restore to the mortgagor the mortgaged property and the proceeds thereof, it was held that the court could not enter a judgment directing the majority of the stockholders to account to the plaintiff and other members of the minority for the profits they had gained through the foreclosure and reorganization therewith connected. *MacArdell v. Olcott*, 189 N. Y. 368. In the following cases relief not prayed in bill was *granted*: In a suit brought to establish a boundary, the Court entered a decree quieting the title of each party as against the other. *Mercelis v. Wilson*, 235 U. S. 579. Under a bill which prayed an injunction against the pollution of a spring and general relief, a Vermont court granted a decree confirming the complainant's title to the spring and enjoining interference with the same, *Coffain v. Cole*, 67 Vt. 226. Where the prayers were that the

complainants should be decreed to be equitable owners of a part of an award and that the party claiming the 'whole and officers of the United States be enjoined from the receipt or payment of the amount thereof, to the detriment of the complainants' interests, under the prayer for general relief the court awarded a decree determining the amount to which the complainants were entitled and directing its payment by the defendant who claimed the whole. *McGowan v. Parish*, 237 U. S. 285. Where a bill prayed the recovery of securities deposited with the defendant under a syndicate agreement and it appeared that the securities had been exchanged for others, upon which the defendant claimed a lien, the court entered a decree for a delivery of the plaintiff's proportionate share of the new securities free from any lien. *Kelly v. Illinois State Trust Co.*, C. C. A., 215 Fed. 567. Where a bill prayed a cancellation of certain deeds as a cloud upon the title to property mortgaged to the plaintiff who was not then entitled to the possession, the court upon granting this relief, it appearing that the mortgagee under the terms of the mortgage was then entitled to the possession, gave the same to it. *Continental Trust Co. v. Tallahassee Falls Mfg. Co.*, 222 Fed. 694. Where the bill prayed the enforcement of a mechanic's lien on the mortgaged premises, the complainant, under the prayer for general relief, was granted an order directing the owner of the equity of redemption and the mortgagee to sign a check to enable it to withdraw funds deposited as security for its

work. *Turner Const. Co. v. Union Terminal Co.*, C. C. A., 248 Fed. 120. Where a cross-bill filed by the lessor in a suit to foreclose a mechanic's lien on a property leased, prayed for a foreclosure of the lessor's liens upon improvements and for general relief, the court granted a decree providing that on the lessor's payment of the liens therein declared to be superior to her rights, she should become absolute owner of the property and of the improvements. *Mellon v. St. Louis Union Tr. Co.*, C. C. A., 240 Fed. 359. In a suit to enforce a lien for the price of stock deposited in escrow, the court may enter a decree for specific performance of the contract, although no lien exists. *David v. M'Rae*, 183 Fed. 812. Under a complaint for the rescission of a sale of land to a minor and for general relief, a Texan court decreed the foreclosure of a lien for the purchase-money. *Morris v. Holland*, 10 Tex. Civ. App. 474; s. c., 31 S. W. R. 690. Upon a bill to compel an agent to account for illicit profits, received by him from contractors with his employers, and to follow the same into securities of other property held for him by other defendants; it was held that, under the prayer for general relief, a decree could be entered as for money had and received for the complainant's use for any difference between the cost of the specific property recovered and the profits thus corruptly obtained. *U. S. v. Carter*, 217 U. S. 286, 291, 54 L. ed. 769. In Michigan, a bill which alleged that the defendant had levied as sheriff was held to support an injunction against him in his official capacity

prayed may be granted.⁶ Where, however, a consolidated corporation filed a bill in equity to enjoin the enforcement of an ordinance reducing all its charges for the supply of gas, not praying in the alternative relief as regards the gas furnished by one of its constituents; it was held, that relief could not be granted so far as such constituent alone was concerned.⁷ Where

although the prayer for relief did not describe him as sheriff. *Wight v. Roethlisberger*, 116 Mich. 241; s. c., 74 N. Y. 474. Where the bill prayed merely a perpetual and not an interlocutory injunction against the construction of a street railway, and the facts proved upon the final hearing showed that an injunction then would not be justified, the Supreme Court held that the bill was properly dismissed, although it contained a prayer for general relief and averments supported by the evidence which showed that the complainant might be entitled to damages in the suit; since the averments were not introduced for that purpose and the complainant at the hearing disclaimed any desire for such relief. *Osborne v. Missouri Pac. Ry. Co.*, 147 U. S. 248, 260, 37 L. ed. 155, 161. Where a bill by a mortgagee, who had bought the property at a foreclosure sale, prayed that the right of redemption of a defendant, who was not a party to the foreclosure suit, might be cut off because he was in privity with one of the defendants to the same and bound by the decree; it was held, that the court might order a general foreclosure and a resale of the property under the prayer for general relief. *London & San Francisco Bank v. Dexter Horton & Co.*, C. C. A., 126 Fed. 593. In a suit for an accounting under a contract, a decree was made

directing an accounting, including the proceeds of property not covered by the contract which had been wrongfully taken by the defendant. *Stennick v. Jones*, C. C. A., 225 Fed. 345. In a suit to enjoin unfair competition and an infringement of trade mark, relief was granted as to a trade mark not described in the bill where it appeared in one of the exhibits and the defendant's answer denied its infringement. *Gordon's Dry Gin Co. v. Eddy & Fisher Co.*, 246 Fed. 954. In a suit to enforce a trust in securities, under the prayer for general relief, the complainant was decreed the securities upon proof that she was the original owner thereof. *Ambrosius v. Ambrosius*, C. C. A., 239 Fed. 473. See *Interstate Commerce Commission v. Southern Pac. Co.*, 132 Fed. 829; holding that the court could enforce an order by the plaintiff, upon different reasons than those assigned by the Commission for its conclusion, when the bill alleged generally that the rule of the company, set aside by the Commission, was in violation of the Interstate Commerce Act. But see authorities cited *supra*, §§ 136, 137.

⁶ *Bay State Gas Co. v. Rogers*, 147 Fed. 557, 574; *A. B. Dick Co. v. Fuller*, 198 Fed. 404.

⁷ *People's Gas Light & Coke Co. v. Chicago*, 194 U. S. 1, 16, 48 L. ed. 851, 856.

a bill prayed for a reformation of a policy; it was held, that a decree could not be granted reforming the policy in a different manner, not justified by the case made by the bill.⁸ Where the bill which charged fraud prayed, that a location be declared void, and also general relief, a decree was allowed declaring that the defendants hold the mine, as trustees *ex malificio*, for the complainant's benefit.⁹

It seems that if there be no objection to the specific relief prayed for, the plaintiff cannot at the hearing abandon that and obtain a decree for different relief.¹⁰

It has been held in England, that, in some cases of fraud, where no other relief can be given against a party deeply involved in the fraud charged by the bill, the payment of the costs of the suit by him ought to form the subject of a specific prayer, and that otherwise his demurrer to the bill will be sustained.¹¹ In a case where the bill contained allegations showing threatened injury to rights of property, not however mentioned as an independent ground of relief, while it was mainly occupied with complaints of a threatened invasion of rights of a political nature, as the specific prayers for relief were confined to the protection of the political rights, although the bill contained a prayer for general relief, the court refused to consider the allegations concerning the threatened injury to property.¹²

A bill may pray relief in the alternative, when it is said to have a double aspect.¹³ If a different state of facts, under which the complaint is entitled to relief, appears upon the hearing, the court may allow the case to stand over, and give the plaintiff leave to amend his bill in conformity with them, and then obtain relief.¹⁴ And if the complainant be an infant

⁸ *Baldwin v. Liverpool & L. G. Ins. Co.*, C. C. A., 124 Fed. 206.

⁹ *Lockhart v. Leeds*, 195 U. S. 427, 49 L. ed. 263.

¹⁰ *Allen v. Coffman*, 1 Bibb (Ky.), 469; *Pillow v. Pillow*, 5 Yerg. (Tenn.) 420.

¹¹ *Le Texier v. The Margravine of Anspach*, 15 Ves. 159, 164; *Daniell's Ch. Pr.* (2d Am. ed.) 441.

¹² *Georgia v. Stanton*, 6 Wall. 50, 18 L. ed. 721.

¹³ *Shields v. Barrow*, 17 How. 130, 144, 15 L. ed. 158, 162; *Kilgour v. New Orleans Gas-Light Co.*, 2 Woods, 144, 148; *Gaines v. Chew*, 2 How. 619, 643, 11 L. ed. 402, 411. See *supra*, § 138.

¹⁴ *Beaumont v. Boulton*, 5 Ves. 485; *Palk v. Lord Clinton*, 12 Ves.

or the representative of a charity, it would formerly grant relief without regard to the allegations in the bill.¹⁵ "Where no account, payment, conveyance, or other direct relief is sought against a party to a suit, not being an infant, the party, upon service of the subpoena upon him, need not appear and answer the bill, unless the plaintiff specially requires him to do so by the prayer; but he may appear and answer at his option; and if he does not appear and answer he shall be bound by all the proceedings in the cause. If the plaintiff shall require him to appear and answer he shall be entitled to the costs of all the proceedings against him, unless the court shall otherwise direct."¹⁶

§ 155. The signature to a bill. "Every bill or other pleading shall be signed individually by one or more solicitors of record, and such signature shall be considered as a certificate by each solicitor that he has read the pleading so signed by him; that upon the instructions laid before him regarding the case there is good ground for the same; that no scandalous matter is inserted in the pleading; and that it is not interposed for delay."¹

Formerly, the requirement was that the bill should have the signature of counsel.² This practice began, it is said, in the time of Sir Thomas More.³ Before that time it was the practice for a mastery in chancery to examine the bill and determine whether it was better to dismiss it originally or retain it by subpoena.⁴ A signature upon the back of the bill has been held to be sufficient.⁵ Under the former practice, the remedy

63; Daniell's Ch. Pr. (2d Am. ed.), 439, 440.

¹⁵ Stapilton v. Stapilton, 1 Atk. 2; Attorney-General v. Jeanes, 1 Atk. 355; Story's Eq. Pl., § 40, note.

¹⁶ Eq. Rule 40.

§ 155. ¹ Eq. Rule 24. In England, it has been held: that the signature of the solicitor should be in manuscript and not lithographed (Regina v. Cowper, 24 Q. B. D. 533); but, in an earlier case, that his clerk might sign on his behalf

(France v. Dutton, 2 Q. B. 208); and that when the counsel had signed a draft, that was sufficient, and his name might be printed at the end of the pleading. "The Annual Practice 1913," p. 317.

² Eq. Rule 24, of 1842.

³ 1 Hargrave's Law Tracts, 302; Daniell's Ch. Pr. (2d Am. ed.) 357.

⁴ 1 Hargrave's Law Tracts, 302; Daniell's Ch. Pr. (2d Am. ed.) 357.

⁵ Dwight v. Humphreys, 3 McLean, 104.

for a defect in this respect was by a motion to take the bill off the file,⁶ or by demurrer.⁷ The remedy would now probably be a motion to dismiss.⁸ The court could, of its own motion, order the bill taken off the file.⁹ If the defendant should answer without taking the objection, such a defect would probably be waived.¹⁰ Leave to amend by adding the signature was always granted.¹¹ If the complainant sues in person, the signature of the solicitor might also be dispensed with.¹² In such a case, the plaintiff himself should sign the bill.

§ 156. Affidavits to bills. The Equity Rules of November 4, 1912, contain but two provisions requiring an oath to a bill. A stockholders' bill must be verified by oath.¹ In every case, "If special relief pending the suit be desired the bill should be verified by the oath of the plaintiff, or someone having knowledge of the facts upon which such relief is asked."² Under the former practice, in such a case it was not necessary that the affidavit should be filed with the bill, nor before the notice of a motion for the interlocutory relief, and its omission did not make the bill demurrable.³ It has been held: that under the Equity Rules of 1912 where the bill prays for a preliminary injunction it must be verified regardless of whether the complainant moves for such relief;⁴ and that when verified by the complainant it must show that the affiant has knowledge of the facts alleged.⁵ It is doubtful whether, when an affidavit is required, one is sufficient which merely alleges that the bill is true to the best of the affiant's knowledge, information and belief.⁶

⁶ *Dillon v. Francis*, 1 Dickens, 68.

⁷ *Kirkley v. Burton*, 5 Madd. 378; *Dwight v. Humphreys*, 3 McLean, 104.

⁸ See Eq. Rule 29.

⁹ *French v. Dear*, 5 Ves. 547.

¹⁰ See U. S. R. S., § 954.

¹¹ *Kirkley v. Burton*, 5 Madd. 378; *Dwight v. Humphreys*, 3 McLean, 104.

¹² See U. S. R. S., § 747; 1 Hoffman's Ch. Pr. 97.

§ 156. ¹ Eq. Rule 27.

² Eq. Rule 25.

³ *Hughes v. Northern Pac. Ry. Co.*, 122 Ala. 409, 25 So. 169, 910. *Henry E. Allen Co.*, 9 L.R.A. 433, 42 Fed. 618, 622; *Cobb v. Clough*, 83 Fed. 604.

⁴ *Scheuerle v. Onepiece Bifocal Lens Co.*, 241 Fed. 270.

⁵ *Ibid.*

⁶ *Burgess v. Martin*, 111 Ala. 636, 20 S. 506; *Pollard v. So. Fertilizer Co.*, 122 Ala. 409, 25 So. 169, 910.

The former practice further required that an affidavit be annexed to the bill in the following cases: A bill to obtain the benefit of an instrument upon which an action at law would lie, were it not either lost or out of the possession of the complainant and believed to be in that of the defendant, had to be supported by an affidavit of those facts which are necessary to give the court jurisdiction.⁷ A bill to perpetuate the testimony of witnesses, or to take testimony *de bene esse*, had to be supported by an affidavit stating the reasons which render such a proceeding necessary.⁸ A bill of interpleader, and perhaps also a bill in the nature of an interpleader, had to be supported by an affidavit by the plaintiff that he does not collude with either of the defendants;⁹ or if the plaintiff were a corporation by one of its officers, that, to the best of his knowledge and belief, the plaintiff does not so collude.¹⁰

§ 157. Bills of interpleader. A bill of interpleader is a petition filed by a disinterested person holding a fund or thing to which two or more who are defendants set up conflicting claims, between whom he cannot decide without incurring the risk, if he delivers the property to one, of being finally obliged to pay the other damages for having done so.¹ It can only be filed by one who claims no interest in the property in question, and who seeks no other relief than leave to deposit it in the care of the court, and be relieved from all danger of further vexation concerning the same.²

The conflicting claims must be doubtful.³ The claimants must seek the same thing, not merely the same amounts under dif-

⁷ Walmsley v. Child, 1 Ves. Sen. 343; Whitfield v. Faussett, 1 Ves. Sen. 392; Story's Eq. Pl., §§ 313, 477; Daniell's Ch. Pr. (2d Am. ed.) 449, 450.

⁸ Philips v. Carew, 1 P. Wms. 117; Daniell's Ch. Pr. (2d Am. ed.) 452.

⁹ Metcalf v. Hervey, 1 Ves. Sen. 248.

¹⁰ Bignold v. Audland, 11 Simons, 23.

§ 157. 1 Mitford's Eq. Pl., Ch. 1; Story's Eq. Pl., §§ 291-297; Dan-

niell's Ch. Pr. (2d Am. ed.) ch. xxxii.

¹ Killian v. Ebbinhaus, 110 U. S. 568, 28 L. ed. 246; Langston v. Boylston, 2 Ves. Jr. 101; Mohawk & Hudson R. R. Co. v. Chute, 4 Paige (N. Y.), 384; Jackson & Sharp Co. v. Pearson, 60 Fed. 113 123. See Montgomery v. Philadelphia, 253 Fed. 473.

² Shaw v. Coster, 8 Paige (N. Y.) 339, 35 Am. Dec. 690; Goehrane v. O'Brien, 2 Jones & La T. 380; Story's Eq. Pl., § 292.

ferent contracts.⁴ A tenant or agent may not, by filing such a bill, dispute the title of his lessor or principal when a demand is made upon him, by a stranger claiming under title paramount;⁵ nor can he thus compel an interpleader of two adverse claimants from whom he has taken independent leases of the same property.⁶ He may, however, thus obtain relief when different persons claim under assignments from the person to whom he first owed the debt,⁷ or when there is a dispute between the principal and a stranger concerning an assignment, which the latter claims the former made to him.⁸ A licensee, in an action by his licensor for royalties, cannot interplead a third person who claims an interest in the patent.⁹

A bill of interpleader may be filed before or after proceedings at law have been begun against the complainant;¹⁰ but no injunction can be granted to restrain a proceeding already begun in a State court;¹¹ nor, according to the English rule, to stay proceedings in ejectment in any court.¹² If a suit in equity has been already begun against the stakeholder, he may perhaps obtain relief by a petition therein;¹³ but the more prudent course is for him to file a new bill.¹⁴

The fact that one of the conflicting claims is actionable at law and the other is purely equitable, will not deprive him of relief.¹⁵ The enactment of a State statute giving similar relief upon motion by the defendant to an action at law, does not deprive equity of its original jurisdiction.¹⁶ It has been held: that where the United States sues upon a bond, in the

⁴ *Hoggart v. Cutts*, 1 Cr. & Ph. 187; *Story's Eq. Pl.*, § 293.

⁵ *Dungey v. Angove*, 2 Ves. Jr. 304, 310; *Lowe v. Richardson*, 3 Madd. 277; *Story's Eq. Pl.*, § 295. But it has been held that a lessee might obtain such relief by a cross-bill. *Robinson v. Brast*, C. C. A., 149 Fed. 149.

⁶ *Standley v. Roberts*, 59 Fed. 836.

⁷ *Cowtan v. Williams*, 9 Ves. 107; *Clarke v. Byne*, 13 Ves. 386; *Hoggart v. Cutts*, 1 Cr. & Ph. 197, 205.

⁸ *Hayward & Clark v. McDonald*, C. C. A., 192 Fed. 890.

⁹ *Pusey & Jones Co. v. Miller*, 61 Fed. 401.

¹⁰ *Richards v. Salter*, 6 J. Ch. (N. Y.) 445.

¹¹ U. S. R. S., § 720.

¹² *Metcalf v. Hervey*, 1 Ves. Sen. 248.

¹³ *Badeau v. Rogers*, 2 Paige (N. Y.) 209.

¹⁴ *Birch v. Corbin*, 1 Cox Eq. 144.

¹⁵ *Richards v. Salter*, 6 J. Ch. (N. Y.) 445.

¹⁶ *Barry v. Mutual Life Ins. Co.*, 53 N. Y. 536; *Wood v. Swift*, 81 N. Y. 31, 35; *Board of Education v. Scoville*, 13 Kan. 17, 30; *Prudential*

absence of statute, the defendant cannot bring in by interpleader the persons who might be entitled to participate in the recovery.¹⁷ The courts sustained a bill of interpleader filed by a bank against a depositor and the Custodian of Alien Property, when the latter claimed that the deposit was owned by an alien enemy.¹⁸ A bill of interpleader may be filed by a person who has offered a reward which is claimed by different parties.¹⁹ Formerly bills of interpleader were often filed by insurance companies against conflicting claimants to the proceeds of policies issued by them.²⁰

Such bills are now regulated by statute, as follows: "The district court of the United States shall have original cognizance to entertain suits in equity begun by bills of interpleader where the same are filed by any insurance company or fraternal beneficiary society, duly verified, and where it is made to appear by such bill that one or more persons, being bona fide claimants against such company or society, reside within the jurisdiction of said court; that such company or society has made or issued some policy of insurance or certificate of membership providing for the payment of a sum of money of at least \$500 as insurance or benefits to a beneficiary or beneficiaries or to the heirs, next of kin, or legal representative of the person insured or member; that two or more adverse claimants, citizens of different States, are claiming or may claim to be entitled to such insurance or benefits and that such company or society deposits the amount of such insurance or benefits with the clerk of said court and abide the judgment of said court. In all such cases the court shall have the power to issue its process for said claimants, returnable at such time as the said court or a judge thereof shall determine, which shall be addressed to and served by the United States marshals for the respective districts wherein said claimants reside or may be found; to hear said bill of interpleader and decide thereon according to the practice in equity; to discharge said complainant

Assurance Co. v. Thomas, L. R. 3 Ch. App. 74, 77.

¹⁷ U. S. v. U. S. Fidelity & Guaranty Co., C. C. A., 242 Fed. 16.

¹⁸ Amer. Exchange Nat. Bank v. Palmer, 256 Fed. 680.

¹⁹ Taft v. Hyatt (Kansas), 180 Pac. 213; Statesman Pub. Co. v. Foltin (Oregon), 167 Pac. 782 (a prize for solving a puzzle).

²⁰ Spring v. South Carolina Ins. Co., 8 Wheat. 268, 5 L. ed. 614.

from further liability upon the payment of said insurance or benefit as directed by the court, less complainant's actual court costs; and shall have the power to make such orders and decrees as may be suitable and proper and to issue the necessary writs usual and customary in such cases for the purpose of carrying out such orders and decrees: Provided, That in all cases where a beneficiary or beneficiaries are named in the policy of insurance or certificate of membership or where the same has been assigned and written notice thereof shall have been given to the insurance company or fraternal benefit society, the bill of interpleader shall be filed in the district where the beneficiary or beneficiaries may reside."²¹

In cases not covered by the statute just quoted, it seems that in the Federal courts no bill can be maintained when either of the defendants cannot be served with process within the jurisdiction.²² Such a bill should be filed in the district of the residence of the beneficiary if he is named in the policy. Otherwise in the district of the residence of one of the claimants.²³ If a suit is pending in which there is the requisite diversity of citizenship, the citizenship of the parties to the bill of interpleader is immaterial.²⁴ A bill of interpleader should state the manner in which the plaintiff obtained possession of the property in question, and admit that he has no interest therein. It should set forth the claims of the defendants, showing that they conflict, and that he is ignorant of their respective rights, and cannot determine between them without hazard to himself. It should offer to deposit the fund or other property in the custody of the court; and conclude with a prayer that upon such deposit the defendants may be enjoined from further molesting him about the matter in question; that they be required to interplead and settle their respective rights among themselves; and that he may have his costs out of the fund, if there be one, otherwise from the defendant.²⁵

²¹ Act of Feb'y 22, 1917. See *Co. v. Henderson*, 244 Fed. 877. H. 113, 39 St. at L. 929; Comp. See *supra*, § 61.

St. § 991a. *Supra*, § 5.

²² *Stockbridge v. Phoenix Mut. Life Ins. Co.*, 193 Fed. 558. See *24 Sherman Nat. Bank v. Shubert Theatrical Co.*, C. C. A., 247 Fed. 256. *Supra*, § 51.

infra, § 166.

²³ *Pennsylvania Mut. Life Ins.* ²⁵ *Mitford's Eq. Pl.*, ch. 1; *Story's Eq. Pl.*, §§ 291-297.

Under the former practice the bill had to be accompanied by an affidavit; which, when filed by a natural person, should be sworn to by him, and state that "this bill is not filed in collusion with either of the defendant named, but merely of his own accord for relief in this Honorable Court."²⁶ If a corporation be the complainant, one of its officers should make the affidavit, swearing that, to the best of his knowledge and belief, the corporation does not collude with either of the defendants.²⁷ The omission of the affidavit was a ground for a demurrer.²⁸ The bill should also conform to the provisions of the rules regulating original bills.

No other step can be taken in the cause until after deposit in court of the fund or other property in dispute.²⁹ In case of a bill by an insurance company to determine the right to a policy, the deposit of the amount due under the policy is a condition precedent to the jurisdiction of the court.³⁰ It has, however, been held in England that the bill is not demurrable for the omission of an offer so to do.³¹

It is better practice to obtain an order *ex parte* permitting such payment.³² When that is done, an injunction will be granted restraining the defendants from suing the plaintiff, and from continuing any action already begun touching the matter in dispute.³³ The injunction is usually granted to take effect upon payment of the fund into court.³⁴ Under special circumstances, however, a stay order might be granted until the complainant had an opportunity to do so.³⁵ Upon an argument to dissolve this injunction before hearing, it seems that the defendants cannot contradict the affidavit that there is no collu-

²⁶ *Metcalf v. Hervey*, 1 Ves. Sen. 248.

²⁷ *Bignold v. Augland*, 11 Simons, 23.

²⁸ *Metcalf v. Hervey*, 1 Ves. Sen. 248; *Tobin v. Wilson*, 3 J. J. Marsh. (Ky.) 67; *Mitford's Eq. Pl.*, ch. 1.

²⁹ *Meux v. Bell*, 6 Simons, 175; *Williams v. Walker*, 2 Rich. Eq. (S. C.) 291.

³⁰ *Penn. Mut. Life Ins. Co. v. Henderson*, 244 Fed. 877.

³¹ *Meux v. Bell*, 6 Simons, 175.

³² *Williams v. Walker*, 2 Rich. Eq. (S. C.) 291.

³³ *Sieveking v. Behrens*, 2 Myl. & Cr. 581.

³⁴ *Sieveking v. Behrens*, 2 Myl. & Cr. 581.

³⁵ *Sieveking v. Behrens*, 2 Myl. & Cr. 581; U. S. R. S., § 718.

sion,³⁶ but a reference may be directed when such a charge is made, and at the hearing collusion may be shown.³⁷

In England, a bill of interpleader can be successfully maintained although all the defendants are beyond the jurisdiction of the court.³⁸

Interpleader suits are usually heard on bill and answered although there is no reason why testimony should not be taken. If at the hearing the cause is ripe for a decision, the court will then decide the controversy between the defendants.³⁹ The court may of its own motion take an objection to a claim not raised by either of the parties.⁴⁰ If not, it will enter a decree dismissing the plaintiff with his costs, enjoining the defendants in accordance with the prayer of the bill, and directing them to interplead.⁴¹ An order directing one of the defendants to plead under oath within ten days, and to file a bond with a surety for the payment, if he lost the case, of the costs and expenses to the other defendant, was held to be erroneous.⁴²

If the claims on both sides are purely legal, an action or an issue at law will usually be directed. If one of them is of an equitable nature, and sometimes when both are legal, a reference to a master is usually ordered.⁴³ At the hearing, each defendant may read the other's answer against him.⁴⁴ If one of them has allowed the bill to be taken as confessed against him,

³⁶ *Stevenson v. Anderson*, 2 Ves. & B. 407; *Manby v. Robinson*, L. R. 4 Ch. App. 347; *Fahie v. Lindsay*, 8 Oreg. 474.

³⁷ *Manby v. Robinson*, L. R. 4 Ch. App. 347; *Langston v. Boylston*, 2 Ves. Jr. 101; *Dungey v. Angove*, 2 Ves. Jr. 304.

³⁸ *Martinus v. Helmuth*, G. Cooper, 248; *Stevenson v. Anderson*, 2 Ves. & B. 412. *Contra*, *Herndon v. Ridgeway*, 17 How. 424, 15 L. ed. 100; *N. Y. Life Ins. Co. v. Dunlevy*, C. C. A., 214 Fed. 1, *supra*, § 96.

³⁹ *Daniell's Ch. Pr.* (2d Am. ed.) 1765; *Angell v. Hadden*, 16 Ves. 202; *City Bank v. Bangs*, 2 Paige (N. Y.), 570.

⁴⁰ *Union Pac. R. Co. v. Belek*, 211 Fed. 699.

⁴¹ *Daniell's Ch. Pr.* (2d Am. ed.) 1765; *Angell v. Hadden*, 16 Ves. 202; *City Bank v. Bangs*, 2 Paige (N. Y.) 570.

⁴² *Buck v. Mason*, C. C. A., 135 Fed. 304.

⁴³ *Daniell's Ch. Pr.* 1765; *Story's Eq. Jur.*, § 822; *Angell v. Hadden*, 16 Ves. 202; *City Bank v. Bangs*, 2 Paige (N. Y.) 570.

⁴⁴ *Bowyer v. Pritchard*, 11 Price, 103; *Daniell's Ch. Pr.* 1765. See *Penn. Mut. L. I. Co. v. Union Tr. Co.*, 83 Fed. 891.

this is considered as an admission that the bill was properly filed, and that he made an improper claim against the fund;⁴⁵ and the defendant, who has answered him, may obtain suitable relief, including a decree against the defaulter for his costs and the costs paid the plaintiff.⁴⁶ If, after answer, one of them defaults at the hearing, the court will enter a decree after hearing the other.⁴⁷

The plaintiff, if successful, was formerly entitled to his costs,⁴⁸ including a counsel fee,⁴⁹ out of the fund, if there were one. Otherwise, from the defendant whose claim was finally held bad.⁵⁰ These costs, as well as the costs of the successful defendant, had eventually to be paid by him whose claim was finally dismissed.⁵¹

It has been said that when the bill is dismissed, there can be no further proceedings in the cause as between the defendants; not even by consent; inasmuch as the court has thereby lost jurisdiction.⁵² After a decree in the plaintiff's favor, the cause is terminated as to him; and in case of his subsequent death the cause will proceed without a revivor.⁵³

§ 158. Bills in the nature of interpleader. Where the plaintiff claims for himself some interest in the fund or matter in question, or does not admit the whole of a defendant's claim, or the defendants claim different amounts, although a bill of interpleader may not, a bill in the nature of an interpleader

⁴⁵ *Badeau v. Rogers*, 2 Paige (N. Y.) 209; *Fairbrother v. Prattent*, 1 Daniel 64. But see *Standley v. Roberts*, 59 Fed. 836.

⁴⁶ *McNamara v. Provident Sav. Life Assur. Soc.*, 114 Fed. 910.

⁴⁷ *Hodges v. Smith*, 1 Cox Eq. 357.

⁴⁸ *Dunlop v. Hubbard*, 19 Ves. 205; *Downson v. Hardcastle*, 2 Cox Eq. 279; *McNamara v. Provident Sav. Life Assur. Soc.*, 114 Fed. 910.

⁴⁹ Where the face value of a life insurance policy was \$50,000, the sum of \$1,000 was allowed as a counsel fee. *Mutual Life Ins. Co. v. Lane*, 151 Fed. 276. Where the amount was \$10,000 or less, \$150

was allowed. *McNamara v. Provident Sav. Life Assur. Soc.*, C. C. A., 114 Fed. 910, 912. See *Mutual Life Ins. Co. v. Farmers' & Mechanics' Nat. Bank*, 173 Fed. 390, 402; § 422, *infra*.

⁵⁰ *Aldridge v. Mesner*, 6 Ves. 418; *Mason v. Hamilton*, 5 Simons, 19; *Daniell's Ch. Pr.* 1767.

⁵¹ *Mason v. Hamilton*, 5 Simons, 19; *Cowtan v. Williams*, 9 Ves. 107; *Daniell's Ch. Pr.* (2d Am. ed.) 1766, 1767.

⁵² *Jennings v. Nugent*, 1 Molloy, 134.

⁵³ *Anon.*, 1 Vern. 351; *Jennings v. Nugent*, 1 Molloy, 134; *Daniell's Ch. Pr.* 1765.

may be sustained.¹ It has been held that such a suit may be maintained by a mortgagee, to compel the mortgagor and a municipal corporation to submit to the court a dispute between them concerning the right to forfeit a franchise.² A bill by a trustee praying leave to resign a trust and to return the subject-matter thereof to a new trustee, in accordance with the terms of the trust agreement, is not a bill in the nature of an interpleader.³ A pleading, filed as a bill of interpleader, may be sustained as a bill in the nature of an interpleader.⁴ The frame of such a bill and the proceedings thereunder should conform, *mutatis mutandis*, to those of a strict bill of interpleader.⁵ When a suit is pending in which the necessary diversity of citizenship exists, the citizenship of the parties of such a bill is immaterial to the jurisdiction.⁶ After payment of what he admits to be due, a decree may be entered discharging the plaintiff as to that, and directing the suit, or if an action at law has previously been begun, the latter, to proceed till his disputed rights are determined.⁷

§ 159. Bills of certiorari. A bill of certiorari was a bill filed in a superior court of equity for the purpose of removing thither a suit in equity pending in an inferior court, on account of some alleged incompetency in the latter or some defect in its proceedings.¹ Such a bill first stated the proceedings in the inferior court; then the cause of its incompetency, as, for ex-

§ 158. ¹Dorn v. Fox, 61 N. Y. 264; Mohawk & Hudson R. R. Co. v. Clute, 4 Paige (N. Y.), 385; Provident Sav. Life Assur. Soc. v. Loeb, 115 Fed. 357; Knickerbocker Tr. Co. v. City of Kalamazoo, 182 Fed. 865; Hayward & Clark v. McDonald, C. C. A., 192 Fed. 890; Sherman Nat. Bank v. Shubert Theatrical Co., C. C. A., 238 Fed. 225. See Robinson v. Brast, C. C. A., 149 Fed. 149; Story's Eq. Pl., § 297b; Daniell's Ch. Pr. (2d Am. ed.), 1768, *Contra*, New England Mutual Life Ins. Co. v. Odell, 50 Hun (57 N. Y. S. C. R.) 279.

²Knickerbocker Tr. Co. v. City of Kalamazoo, 182 Fed. 865.

³Moore Printing Typewriter Co. v. National Savings & Tr. Co., 218 U. S. 422, 54 L. ed. 1093.

⁴McNamara v. Provident Sav. Life Assur. Soc., 114 Fed. 910.

⁵McNamara v. Provident Sav. Life Assur. Soc., 114 Fed. 910.

⁶Sherman Nat. Bank v. Shubert Theatrical Co., 238 Fed. 225.

⁷City Bank v. Bangs, 2 Paige (N. Y.), 570. See Groves v. Senteel, 153 U. S. 465, 38 L. ed. 785; s. c., 66 Fed. 179.

§ 159. ¹Mitford's Pl. ch. 1; Story's Eq. Pl., § 298.

ample, that the subject of the action or the parties were not within its jurisdiction, or that, for some other cause, equal justice could not be done there; and finally prayed a writ of *certiorari*, to certify and remove the record and the cause to the superior court.² It did not pray that the defendant should answer, or even that he should appear to the bill, and consequently prayed for no writ of subpoena, although a subpoena had to be sued out and served.³ It was considered as an original bill, and filed as such in the superior court. Thereupon, the plaintiff was required to execute a bond in the penalty of £100, with one surety conditioned to prove the suggestions of the bill in fourteen days. A subpoena was next sued out and served; and a writ of *certiorari* issued directed to the judge of the inferior court, requiring him to certify or send to the court issuing the writ the tenor of the bill or plaint below, with the process or proceedings thereon. The writ having been served and returned, together with the required statement and papers, an order directing them to be filed was then obtained. Testimony to prove or disprove the suggestions of the bill was immediately taken, and the cause referred to a master to report whether they were proven or no. This was required to be done within fourteen days, unless the court specially enlarged the time. If the allegations were proved and showed a sufficient reason for retaining the suit, an order to retain the bill was granted; and the defendant below was obliged to answer, and the cause removed proceeded in the same manner as if it had been originally instituted in the superior court.⁴ In no reported case has such a bill been filed in a court of the United States, although petitions for writs of *certiorari* in proceedings at common law are not uncommon.⁵

² Story's Eq. Pl., § 298.

⁴ Hindee's Pr. 28-32 and 581, 582.

³ Story's Eq. Pl., § 298; Mitford's Pl. ch. 1.

⁵ See *infra*, § 460.

CHAPTER VI.

SUBPOENAS TO ANSWER.

§ 160. **Definition and form of subpoena.** The first process in a court in equity is the *subpœna ad respondendum* which is a writ requiring the defendant to answer the bill under penalty therein expressed. A similar writ, called *quibusdam certis de causis*, in the form of a subpoena without any penalty, is also found in some of the early English chancery cases.¹ The process of subpoena constitutes the proper mesne process in all suits in equity, in the first instance, to require the defendant to appear and answer the exigency of the bill.² These writs, like all writs and processes issuing from the courts of the United States, must be under the seal of the court from which they issue, and signed by the clerk thereof. Those issuing from the Supreme Court must bear teste of the Chief Justice of the United States, or, when that office is vacant, of the Associate Justice next in precedence. Those issuing from a District court must bear teste of the Judge, or, when that office is vacant, of the clerk thereof.³ When issued from the Supreme Court the writ must be in the name of the President of the United States.⁴

In the Supreme Court, the return day of the writ must be at least sixty days from the service thereof.⁵ In the District courts, the return day is twenty days from its issue.⁶

In the District courts, whenever a bill is filed, and not before, the clerk shall issue the process of subpoena thereon, as of course, upon the application of the plaintiff, which shall contain the names of the parties and be returnable into the clerk's office twenty days from the issuing thereof. At the bottom of the sub-

§ 160. ¹ Mr. Justice Holmes, in an article on Early English Equity, 1 *Law Quart. Rev.* 162, note 2, citing Palgrave, King's Council, 131, 132, note x; Scaldewell v. Stormesworth, 1 Cal. Ch. 5.

² Equity Rule 7.

³ U. S. R. S., § 911.

⁴ U. S. S. C. Rule 5.

⁵ U. S. S. C. Rule 5.

⁶ Equity Rule 12.

pœna shall be placed a memorandum, that the defendant is required to file his answer or other defense in the clerk's office on or before the twentieth day after service, excluding the day thereof; otherwise the bill may be taken pro confesso. Where there are more than one defendant, a writ of subpœna may, at the election of the plaintiff, be sued out separately for each defendant, or a joint subpœna against all the defendants.⁷

If a defendant is sued in a representative capacity, or in both an individual and a representative capacity, he should be so described in the subpœna; which should in this respect follow the prayer of process in the bill.⁸ A subpœna addressed to John Moore, guardian of John Stiles, is sufficient to give jurisdiction over him individually although it might not be to give jurisdiction over him as guardian.⁹ It was held that a writ addressed to "J. O. Baugh, Sheriff of Coahoma County, Mississippi" was against the individual, not against the office and might be served in another State when he was found there.¹⁰ If a subpœna is not properly addressed, its service may be set aside upon motion, as made without authority.¹¹ Such a defect will, however, be waived, if the defendant enter his general appearance in his representative capacity.¹² Where an unincorporated partnership was described in the subpœna and bill as a corporation, and no appearance was made, it was held that the order thereupon was void, although the writ was served upon one of the partners, who failed to notify the plaintiff of his mistake. There, before suit, the attorney for the co-partnership had inadvertently written to the complainant a letter which implied that the company

⁷ Eq. Rule 12. This is copied in part from Eq. Rule 12 of 1842. It makes the return day twenty days, instead of "the next rule day or the next rule day but one, at the election of the plaintiff, occurring after twenty days from the time of the issue thereof." It omits the phrase, added to the former rule Dec. 17, 1900 (180 U. S. 641), "which shall contain the Christian names as well as the surnames of the parties." It adds the words, "and not before," in order to make clear the practice under the former rule. See Arm-

strong Cork Co. v. Merchants' Refrigerating Co., 171 Fed. 778.

⁸ Carter v. Ingraham, 43 Ala. 78; Walton v. Herbert, 3 Green Ch. (N. J.) 73; Brasher v. Van Cortlandt, 2 J. Ch. (N. Y.) 247; see Cornell v. Green, 88 Fed. 821.

⁹ Cornell v. Green, 88 Fed. 821; s. c. in C. C. A., 95 Fed. 334.

¹⁰ Tate v. Baugh, 252 Fed. 317.

¹¹ Walton v. Herbert, 3 Green Ch. (N. J.) 73; Brasher v. Van Cortlandt, 2 J. C. (N. Y.) 242, 247.

¹² Ibid.; Buerk v. Imhaeuser, 8 Fed. 457.

had a board of directors, and the partnership did business under the name of the Newport Pressed Brick Company.¹³

The penalty named in the writ is now usually two hundred and fifty dollars. In earlier times it might be life or limb.¹⁴ But it is never enforced, since the taking of the bill as confessed affords a far more substantial remedy. The subpoena should be addressed to the defendant against whom it is issued.¹⁵

The usual form of a subpoena in a District court of the United States is substantially as follows:—

The President of the United States of America, To John Aber:

GREETING,—You are hereby commanded to appear before the Judges of the District Court of the United States of America for the Southern District of New York, in the Second Circuit, to answer a bill of complaint exhibited against you in the said Court in a suit in Equity, by WILLIAM TERHUNE and to further do and receive what the said Court shall have considered in this behalf; and this you are not to omit under the penalty on you JOHN ABER of TWO HUNDRED AND FIFTY DOLLARS (\$250).

WITNESS, Honorable GEORGE C. HOLT, Judge of the District Court of the United States for the Southern District of New York, at the City of New York, on the first day of February, in the year one thousand nine hundred and thirteen and of the Independence of the United States of America the one hundred and thirty-seventh.

ALEXANDER GILCHRIST, JR., *Clerk.*

ROBERT JONES, *Sol'r.*

The Defendant JOHN ABER is required to file his answer or other defense in the above cause in the Clerk's office of this Court, on or before the twentieth day after service hereof excluding the day of said service; otherwise the bill aforesaid may be taken *pro confesso*.

ALEXANDER GILCHRIST, JR., *Clerk.*

§ 161. *Issue of the subpoena.* No process of subpoena can issue from the clerk's office in any suit in equity until the bill

¹³ *Baxter v. Jones*, 185 Fed. 900.

¹⁴ Mr. Justice Holmes, in an article on Early English Equity, 1 Law Quar. Rev., 162, note 2, citing

1 *Proceedings Privy Council* (21 R. 2, 1397).

¹⁵ *Daniell's Ch. Pr.* (2d Am. ed.) 495.

is filed in the office.¹ Whenever a bill is filed the clerk must issue the process of subpoena thereon, as of course, upon the application of the plaintiff.² The signature of counsel is a sufficient warrant for his so doing. A *præcipe* or written order for the subpoena, signed by the attorney is usually first given him. It has been held that the clerk may issue to an attorney a summons duly sealed and signed without specifying the title of the cause, the names of the parties, or the return day; and that the attorney may fill in the blanks when he wishes to serve the paper.³

In the early times, the bill was first examined by one of the masters in chancery, whose duty it was to determine whether to dismiss the bill by original or to retain it by subpoena.⁴ The present practice, it is said, originated when Sir Thomas More was Keeper.⁵ In the Supreme Court of the United States a motion for leave to file a bill must first be made. This is usually heard *ex parte*;⁶ but when leave was asked to file a bill against the President of the United States, under the peculiar circumstances of that case it was thought proper that argument should be heard **against the motion** for leave.⁷ In special circumstances the court will require notice to be served upon the proposed defendant, and leave to file a bill has been denied.⁸ Whenever any subpoena is returned not executed as to any defendant, the plaintiff is entitled to another subpoena, *toties quoties*, against him, if he required it, until due service is made.⁹

§ 161. ¹ Equity Rule 12. For the rule where a district is divided into two or more divisions, see U. S. v. Eddy, 28 Fed. 226.

² Equity Rule 12.

³ Jewett v. Garrett, 47 Fed. 625.

⁴ Treatise on Masters of the Chancery, 1 Harg. Law Tracts, 302; Daniell's Ch. Pr. (2d Am. ed.) 357.

⁵ Ibid.

⁶ Georgia v. Grant, 6 Wall. 241, 18 L. ed. 848.

⁷ Mississippi v. Johnson, 4 Wall. 475, 18 L. ed. 437; Georgia v. Grant,

6 Wall. 241, 242, 18 L. ed. 848; Louisiana v. Texas, 176 U. S. 1, 44 L. ed. 347; Minnesota v. Northern Securities Co., 184 U. S. 199, 46 L. ed. 499; Washington v. Northern Securities Co., 185 U. S. 254, 46 L. ed. 897.

⁸ Mississippi v. Johnson, 4 Wall. 475, 18 L. ed. 437; Georgia v. Grant, 6 Wall. 241, 18 L. ed. 848; Minnesota v. Northern Securities Co., 184 U. S. 199, 46 L. ed. 499; *supra*, § 3a.

⁹ Equity Rule 14.

§ 162. **When a subpoena is necessary.** No defendant can be brought before the court against his will without the service of a subpoena upon him.¹ A general appearance will, however, waive such an omission.² After a bill has been amended with no further change than the bringing in of new parties defendant, they alone need be served with a new subpoena.³ If, however, it were otherwise substantially amended, according to the English practice a subpoena to answer the amendments had to be served upon all the defendants.⁴ A subpoena to appear and answer a bill of revivor if required, should be substantially in the form of a subpoena to an original bill, except that it requires the proper representatives of the party against whom it issues to appear at the next rule-day, which shall occur after fourteen days from the time of the service of the process, and there show cause, if any they have, why the cause should not be revived.⁵

§ 163. **Personal service of a subpoena.** Except in certain exceptional cases the service of the subpoena must be personal,¹ and made within the district.² Except in such cases it cannot be served in another district in the same State.³ The defendant must be actually served although he resides within the district.⁴ The service of process upon one of two defendants does not give the court jurisdiction over the other.⁵ A State has no power to provide that non-residents in suits arising out of their business within a State shall be bound by process served after the agency is at an end upon the agent through whom the business was transacted.⁶ A statute, providing that after an attachment had

§ 162. ¹ Equity Rule 7.

² Buerk v. Imhaeuser, 8 Fed. 457.

³ Longworth v. Taylor, 1 McLean, 514; Angerstein v. Clarke, 1 Ves. Jr. 250; Skeffington v. ———, 4 Ves. Jr. 66.

⁴ Cooke v. Davies, T. & R. 309; Bramston v. Carter, 2 Simons, 458. See Kendall v. Beckett, 1 Russ. 152.

⁵ Equity Rule 56.

§ 163. ¹ Equity Rule 13. As to service in suits against soldiers and sailors during the war with Germany, see Act of May 8, 1918, ch. 20, § 200, 40 St. at L. 440, Comp. St. § 3078, 114bb.

² Toland v. Sprague, 12 Pet. 300, 328, 9 L. ed. 1093, 1104; Picquet v. Swan, 5 Mason, 35; Bourke v. Amison, 32 Fed. 710; Winter v. Koon, Schwartz & Co., 132 Fed. 251; *supra*, § 61.

³ Lukosewicz v. Phila. & R. Coal & I. Co., 232 Fed. 292; Tauza v. Penn. R. Co., 232 Fed. 294; Rakauskas v. Erie R. Co., 237 Fed. 495.

⁴ Dutton v. First Nat. Bank, 244 Fed. 236.

⁵ Wright v. Ankeny, 217 Fed. 988.

⁶ Flexner v. Farson, 248 U. S. 289.

been levied personal service of the process may be made by leaving the writ at the place where defendant had last stopped, is due process of law in so far as it supports a judgment against the property seized.⁷

At common law the service should be made in accordance with the State statute.⁸ Where the State practice permits the writ to be served by an individual who is not an officer, it need not be served by the marshal.⁹ The manner of service upon corporations is described in the following sections.¹⁰

In equity it must be made by the marshal of the district or his deputy, or by some other person specially appointed by the court for that purpose, and not otherwise.¹¹

A copy of an order, that non-resident defendants appear and plead before a day specified therein, may be served by any one, under an order for substituted or statutory service, although the usual practice is to serve it by a deputy marshal of the district where the defendants are found.¹² It was held that the marshal might give an attorney an appointment of a special deputy with the name in blank with oral permission to the attorney to fill in the same.¹³

"When the marshal or his deputy is a party in any cause, the writs and præcepts therein shall be directed to such disinterested person as the court or any justice or judge thereof may appoint, and the person so appointed may execute and return them."¹⁴ "The service of all process, mesne and final, shall be by the marshal of the district, or his deputy, or by some other person specially appointed by the court or judge for that purpose, and not otherwise. In the latter case, the person serving the process shall make affidavit thereof."¹⁵ When a husband and wife are parties a copy should be served upon each, although the former practice was complied with by service upon the husband alone.¹⁶

⁷ *Herbert v. Bicknell*, 233 U. S. 70.

⁸ *Amy v. Watertown*, 130 U. S. 301, 32 L. ed. 946; *Shampeon v. Conn. R. L. Co.*, 37 Fed. 771; *infra*, § 453.

⁹ *King v. Davis*, 187 Fed. 198, 210, *aff'd as Blankenship v. King*, C. C. A., 157 Fed. 676.

¹⁰ § 164.

¹¹ Equity Rule 15; *Deacon v. Sewing M. Co.*, 14 Rep. 43.

¹² *Forsyth v. Pierson*, 9 Fed. 801.

¹³ *Jewett v. Garrett*, 17 Fed. 625.

¹⁴ U. S. R. S., § 922.

¹⁵ Eq. Rule 15, copied in substance from Eq. Rule 15 of 1842. See *Phoenix Ins. Co. v. Wulf*, 1 Fed. 775; *Hyslop v. Hoppock*, 5 Ben. 447.

¹⁶ *O'Hara v. MacConnell*, 93 U. S. 150, 23 L. ed. 840; *Robinson v. Catheart*, 2 Cranch C. C. 590.

When a defendant was sued both individually and in a representative capacity, it was held that only one copy of the subpoena need be left with him.¹⁷ Such service at the door of the defendant's dwelling,¹⁸ and at his place of business when he lives in rooms above the same,¹⁹ has been held to be sufficient. In an English case, where infant defendants were secreted, service upon their mother was allowed, and held sufficient.²⁰ Where a guardian *ad litem* has been appointed it will be presumed, in the absence of evidence to the contrary, that his wards were duly served.²¹ Chief Baron Gilbert, in his "*Forum Romanum*," says of the subpoena: "The service is good in the night or on Sunday, if it be before the time of the return; for this being only process of notice, and not to arrest the parties, it can create no disturbance, though it be served in the night or on Sunday."²² It has, however, since been held in England that a service on Sunday may be set aside.²³ A decision of circuit holds that, in an extraordinary case, a warrant of arrest in admiralty can be issued on Sunday.²⁴

Personal service of the subpoena cannot, in the absence of any special statutory provision, be made beyond the territorial jurisdiction of the court;²⁵ not even in another district of the State;²⁶ except that in a case of a local nature, at law or in equity, where the land or other subject-matter of a fixed nature, such as a railroad, is in both districts of the same State or is situated

¹⁷ *Cornell v. Green*, 88 Fed. 821; s. c. in C. C. A., 95 Fed. 334.

¹⁸ *Phoenix Ins. Co. v. Wulf*, 1 Fed. 775. For cases where the proof of service was held insufficient, see *Blythe v. Hinckley*, 84 Fed. 228; *Swift v. Meyers*, 37 Fed. 37.

¹⁹ *Lovin v. Hicks*, 116 Minn. 179, 133 N. W. 575.

²⁰ *Smith v. Marshall*, 2 Atk. 70, Mr. William Allen Butler, in a learned opinion when referee, held that, where a guardian *ad litem* was appointed, service of a subpoena upon his infant ward was not indispensable to the jurisdiction. *Sloane v. Martin*, 77 Hun. 249. See *supra*, § 106.

²¹ *Sloane v. Martin*, 77 Hun (N. Y.), 249. See *supra*, § 106.

²² Gilbert's *Forum Romanum* (Tyler's ed.) 42.

²³ *Mackreth v. Nicholson*, 19 Ves. 367.

²⁴ *Pearson v. The Alsalfa*, 44 Fed. 358 (U. S. D. C. D., S. C.).

²⁵ *Toland v. Sprague*, 12 Pet. 300, 328, 9 L. ed. 1093, 1104; *Picquet v. Swan*, 5 Mason, 35; *Bourke v. Armitson*, 32 Fed. 710; *Butterworth v. Hill*, 114 U. S. 128, 29 L. ed. 119.

²⁶ *Lukosewicz v. Phila. & R. Coal & Iron Co.*, 232 Fed. 292; *Tanzu v. Penn. R. Co.*, 232 Fed. 294; *Rakauskas v. Erie R. Co.*, 237 Fed. 495.

entirely in either district of a State which is divided into two or more districts, a defendant resident therein may be served by the marshal of any district in that State where he resides.²⁷ The writ must be addressed to the marshal in the district where service is to be made.²⁸ It has been held that a suit brought solely for the purpose of appointing a receiver of a railroad, with an injunction against its creditors,²⁹ a suit to determine the rightful owners of a fund in court,³⁰ and a suit by the United States to determine the right of an Indian tribe to a fishery,³¹ are such cases of a local nature.

In a suit not of a local nature, a duplicate writ may be issued against a defendant residing in a different district of the State directed to the marshal of such district. "The clerk issuing the duplicate writ shall indorse thereon that it is a true copy of a writ sued out of the court of the proper district; and such original and duplicate writs, when executed and returned into the office from which they issue, shall constitute and be proceeded on as one suit; and upon any judgment or decree rendered therein, execution may be issued, directed to the marshal of any district in the same State."³² Where defendants reside in different divisions of a district, all mesne and final process may be served and executed in any or all of the divisions of the district.³³ In other cases where a State is divided into two or more districts the defendant cannot be served out of the district.³⁴

When a petition is filed by a district attorney of the United States praying an injunction against a combination in restraint of commerce among the several States or with foreign nations, the subpoena may be served by leave of the court in any district by the marshal thereof.³⁵ In suits for the infringement of patents, service may be made in the district where the suit is brought upon any agent of the defendant engaged in conducting the defendant's business there, provided that the defend-

²⁷ Jud. Code, §§ 54, 55, 56, 36 St. at L. 1087.

²⁸ *Kuzma v. Witherbee Sherman Co.*, 232 Fed. 286; *Vitkus v. Clyde S. S. Co.*, 232 Fed. 288.

²⁹ *East Tenn., V. & G. R. Co. v. Atlanta & T. F. R. Co.*, 49 Fed. 508.

³⁰ *Winter v. Ludlow*, 3 Phila. 464.

³¹ *U. S. v. Winans*, 73 Fed. 72.

³² Jud. Code, § 52, 36 St. at L. 1087.

³³ Jud. Code, § 53, 36 St. at L. 1087.

³⁴ *Galveston, H. & S. A. Ry. Co. v. Gonzales*, 151 U. S. 496, 38 L. ed. 248. But see *Winter v. Ludlow*, 3 Phila. 464.

³⁵ 26 St. at L., §§ 5, 210.

ant has a regular place of business in the district and has committed acts of infringement there.³⁶ At common law, where the State statutes permit the practice,³⁷ and in equity by leave of the court,³⁸ a receiver of a foreign railroad company may be served by leaving the writ with one of his station agents. It has been held that an attorney cannot accept service of a subpoena *ad respondendum* before the entry by him of a formal appearance;³⁹ but an acceptance and appearance by him without any authority may be ratified by estoppel.⁴⁰

§ 164. Service upon public corporations. If the United States are sought to be made parties defendant, the subpoena should be served upon the Attorney-General or the District Attorney of the district where the suit is brought.¹

"When process at common law or in equity shall issue against a State, the same shall be served on the Governor, or chief executive magistrate, and Attorney General of such State."² Service upon a municipal corporation in an action at common law should be in accordance with the state practice,³ which will usually be followed in suits in equity⁴ as well as at law.

§ 164a. Service upon Federal corporations. It has been held: that a corporation created by an act of Congress can, in the absence of a special statute of the United States, be served with process from a Federal court only in the district where its principal office is situated and its corporate business is transacted, and not in another district where it has stipulated, in accordance with the State statute, to accept service of process;¹ and in Pennsylvania, that, in the absence of an express provision in its

³⁶ Jud. Code, § 38, 36 St. at L. 1087; *supra*, § 62.

³⁷ *Eddy v. Lafayette*, 163 U. S. 456, 41 L. ed. 225.

³⁸ *Central Tr. Co. v. St. L. A. & T. Ry. Co.*, 40 Fed. 426.

³⁹ *U. S. v. Cooper*, 196 Fed. 584.

⁴⁰ *Cowden v. Wild Goose Mining & Trading Co.*, C. C. A., 199 Fed. 561.

§ 164. 1 *Hoffman's Ch. Pr.* 108; *Daniell's Ch. Pr.* (2d Am. ed.) 517, note 4.

² Supreme Court Rule 5; Grayson

v. Virginia, 3 Dall, 320, 1 L. ed. 619; *supra*, § 3.

³ *Amy v. Watertown*, 130 U. S. 301, 9 Sup. Ct. 530, 32 L. ed. 946.

⁴ *Eby v. Northern Pacific R. Co.*, 13 Phila. 144; § 164a.

§ 164a. 1 A. L. Wolff & Co. v. Choctaw, O. & G. R. Co., 133 Fed. 601. Cf. *Caledonian Coal Co. v. Barker*, 196 U. S. 432, 49 L. ed. 540; *Gould v. Texas & Pac. Ry. Co.*, N. Y. Sp. Tm. per Shearn, J., L. J. Dec. 15, 1916.

charter a corporation created by an act of Congress can be sued by service upon its president in any State.²

§ 164b. **Service upon domestic corporations.** When a suit is brought against a domestic corporation, that is, one chartered within the State which contains the district where the suit is brought, the subpoena should be served upon one of the officers; or where that is impossible, by leaving a copy at its principal place of business; or where it has no place of business nor officers within the State, by service upon its managing agents, or where there is no agent there, perhaps upon one of its stockholders.¹ Where the State practice prescribed a specific method of service, that must be followed in actions at common law,^{2a} and will usually be followed in a suit in equity.³ If not obnoxious to the Constitution, it is binding in a collateral proceeding;⁴ but when the proceeding is attacked by a motion to set aside the service upon a foreign corporation, the Federal court determines the objection for itself and is not necessarily controlled by the State law.⁵ When railroads were operated by receivers appointed by a Federal court it was held that the receivers might be served by service upon their managing agent within the State⁶ or by service upon the ticket agent who was also station master.⁷ An irregularity in service upon the agent of a corporation may be validated by his admission of service.⁸

² *Thornburgh v. Savage Mining Co.*, 1 Pac. Law Mag. 267.

§ 164b. ¹ *Daniell's Ch. Pr.* (1st Am. ed.) 564. "If a bill be filed against a corporation the process must be served upon some one of the members." Citing *Hinde's Ch. Pr.* 87, which uses the same words. But see *St. Clair v. Cox*, 106 U. S. 353, 359, 27 L. ed. 223, 226; *Rand v. Proprietors, etc., Co.*, 3 Day (Conn.), 441; *O'Brien v. Stair's F. & T. O. Co.*, 10 Cal. 343.

^{2a} *Amy v. Watertown*, 130 U. S. 301, 9 Sup. Ct. 530, 32 L. ed. 946; *Lemon v. Imperial Window Glass Co.*, 190 Fed. 927, holding that, in West Virginia, a corporation which had failed to fix its place of residence in the State, by appointing an

attorney resident in one of its counties might be served either by attachment and publication or by serving process upon the State auditor.

³ *Eby v. Northern Pac. R. Co.*, 13 Phila. 144. But see *infra*, § 455.

⁴ *Swarts v. Christie Grain & Stock Co.*, 166 Fed. 338.

⁵ *West v. Cincinnati, N. O. & T. P. Ry. Co.*, 170 Fed. 349, and cases cited *infra*.

⁶ *Jacobs v. Blair*, 157 App. Div. (N. Y.) 601.

⁷ *Missouri K. & T. Ry. Co. v. Hudson*, 174 Pac. 1058 (Oklahoma, Sept. 1918). See *infra*, § 314.

⁸ *Union Pac. Ry. Co. v. Novak*, C. C. A., 61 Fed. 573. Not, however, one by a statutory agent.

§ 164c. **Service upon foreign corporations.** When the jurisdiction rests solely upon the existence of a Federal question in a case which is not brought for the infringement of a patent or copyright nor against a surety company, nor under the statute against combinations in restraint of commerce nor under other special statutes, a District Court of the United States has no jurisdiction over a foreign corporation¹ which is not an alien. But when the defendant is an alien corporation,² or when jurisdiction is claimed on account of a difference of citizenship, a foreign corporation may be served with process in the State of the complainant's residence, provided it be "found" within the district.³

What constitutes such a finding is a matter hard to define with accuracy. If a State statute forbids a foreign corporation to transact business within its borders except upon condition that the corporation stipulate to allow legal process to be served upon it, and the company execute such a stipulation, not in express terms restricted to the process of a State court; it will be considered to apply to the Federal courts, and a subpoena from a Federal court may be served upon the foreign corporation in the same manner as a similar process of a State tribunal.⁴

Such condition and stipulation may be implied as well as expressed.⁵ If a State permits a foreign corporation to do business within her limits, and at the same time provides that, in suits against it for business there done, process shall be served upon its agents, the provision is deemed to be a condition of the permission; and corporations that subsequently do business in the State are deemed to assent to such conditions as fully as

Farmer v. Nat. Life Ass'n, 150 Fed. 829.

§ 164c. ¹ *McCormick H. M. Co. v. Walthers*, 134 U. S. 41, 33 L. ed. 833; *In re Keasby & Mattison Co.*, 160 U. S. 221, 40 L. ed. 402; *supra*, § 61.

² *In re Hohorst*, 150 U. S. 653, 37 L. ed. 1211; *Barrow S. S. Co. v. Kane*, 170 U. S. 100, 42 L. ed. 964.

³ *McCormick H. M. Co. v. Walthers*, 134 U. S. 41, 33 L. ed. 833; *supra*, § 61.

⁴ *Ex parte Schollenberger*, 96 U.

S. 369, 24 L. ed. 853; *Pennsylvania Lumbermen's Mutual Fire Ins. Co. v. Meyer*, 197 U. S. 407, 49 L. ed. 810; *Gale v. So. Building & L. Ass'n*, 117 Fed. 732; *Buckingham & Hecht v. North German Fire Ins. Co. of New York*, 149 Fed. 622; *Castagnino v. Mutual Reserve Fund Life Ass'n*, C. C. A., 157 Fed. 29. Overruling several cases to the contrary previously decided in the Circuit Courts.

⁵ *St. Clair v. Cox*, 106 U. S. 350, 358, 27 L. ed. 222, 225.

though they had specially authorized their agents to receive service of the process.⁶ Such condition must not, however, encroach upon that principle of natural justice which requires notice of a suit to a party before he can be bound by it.⁷ It must be reasonable, and the service provided for should be only upon such agents as may be properly deemed representative of the foreign corporation. It has been said, "that in the absence of a voluntary appearance, three conditions must concur or co-exist in order to give the Federal courts jurisdiction *in personam* over a corporation created without territorial limits of the State in which the court is held, viz: (1) It must appear as a matter of fact that the corporation is carrying on its business in such foreign State or district,⁸ (2) that such business is transacted or managed by some agent or officer appointed by and representing the corporation in such State; and (3) the existence of some local law making such corporation, or foreign corporations generally, amenable to suit there, as a condition, express or implied, of doing business in the State."⁹ It seems that by the common law a court has jurisdiction over a foreign corporation to enforce a cause of action arising in its territorial jurisdiction.¹⁰ Service upon a natural person is regulated solely by the Federal Statutes and decisions.¹¹

It has been said that service upon foreign corporations when the jurisdiction depends upon difference of citizenship must be made in accordance with the State statutes.¹²

Service upon an agent, who stood in no representative character to the company, or whose duties were limited to those of a

⁶ Mr. Justice Field in *St. Clair v. Cox*, 106 U. S. 350, 356, 27 L. ed. 222, 225; *Railroad Co. v. Harris*, 12 Wall. 65, 81, 20 L. ed. 354, 358; *Old Wayne Life Ass'n v. McDonough*, 204 U. S. 8, 21, 51 L. ed. 345, 350; *Hayden v. Androscoggin Mills*, 1 Fed. 93; *Estes v. Belford*, 22 Fed. 275.

⁷ *St. Clair v. Cox*, 106 U. S. 356, 27 L. ed. 222, 225.

⁸ *Contra*, *Sadler v. B. & B. Rubber Co.*, 140 App. Div. (N. Y.) 367.

⁹ *U. S. v. Am. B. Tel. Co.*, 29 Fed. 17, 35, per Jackson, J. See *Max-*

well v. Atchinson, T. & S. F. R. Co., 34 Fed. 286, 289; *Buffalo Glass Co. v. Manufacturer's Glass Co.*, 142 Fed. 373.

¹⁰ *Newby v. Von Oppen, etc., Co.*, L. R. 7 Q. B. 293.

¹¹ *Vitkus v. Clyde S. S. Co.*, 232 Fed. 288.

¹² *McCullough v. United Grocers Corporation*, 247 Fed. 880; *Boulton v. Int. Paper Co.*, C. C. A., 229 Fed. 951. But see *Henrietta Min. & Milling Co. v. Johnston*, 173 U. S. 221, 19 Sup. Ct. 402, 43 L. ed. 675.

subordinate employee,¹³ unless formally designated to receive service of process,¹⁴ or to a particular transaction¹⁵ or whose agency had ceased when the matter in dispute arose¹⁶ have been held to be insufficient. But where, while transacting business there, it had appointed an agent, for the purpose of the service of process, and his authority had not been revoked, the corporation was held to be subject to the jurisdiction.¹⁷ It has been held that after the United States Railroad Director had taken possession of a railroad, service upon his agent was not service upon the railroad company.¹⁸ It has been said that service upon an agent, otherwise competent, whose relations to the claim are such as to make it his interest to suppress the fact is insufficient.¹⁹ A State statute providing that a public officer shall be the attorney in fact for every foreign corporation doing business in the State and every non-resident domestic corporation, with authority to accept service of process on its behalf, is constitutional so far as actions upon contracts made within the State are concerned,²⁰ but not, it has been held, as regards suits upon contracts executed in another State with citizens of the State where the suit is brought, although the defendant has transacted some business in the latter State.²¹ A few cases in the lower

¹³ *St. Clair v. Cox*, 106 U. S. 350, 359, 360, 27 L. ed. 222, 226; *Mexican C. Ry. Co. v. Pinkney*, 149 U. S. 194, 37 L. ed. 699; *Maxwell v. Atchison, T. & S. F. R. Co.*, 34 Fed. 286; *Carron Iron Co. v. McClaren*, 5 H. L. C. 416; *Toledo Rys. & Light Co. v. Hill*, 244 U. S. 48; *Franco-American Chem. Co. v. McKee Glass Co.*, 232 Fed. 198; *American Oil & Supply Co. v. Western Gas Const. Co.*, C. C. A., 239 Fed. 505; *Boulton v. International Paper Co.*, 229 Fed. 951; *Knapp v. Bullock Tractor Co.*, 242 Fed. 543. See *Rakauskas v. Erie R. Co.*, 237 Fed. 495.

¹⁴ *Boulton v. Int. Paper Co.*, C. C. A., 229 Fed. 951.

¹⁵ *St. Clair v. Cox*, 106 U. S. 350.

¹⁶ *Peoples Tobacco Co. v. Am. Tobacco Co.*, 246 U. S. 69; *Cooper v. Brazelton. C. C. A.*, 135 Fed. 476;

Crews v. Illinois Commercial Men's Ass'n, 256 Fed. 268. But see *Ross v. Western Land & Irrigation Co.*, 223 Fed. 680.

¹⁷ *Hill v. Empire State-Idaho Mining & Developing Co.*, 156 Fed. 797.

¹⁸ *Wood v. Clyde S. S. Co.*, 257 Fed. 879.

¹⁹ *King Tonopah Min. Co. v. Lynch*, 232 Fed. 485.

²⁰ *Saint Mary's Franco-American Petroleum Co. v. West Virginia*, 203 U. S. 183, 51 L. ed. 144, 7 Ann. Cas. 1018; *Leyden v. Western Life Indemnity Co.*, 204 Fed. 687, where the statute was applied to a suit for a breach of contract with an agent.

²¹ *Old Wayne Life Ass'n v. McDonough*, 204 U. S. 8, 51 L. ed. 345; *Simon v. Southern Ry. Co.*, C. C. A., 195 Fed. 56. *Aff'd* 236 U. S. 115.

courts hold that no foreign corporation can be sued for a tort committed in another State or district.²² But where the defendant had filed a stipulation in pursuance of the statute, it was held that it was bound by service upon the party therein designated in suits upon causes of action in tort²³ or contract arising²⁴ elsewhere. If the statute so provides the service will be good after the defendant has withdrawn from the State so far as concerns contracts previously made²⁵ or subsequently made for performance in the state.²⁶ When the statute does not direct the officer served to give notice of the service to the corporation, it is unconstitutional.²⁷ It has been held that the Superintendent of the Insurance Department of the State of New York cannot be served by mail; and that he has no power to waive a defect in the service of process upon him so as to bind a foreign insurance company.²⁸ It seems that service upon the officer's deputy is sufficient.²⁹ The designation of an agent does not authorize service upon him in another district of the State than that where the suit was brought.³⁰ Service upon such an agent cannot be made without the limits of the territorial district.³¹ Where there are two or more districts in the State, service upon the agent in the district other than that where the suit is brought, cannot effect his principal³² except in the cases expressly excepted by statutes.³³

²² *Fry v. Denver & R. G. R. Co.*, 226 Fed. 893; *Atch., T. & S. F. Ry. Co. v. Weeks*, C. C. A., 254 Fed. 513. See *Simon v. Southern Ry. Co.*, 356 U. S. 115.

²³ *Smolik v. Phila. & R. Coal & I. Co.*, 222 Fed. 148; *Bagdon v. Phila. & R. Coal & I. Co.*, 217 N. Y. 432.

²⁴ *Penn. Fire Ins. Co. v. Gold Issue Min. & Milling Co.*, 243 U. S. 93.

²⁵ *Mitchell v. Nat. Surety Co.*, 206 Fed. 807; *Hagler v. Security Mut. Life Ins. Co.*, 244 Fed. 863; *Southern Paving Const. Co. v. Knoxville*, C. C. A., 245 Fed. 421.

²⁶ *Bankers Surety Co. v. Town of Holly*, 219 Fed. 96; *King Tonapah Mining Co. v. Lynch*, 232 Fed. 485.

²⁷ *Farmer v. National Life Ass'n*, 50 Fed. 829.

²⁸ *Bankers Surety Co. v. Town of Holly*, 219 Fed. 96.

²⁹ *Lukosewicz v. Phila. & R. Coal & I. Co.*, 232 Fed. 292; *Tauza v. Penn. R. Co.*, 232 Fed. 294.

³⁰ *Rakauskas v. Erie R. Co.*, 237 Fed. 495.

³¹ *Lukosewicz v. Philadelphia & Reading Coal & Iron Co.*, 232 Fed. 292.

³² *Tauza v. Pennsylvania R. Co.*, 232 Fed. 294.

³³ *Rakauskas v. Erie R. Co.*, 237 Fed. 495.

§ 164d. Transaction of business within a State or district.

In order thus to subject itself to the service of process the foreign corporation must actually transact business in the district where the suit is brought.¹ The transaction of business subsequent to the service of process does not affect the jurisdiction although it may be material evidence upon the question whether the corporation was transacting business in the State.² The maintenance of an office or storeroom, where goods are kept for sale,³ or where contracts are closed,⁴ or railroad tickets sold;⁵ the continuous solicitation of orders filled by shipments from the home office when the soliciting agent had authority to receive payment in cash, checks, drafts and notes, payable in

§ 164d. 1 *Cooper Mfg. Co. v. Ferguson*, 113 U. S. 727, 28 L. ed. 1137; *Hayden v. Androscoggin Mills*, 1 Fed. 93; *Zambrino v. Galveston, H. & S. A. Ry. Co.* 38 Fed. 449; *Riddle v. N. Y., L. E. & W. R. Co.*, 39 Fed. 290; *Maxwell v. Atchison, T. & S. F. R. Co.*, 37 Fed. 286; *Filli v. D., L. & W. R. Co.*, 37 Fed. 65; *Denton v. International Co. of Mexico*, 36 Fed. 1; *Block v. Atchison, T. & S. F. R. Co.*, 21 Fed. 529; *Johnson v. Computing Scale Co.*, 139 Fed. 339; *Phelps v. Connecticut Co.*, 188 Fed. 765; *Chinn v. Foster-Milburn Co.*, 195 Fed. 158; *Cody Motors Co. v. Warren Motor Car Co.*, 196 Fed. 254. That otherwise, the statute would be unconstitutional, was held in *Moredock v. Kirby*, 118 Fed. 180; *Cella Commission Co. v. Bohlinger, C. C. A.*, 8 L.R.A.(N.S.) 537, 147 Fed. 419. See *Brooks v. Dun*, 51 Fed. 138.

² *Frontier S. S. Co. v. Franklin S. S. Co.*, 233 Fed. 127.

³ *Cheney Bros. Co. v. Massachusetts*, 246 U. S. 147; *Toledo Computing Scale Co. v. Computing Scale Co.*, C. C. A., 142 Fed. 919; *Chadeloid Chemical Co. v. Chicago Wood Finishing Co.*, 180 Fed. 770. But

see *Hefner v. Am. Tube & Stamping Co.*, 163 Fed. 866.

⁴ *Sleicher v. Pullman Co.*, 170 Fed. 365; *Michigan Aluminum Foundry Co. v. Aluminum Castings Co.*, 190 Fed. 879. Where the corporation acted as a broker of grain and stock it was held to transact business in a State where it maintained an office, at which orders, written or oral, were received by persons called its correspondents, the correspondents participating in neither the loss nor the profits of the transaction. *Board of Trade v. Hammond Elevator Co.*, 198 U. S. 424, 49 L. ed. 1111.

⁵ *Chesapeake & O. Ry. Co. v. Stojanowski, C. C. A.*, 191 Fed. 720; *Rakauskas v. Erie R. Co.*, 237 Fed. 295; *Mauser v. Union Pac. R. Co.*, 243 Fed. 274. But not the maintenance of an office where are sold coupon passenger tickets attached to other tickets for transportation over railroads operated by other companies. *Phila. & R. Ry. Co. v. McKibbin*, 243 U. S. 264, 37 Sup. Ct. 280; *Earle v. Chesapeake & O. Ry. Co.*, 127 Fed. 235; *Gen. Inv. Co. v. Lake Shore & M. So. Ry. Co.*, 226 Fed. 976; *aff'd C. C. A.*, 250 Fed.

the forum;⁶ the execution of a single contract for the installation of machinery upon foundations constructed there for this purpose;⁷ the transportation of merchandise for hire from ports there on boats put into commission, repaired and laid up for the winter;⁸ the shipment by a mining company of a large part of its product by boat into the forum and the rest by rail to a city therein;⁹ the maintenance of an office there by its president where he performs his presidential duties,¹⁰ or the maintenance there of an office where the executive business of the company is transacted,¹¹ are sufficient to authorize service within a foreign State.

An insurance company is engaged in business in a State where it is accustomed to send its agents there to adjust fire losses.¹² But not an incorporated insurance association with no office in the State which issues certificates of membership to residents although its by-laws obligate every member to use his influence in the interest of the association.¹³ An insurance company does not cease to do business in a State where it receives premiums upon policies previously issued there; although such premiums are sent by the insured to an agent in another State, and the company issues no new policies in the former State.¹⁴ It has been held that service upon an agent of a foreign cor-

160; *Granstein v. Rutland, R. Co.*, 256 Fed. 409.

⁶ *International Harvester Co. v. Kentucky*, 234 U. S. 579, 585. *Cf.* *Kirby v. Louismann-Capen Co.*, 221 Fed. 267; *Knapp v. Bullock Tractor Co.*, 242 Fed. 543; *Knapp v. Bullock Tractor Co.*, 242 Fed. 543; *Franco-American Chemical Co. v. McKee Glass Co.*, 232 Fed. 198; *American Oil & Supply Co. v. Western Gas Construction Co.*, C. C. A., 239 Fed. 509; *Boulther v. International Paper Co.*, C. C. A., 229 Fed. 951; *Davis v. B. & O. R. Co.*, 256 Fed. 407.

⁷ *Beach v. Kerr Turbine Co.*, 243 Fed. 706.

⁸ *Frontier S. S. Co. v. Franklin S. S. Co.*, 233 Fed. 127. (When at the time of service no boats of the

defendant were within the district.)

⁹ *Empire Fuel Co. v. Lyons, C. C. A.*, 257 Fed. 890.

¹⁰ *Washington-Virginia Ry. Co. v. Real Estate Trust Co., of Philadelphia*, 238 U. S. 185; *Revens v. So. Mo. & A. R. Co.*, 114 Fed. 982.

¹¹ *Real Estate Trust Co. of Philadelphia v. Washington-Virginia Ry. Co.*, 204 Fed. 678.

¹² *Pennsylvania Lumbermen's Mutual Fire Ins. Co. v. Meyer*, 197 U. S. 407, 49 L. ed. 810. But see *Louden Machinery Co. v. Malleable Iron Co.*, 127 Fed. 1008.

¹³ *Tomlinson v. Iowa State Traveling Men's Ass'n*, 251 Fed. 171.

¹⁴ *Connecticut Mut. Life Ins. Co. v. Spratley*, 172 U. S. 602, 43 L. ed. 569.

poration, who has been sent into the State to negotiate with the plaintiff for a settlement of the controversy, is sufficient; although the company has never done any other business within the jurisdiction.¹⁵ The holding of directors' meetings is an element to be considered in determining whether a corporation is found within the State,¹⁶ so is the transfer of stock.¹⁷ It has been held that the following acts do *not* amount to a transaction of business within the State, which will subject a foreign corporation to the jurisdiction of the courts, State or Federal, there held: The residence of three directors of the corporation and its assistant secretary, who, at various times, received and gave information indirectly affecting the business of the corporation elsewhere.¹⁸ The residence of the officers or directors served, and a by-law providing that the directors may meet within the district once a month, where there is no proof of a compliance with such by-law.¹⁹ The maintenance of an office for the registration of transfers of stock, the meeting of the directors at the office of one of them, and the maintenance of a bank account, where it was not shown what business had been transacted at such meetings, nor how recently before the attempted service such meeting had been held.²⁰ The presence of the principal officers of a corporation when they have with them property of the corporation merely for

¹⁵ Brush Creek Coal & Min. Co. v. Morgan-Gardner El. Co., 136 Fed. 505 (W. D. Mo.); Geo. Wm. Bentley Co. v. Chivers & Son, Ltd., 215 Fed. 959. See Connecticut Mutual Life Ins. Co. v. Spratley, 172 U. S. 602, 43 L. ed. 569; where, however, the company was transacting business within the State. *Smithson v. Roneo, Ltd.*, 231 Fed. 350. *Contra*, *Louden Machinery Co. v. Am. Malleable Iron Co.*, 127 Fed. 1008 (S. D. Ia.); *Craig v. Welch Motor Car Co.*, 165 Fed. 554; *Union Water Development Co. v. Stevenson*, 256 Fed. 981; *Buffalo Sandstone Brick Co. v. American Sandstone Brick Machinery Co.*, 141 Fed. 211 (W. D.

N. Y.); *Wilkins v. Queen City Savings Bank & Trust Co.*, 154 Fed. 173 (S. D. N. Y.); *Hoyt v. Ogden Portland Cement Co.*, 185 Fed. 889 (N. D. N. Y.); where service upon the president was said to be insufficient.

¹⁶ *Sleicher v. Pullman Co.*, 170 Fed. 365.

¹⁷ *Ibid.*, *Westinghouse A. B. Co. v. Great N. Ry. Co.*, C. C. A., 88 Fed. 258.

¹⁸ *Earle v. Chesapeake & O. Ry. Co.*, 127 Fed. 235.

¹⁹ *Conley v. Mathieson Alkali Works*, 190 U. S. 406, 408, 411, 47 L. ed. 1113, 1114, 1115.

²⁰ *Honeyman v. Colorado Fuel & Iron Co.*, 133 Fed. 96.

the purpose of exhibition.²¹ The attendance of the secretary of the corporation upon the taking of depositions, in a suit to which his company is a party.²² The transaction of business by another company of which it owns practically the entire stock.²³ The lease by a foreign to a domestic corporation of personal property, and the payment by the latter to the former of a part of the profits derived from the use of such property within the jurisdiction of the court.²⁴ The acceptance of a lease by a railroad within a State, where the terms of the lease did not appear.²⁵ The negotiation of loans upon a mortgage, and a successful application to have the bonds thereby secured listed on the stock exchange.²⁶ The previous payment of coupons.²⁷ A single act of business, such as the making of a contract there for the sale of an article to be manufactured elsewhere and there delivered, when there was no purpose to do any other business or to have a place of business within the district.²⁸ The maintenance of an office with an agent merely for the solicitation of business and without authority to make contracts²⁹ although samples are shown in such

²¹ *Carpenter v. Westinghouse Air-Brake Co.*, 32 Fed. 434. See *Reifsnider v. American Imp. Pub. Co.*, 45 Fed. 433; *Donovan v. Dixieland Amusement Co.*, 152 Fed. 661. See *Cody Motors Co. v. Warren Motor Car Co.*, 196 Fed. 254.

²² *Ladd Metals Co. v. American Mining Co.*, 152 Fed. 1008.

²³ *Peterson v. Chicago, R. I. & Pac. Ry. Co.*, 205 U. S. 364, 51 L. ed. 841; *Phila. & R. Ry. Co. v. McKibbin*, 243 U. S. 264, 268, 37 Sup. Ct. 280; *Peoples Tobacco Co. v. Am. Tobacco Co.*, 246 U. S. 79, 87.

²⁴ *U. S. v. Am. B. Tel. Co.*, 29 Fed. 17.

²⁵ *Green v. Chicago B. & Q. Ry. Co.*, 147 Fed. 767.

²⁶ *Clews v. Woodstock Iron Co.*, 44 Fed. 31.

²⁷ *Toledo Rys. & Light Co. v. Hill*, 244 U. S. 48.

²⁸ *Cooper Mfg. Co. v. Ferguson*,

113 U. S. 727, 735, 28 L. ed. 1137, 1139; *Good Hope Co. v. Railway B. F. Co.*, 22 Fed. 635; *Maxwell v. Atchison, T. & S. F. R. Co.*, 34 Fed. 286; *Frawley v. Pennsylvania Cas. Co.*, 124 Fed. 259. *Cf. Doe v. Springfield B. Co.*, C. C. A., 104 Fed. 684; *Eirich v. Donnelly C. Co.*, C. C. A., 105 Fed. 1.

²⁹ *Green v. Chicago, B. & Q. Ry. Co.*, 205 U. S. 530, 51 L. ed. 916; *People's Tobacco Co. v. Am. Tobacco Co.*, 246 U. S. 79, 87; *Denver & Rio Grande R. Co. v. Roller Co.*, C. C. A., 49 L.R.A. 77, 100 Fed. 738; *Weller v. Pennsylvania R. Co.*, 113 Fed. 502; *Earle v. Chesapeake & O. Ry. Co.*, 127 Fed. 235; *Buffalo Glass Co. v. Manufacturers' Glass Co.*, 142 Fed. 273; *McGuire v. Great Northern Ry. Co.*, 155 Fed. 230; *West v. Cincinnati, N. O. & T. P. Ry. Co.*, 170 Fed. 349; *Hefner v. Am. Tube & Stamping Co.*, 163 Fed. 866;

office³⁰ and repairs there made.³¹ The maintenance of a purchasing office when the purchases must be approved at the home office.³² The transportation of its freight cars moved by another carrier who allows it a proportionate share of the freight.³³ The insertion of its name and number in a telephone directory.³⁴ The collection of news paid for by the item.^{34a} Advertisements.^{34b}

Where the business within the State has ceased, and there is no official appointment of an agent for the service of process outstanding unrevoked, service upon a former agent is insufficient.³⁵ Service upon an agent is insufficient unless he represents the defendant in the transaction of business within the State or district.³⁶ Service upon the president,³⁷ secretary,³⁸ or other prin-

William Grace Co. v. Henry Martin Brick Mach. Mfg. Co., C. C. A., 174 Fed. 131; *Fawkes v. Am. Motor Car Sales Co.*, 176 Fed. 1010; *Cody Motors Co. v. Warren Motor Car Co.*, 196 Fed. 254; *Harasimowicz v. Penna. R. Co.*, 232 Fed. 295. See *Tomlinson v. Iowa State Traveling Men's Ass'n*, 251 Fed. 171; *W. S. Tyler Co. v. Ludlow Saylor Wire Co.*, 236 U. S. 723.

³⁰ *Cody Motors Co. v. Warren Motor Car Co.*, 196 Fed. 254; *Hovey v. De Long Hook & Eye Co.*, N. Y. Sup. Ct., Sp. Tm. (N. Y.), N. Y. L. J., June 2, 1914.

³¹ *Fawkes v. Am. Motor Car Sales Co.*, 176 Fed. 1010.

³² *Johanson v. Alaska Treadwell Gold Min. Co.*, 225 Fed. 270.

³³ *Phila. & R. Ry. Co. v. McKibbin*, 243 U. S. 264, 266.

³⁴ *Phila. & R. Ry. Co. v. McKibbin*, 243 U. S. 264, 268.

^{34a} *Evansville Courier Co. v. United Press*, 74 Fed. 918.

^{34b} *Boardman v. S. S. McClure Co.*, 123 Fed. 614.

³⁵ *People's Tobacco Co. v. Am. Tobacco Co.*, 246 U. S. 79; *Cooper v. Brazelton*, C. C. A., 135 Fed. 476.

³⁶ *Partola Mfg. Co. v. Norfolk & W. Ry. Co.*, 250 Fed. 273; *Peterson v. Chicago, R. I. & Pac. Ry. Co.*, 205 U. S. 364, 51 L. ed. 841; *Atchison & S. F. Ry. Co. v. Weeks*, 248 Fed. 970, 977; *Ryan v. Ohmer*, 233 Fed. 165.

³⁷ *Phila. & R. Ry. Co. v. McKibbin*, 243 U. S. 264; *Carpenter v. Westinghouse Air-Brake Co.*, 32 Fed. 434; *Hoyt v. Ogden Portland Cement Co.*, 185 Fed. 889. The New York courts no longer follow the state statute (Code of Civil Procedure, § 432) authorizing service upon a foreign corporation by delivering a copy of the summons to the president, secretary or treasurer within the State, whether the defendant transacts business there or not. *Bagdon v. Phila. & Reading Coal & Iron Co.*, 217 N. Y. 432, *Pope v. Terre Haute Car & Mfg. Co.*, 87 N. Y. 137; *Sadler v. Boston & Bolivia Rubber Co.*, 140 App. Div. (N. Y.) 367, *aff'd* 202 N. Y. 547; *Mallory v. Virginia Hot Springs Co.*, New York Supreme Court (Kings County, Sp. Tm.) N. Y. L. J. February 13, 1913.

³⁸ *Phelps v. Connecticut Co.*, 188

cipal officers³⁹ of a foreign corporation within the State, is not sufficient to confer jurisdiction upon the court, unless the corporation is found there or waives the objection.

A surety company may be served in any district where it is found in a suit upon a bond or undertaking given in such district under the statutes of the United States.⁴⁰ Service upon a surety company is made upon its agent in the district appointed by it for that purpose or in his absence, or, in case there is no such appointment, by service upon the clerk of the court where the suit is brought.⁴¹ Such service must be personal.⁴²

Service of process in the manner prescribed by the State practice may subject a foreign corporation to the jurisdiction of the Federal court, in a case over which the State statutes deprive her courts of jurisdiction because the cause of action arose without the State.⁴³

By stipulation in the suit, a corporation may be estopped from objecting that a person upon whom service was made was not authorized to represent it.⁴⁴

The return of a sheriff or marshal as to service upon a foreign corporation is presumed to be correct.⁴⁵ The marshal's return may be amended.⁴⁶ It has been held that after removal the sheriff's return cannot,⁴⁷ but that its defects may be cured by affidavit.⁴⁸ The return may be contradicted.⁴⁹

§ 165. Substituted service of a subpoena. Independently of an express statutory authority, there is no power in a court

Fed. 765; *Knapp v. Bullock Tractor Co.*, 242 Fed. 543.

³⁹ *Carpenter v. Westinghouse Air-Brake Co.*, 32 Fed. 434; *Union Water Development Co. v. Stevenson*, 256 Fed. 981; *Smithson v. Roneo, Ltd.*, 231 Fed. 350.

⁴⁰ 28 St. at L., p. 279, *supra*, § 61.

⁴¹ *Ibid.*

⁴² *U. S. v. Southern Dredging Co.*, 251 Fed. 400.

⁴³ *Carstairs v. Mechanics' and Traders' Ins. Co. of N. Y.*, 13 Fed. 823.

⁴⁴ *Cowden v. Wild Goose Mining*

& Trading Co., C. C. A., 199 Fed. 561. But see *Phila. & R. Ry. Co. v. McKibbin*, 243 U. S. 264, 269.

⁴⁵ *Nickerson v. Warren City Tank & Boiler Co.*, 223 Fed. 843.

⁴⁶ *Fountain v. Detroit M. & T. S. L. Ry. Co.*, 210 Fed. 982.

⁴⁷ *Boulthbee v. International Paper Co.*, C. C. A., 22a Fed. 951.

⁴⁸ *Gen. Inv. Co. v. Lake Shore & M. S. Ry. Co.*, C. C. A., 250 Fed. 16.

⁴⁹ *U. S. v. Southern Bridging Co.*, 251 Fed. 400.

of equity to order actual personal service to be effected upon a defendant beyond its territorial jurisdiction;¹ but, in a few cases, such courts have for more than a century assumed the power of ordering service to be made within their jurisdiction upon some person for the absent defendant, and have treated such service as valid.² In suits to stay proceedings at law in the same court, the service of a subpoena upon the attorney of the plaintiff at law may be allowed, and it will then bind the latter if he be beyond the territorial jurisdiction of the court.³ It has been held that this cannot be done after the judgment at law has been enforced, since the attorney's authority to represent his client is then terminated.⁴ Nor where an injunction is also asked against a non-resident, who is not a party to the suit a stay of which is prayed;⁵ unless he is in privity with one of the original defendants, in which case it was held, that service might be made upon him in another district.⁶

A similar practice would in all probability be allowed in serving process under bills not original; namely, bills of revivor, supplemental bills, and bills of revivor and supplement, which are nothing more than continuations of the suits upon which they operate,⁷ unless they bring in new parties not the personal representatives of one who has died pending the suit. A defendant who is charged by a supplemental bill with estoppel by the decree because he controlled the defense cannot thus be

§ 165. ¹ This passage was quoted and approved by Maxey, J., in *Batt v. Proctor*, 45 Fed. 515, 516.

² *Hales v. Sutton*, 1 Dickens, 26; s. c., *sub. nom.* *Hallett v. Sutton*, 12 Simons, 145, note; *Carter v. De Brune*, 1 Dickens, 39; *Hyde v. Forster*, 1 Dickens, 102; *Lady Carrington v. Cantillon*, Bunb. 107; *Hobhouse v. Courtney*, 12 Simons, 140, and cases there cited; *Daniell's Ch. Pr.* (2d Am. ed.) 502-508.

³ *Dunn v. Clarke*, 8 Pet. 1, 8 L. ed. 845; *Hitner v. Suckley*, 2 Wash. 465; *Eckert v. Bauert*, 4 Wash. 370; *Ward v. Seabry*, 4 Wash. 426; *Read v. Consequa*, 4 Wash. 174; *Bartlett v. Sultan of Turkey*, 19 Fed. 346.

See also *Logan v. Patrick*, 5 Cranch, 288, 3 L. ed. 103; *Dunlap v. Stetson*, 4 Mason, 349.

⁴ *Kamms v. Stark*, 1 Sawyer, 547.
⁵ *Manning v. Berdan*, 132 Fed. 382.

⁶ *O'Connor v. O'Connor*, 146 Fed. 994.

⁷ *Norton v. Hepworth*, 1 H. & T. 158; *Dunn v. Clarke*, 8 Pet. 1, 8 L. ed. 845, p. 449a. But see *Henderson v. Meggs*, 2 Brown Ch. C. 127; *Anderson v. Lewis*, 3 Brown Ch. C. 429; *Gardiner v. Mason*, 4 Brown Ch. C. 478. This passage was quoted with approval by *Morrow, J.*, in *Shainwald v. Davids*, 66 Fed. 701, 703.

served.⁸ So, it has been held: That, under a bill to reform an insurance policy pending an action at law upon the policy, a subpoena may be thus served upon the attorney for the party to the action at law.⁹ That under a bill to enjoin the prosecution of a suit to compel the transfer of stock, a subpoena may be served upon the attorney for the plaintiff in the former suit.¹⁰ And that under a bill to collect out of equitable assets a decree of the same court of equity for costs, such service of a notice without a subpoena is sufficient.¹¹ The Federal courts have refused to extend this class of cases so as to include a bill of interpleader, two of the defendants to which were engaged in an action between themselves in the same court concerning the same matter,¹² although in England such a mode of service might have been allowed.¹³

Nor, it seems, can a subpoena thus be served under a bill to set aside a sale made under a decree of the same court to which persons are joined as defendants who were not parties to the former suit.¹⁴

Substituted service of a subpoena to appear and answer to a cross-bill has been allowed,¹⁵ but not when the cross-bill sought to introduce new and distinct matters into original suit.¹⁶ The safer practice when a defendant to a cross-bill can-

⁸ *G. & C. Merriam Co. v. Saalfeld*, 241 U. S. 22.

⁹ *Abraham v. North German Fire Ins. Co.*, 3 L.R.A. 188, 37 Fed. 731.

¹⁰ *Kelley v. T. L. Smith Co., C. U. A.*, 196 Fed. 466.

¹¹ *Maitland v. Gibson*, 79 Fed. 136.

¹² *Herndon v. Ridgway*, 17 How. 424, 15 L. ed. 100. See § 157. *Ves. & B.* 407. See § 157.

¹³ *Martinius v. Helmuth*, G. Cooper, 248; *Stevenson v. Anderson*, 2 *Ves. & B.* 407. See § 157.

¹⁴ *Pacific R. Co. of Mo. v. Mo. Pac. Ry. Co.*, 3 Fed. 772; s. c., on appeal, 111 U. S. 505, 522, 28 L. ed. 498, 504.

¹⁵ *Johnson R. R. S. Co. v. Union S. & S. Co.*, 43 Fed. 331, § 201;

Kingsbury v. Buckner, 134 U. S. 650, 676, 33 L. ed. 1047, 1057; *Lowenstein v. Glidewell*, 5 Dill. 325; *Sawyer v. Gill*, 3 Woodb. & M. 97; *Segee v. Thomas*, 3 Blatchf. 11; *Hitner v. Suckley*, 2 Wash. 465; *Anderson v. Lewis*, 3 Brown Ch. C. 429; *Gardiner v. Mason*, 4 Brown Ch. C. 478; *Waterton v. Croft*, 5 Simons, 502; *infra*, § 201.

¹⁶ *Rubber Co. v. Goodyear*, 9 Wall. 807; *Heath v. Erie Ry. Co.*, 9 Blatchf. 316; *Lowenstein v. Glidewell*, 5 Dillon 325; *Ledbetter v. Mandell*, 141 App. Div. (N. Y.) 556, *aff'd* 205 N. Y. 537. But see *Kingsbury v. Buckner*, 134 U. S. 650, 676, 33 L. ed. 1047, 1057. See *infra*, § 201.

not be served personally seems to be to procure an order staying his proceedings in the original cause until he answers the cross-bill.¹⁷ Substituted service of process or notice upon a petition of intervention is allowed in the same cases in which it would be allowed upon a cross-bill.¹⁸ Substituted service has also been allowed in England upon the agent of a defendant beyond the jurisdiction, who had authority to represent the latter with respect to the property which was the subject of the suit.¹⁹ When substituted service is wished, an order must be obtained that service upon the attorney employed in the former suit or action shall be deemed good service.²⁰ If service be made upon the attorney without such an order having been obtained, it may be set aside,²¹ and all subsequent proceedings will be void.²² The motion for such an order ordinarily may be *ex parte*.²³ It must be supported by an affidavit, made by the plaintiff or by some person having personal knowledge of the facts therein stated, setting forth the reasons why such service is necessary and verifying the allegations of the bill.²⁴ Written admissions of the defendant may, however, be sufficient to support the motion without such affidavit.²⁵ A previous request of the attorney and his refusal to accept service of the subpoena are not a necessary preliminary to such a motion.²⁶ Where the bill is demurrable for want of equity, the motion for substituted serv-

¹⁷ *Sawyer v. Gill*, 3 W. & M. 97; *Segee v. Thomas*, 3 Blatchf. 11; *Hitner v. Suckley*, 2 Wash. 465; *Ander-son v. Lewis*, 3 Brown Ch. C. 429; *Gardiner v. Mason*, 4 Brown Ch. C. 478; *Watertown v. Croft*, 5 Simons, 502.

¹⁸ *Fidelity T. & S. D. Co. v. Mobile St. Ry. Co.*, 53 Fed. 850; *infra*, § 259.

¹⁹ *Hobhouse v. Courtney*, 12 Sim. 140; *Fidelity T. & S. D. Co. v. Mobile St. Ry. Co.*, 53 Fed. 850; *Gasquet v. Fidelity T. & S. V. Co.*, C. C. A., 57 Fed. 80; *Gregory v. Pike*, 79 Fed. 520.

²⁰ *Pacific Ry. Co. of Mo. v. Mo. Pac. Ry. Co.*, 3 Fed. 772; s. c., 1

McCary, 647; *Daniell's Ch. Pr.* (2d Am. ed.) 502.

²¹ *Ibid.* *Johnston-Brown Co. v. Dela. L. & W. R. Co.*, 239 Fed. 590.

²² *Gregory v. Pike*, 79 Fed. 520.

²³ *Daniell's Ch. Pr.* (2d Am. ed.) 502. But see *Crew v. Martin*, 1 *Fowler Ex. Pr.* 225.

²⁴ *Pacific Ry. Co. of Mo. v. Mo. Pac. Ry. Co.*, 3 Fed. 772; s. c., 1 *McCary*, 647; *Delancy v. Wallis*, 3 *Brown's C. C.* 12; *Stephen v. Cini*, 4 *Ves.* 359; *Kenworthy v. Aceunor*, 3 *Madd.* 550.

²⁵ *Royal Exch. Ins. Co. v. Ward*, 1 *Fowler Ex. Pr.* 225.

²⁶ *French v. Roe*, 13 *Ves.* 593.

ice may be denied.²⁷ Where the order has been improvidently made, it may be set aside on motion at the same term.²⁸

§ 165a. Service in suits where receivers have been appointed. Where in a suit in which a receiver has been appointed, land or other property of a fixed character which is the subject of the suit lies within different states in the same circuit, and the appointment of the receiver is not disapproved by the Circuit Court of Appeals or Circuit Judge, the Judicial Code provides: "Process may issue and be executed within any district and circuit in the same manner and to the same extent as if the property were wholly within the same district; but orders affecting such property shall be entered of record in each district in which the property affected may lie or be."¹ It has been held that this authorizes process in a suit brought by the receiver to protect the property in one district to be served in any district in the State.² Such service was upheld in a suit by a receiver of a natural gas company to enjoin State officers and commissions in different States from enforcing orders regulating price of gas.³

§ 166. Statutory service of a subpoena. The statutes of the United States, which in this respect are analogous to those of England,¹ provide; "That when in any suit, commenced in any district court of the United States, to enforce any legal or equitable lien upon or claim to, or to remove any incumbrance or lien or cloud upon the title to real or personal property within the district where such suit is brought, one or more of the defendants therein shall not be an inhabitant of or found within the said district, or shall not voluntarily appear thereto, it shall be lawful for the court to make an order directing such absent defendant or defendants to appear, plead, answer, or demur by a day certain to be designated, which order shall be served on such absent defendant or defendants, if practicable, whenever found, and also upon the person or persons in

²⁷ *Muhlenburg County v. Citizens' Nat. Bank*, 65 Fed. 537.

²⁸ *Fidelity T. & S. D. Co. v. Mobile St. Ry. Co.*, 53 Fed. 850.

¹ 165a. 1 Jud. Code § 56, 36 St. at L. ch. 231, p. 1102, Comp. St. § 1038. See *supra*, §§ 61, 64.

² *Landon v. Public Utilities Commission*, 234 Fed. 152, 157.

³ *Ibid.*

§ 166. 12 Wm. IV, ch. 33; 4 & 5 Wm. IV, ch. 82.

possession or charge of said property, if any there be; or where such personal service upon such absent defendant or defendants is not practicable, such order shall be published in such manner as the court may direct, not less than once a week for six consecutive weeks. In case such absent defendant shall not appear, plead, answer, or demur within the time so limited, or within some further time to be allowed by the court, in its discretion, and upon proof of the service or publication of said order, and of the performance of the directions contained in the same, it shall be lawful for the court to entertain jurisdiction, and proceed to the hearing and adjudication of such suit in the same manner as if such absent defendant had been served with process within the said district; but said adjudication shall, as regards said absent defendant or defendants without appearance, affect only the property which shall have been the subject of the suit and under the jurisdiction of the court therein, within such district; and when a part of the said real or personal property against which such proceedings shall be taken shall be within another district, but within the same State said suit may be brought in either district in said State: *Provided, however,* That any defendant or defendants not actually personally notified as above provided may, at any time within one year after final judgment in any suit mentioned in this section, enter his appearance in said suit in said Circuit court, and thereupon the said court shall make an order setting aside the judgment therein permitting said defendant or defendants to plead therein on payment by him or them of such costs as the courts shall deem just; and according to law."² It seems that this statute applies to the District Court for Porto Rico in a case where the same has general jurisdiction.³

The statute applies, although there is but one defendant.⁴

² Jud. Code, § 57, 36 St. at L. 1087. A similar method of service is authorized in bankruptcy, in case personal service cannot be made. 30 St. at L., § 18, pp. 544, 551; *infra*, § 97. All statutes which authorize proceedings against absent defendants and unknown heirs upon serv-

ice by publication must be strictly followed. *Hunt v. Wickliffe*, 2 Pet. 201; *Boswell v. Otis*, 9 How. 336. 13 L. ed. 164.

³ *Perez v. Fernandez*, 220 U. S. 224, 55 L. ed. 443.

⁴ *Ames v. Holderbaum*, 42 Fed. 341; *Wheelwright v. St. L. N. O.*

It is no defense to such a suit that neither of the defendants thus served, nor the plaintiff, is a resident of the district.⁵ Nor, it has been held, that the property in question has been attached by a State sheriff.⁶

§ 166a. Cases in which statutory service can be made. Process can thus be served in an action of ejectment;¹ in a suit to foreclose a railway,² or other mortgage,³ but not so as to justify a decree for the deficiency against a mortgagor, who does not appear;⁴ in a suit to foreclose an attorney's lien upon personalty⁵ a stockholders' lien upon the books and funds of a foreign corporation, after its dissolution, in the State of its domicile.⁶

Process may thus be served in a partition suit⁷ and a suit to quiet title to real or personal property;⁸ for example, a suit by the United States to cancel land patents,⁹ or by a private individual to cancel a deed,¹⁰ or by stockholders to set aside a

& O. C. Tr. Co., 50 Fed. 709; *supra*, § 61.

⁵ *Ibid.*

⁶ *Wheelwright v. St. L., N. O. & O. C. & Tr. Co.*, 50 Fed. 709; *supra*, § 56.

¹ *Spencer v. Kansas City S. F. Co.*, 56 Fed. 741.

² *Farmers' L. & Tr. Co. v. Houston & T. C. Ry. Co.*, 44 Fed. 115.

³ *Du Pont v. Abel*, 81 Fed. 534.

⁴ *Ibid.*

⁵ *Ingersoll v. Coram*, 211 U. S. 335, 53 L. ed. 208; reversing on another point *C. C. A.*, 148 Fed. 169; modifying and affirming 136 Fed. 689.

⁶ *Kent v. Honsinger*, 167 Fed. 619.

⁷ *German Sav. & Loan Soc. v. Tull*, *C. C. A.*, 136 Fed. 1.

⁸ *U. S. v. Southern Pac. Ry. Co.*, 63 Fed. 481; *U. S. v. American Lumber Co.*, 80 Fed. 309; *Evans v. Charles Scribner's Sons*, 58 Fed. 303; *Duff v. First Nat. Bank*, 13 Fed. 65; *Dick v. Foraker*, 155 U. S. 404, 39 L. ed. 201; *Citizens' Sav. & Trust Co. v. Illinois Cent. R. Co.*,

205 U. S. 46, 51 L. ed. 703; *Miller v. Ahrens*, 150 Fed. 644; *Evans v. Charles Scribner's Sons*, 58 Fed. 303. See *Canton Roll & Machine Co. v. Rolling Mill Co. of America*, 155 Fed. 321; *Gage v. Riverside Trust Co.*, 156 Fed. 1002; *Schultz v. Diehl*, 217 U. S. 594, 54 L. ed. 896; *Jellenik v. Huron Copper Mining Co.*, 177 U. S. 1, 44 L. ed. 647; *State Nat. Bank v. Syndicate Co.*, 178 Fed. 359; *Howard v. Nat. Telephone Co.*, 182 Fed. 215; *Sohege v. Singer Mfg. Co.*, *Ch. N. J.*, Nov. 1907. As to validity of statutes authorizing similar methods of service in the State courts, see *Hart v. Sanson*, 110 U. S. 151, 28 L. ed. 101; *Arndt v. Griggs*, 134 U. S. 316, 33 L. ed. 918; *Roller v. Holly*, 176 U. S. 398, 44 L. ed. 520.

⁹ *U. S. v. Southern Pac. Ry. Co.*, 63 Fed. 481; *U. S. v. American Lumber Co.*, 80 Fed. 309.

¹⁰ *Dick v. Foraker*, 155 U. S. 404, 39 L. ed. 201; *Citizens' Sav. & Trust Co. v. Illinois Cent. R. Co.*, 205 U. S. 46, 51 L. ed. 703; *Miller v. Ahrens*, 150 Fed. 644; *Evans v.*

judgment in the district against a foreign corporation obtained by non-residents,¹¹ or to cancel stock¹² and bonds,¹³ or by claimants to shares of stock in a domestic corporation to set aside an unlawful transfer of their shares and enforce their right to new certificates,¹⁴ although the stock certificates and bonds sought to be cancelled are held by non-residents outside of the jurisdiction; but not where the corporation is domiciled without the district even it has been held, if it appears therein, when the stock is held by a non-resident defendant;¹⁵ nor, it has been held, in a suit by a subscriber to a syndicate, to enforce his right to stock, in which the managers had invested the syndicate funds.¹⁶ Process may thus be served in a suit to establish the existence of a lost document which is a muniment of the title to lands in the possession of the complainant.¹⁷ An absent judgment debtor may thus be served in a suit by the creditor to appropriate his assets;¹⁸ but the statute does not authorize a simple contract creditor to maintain a creditor's bill, to set aside a fraudulent conveyance of property.¹⁹ Process may thus be served; in a suit by a receiver to adjust equities between himself and non-resident defendants, when a resident defendant has obtained for his own benefit, as well as theirs, a judgment within the jurisdiction, which he is seeking to en-

Charles Scribner's Sons, 58 Fed. 303. See *Canton Roll & Machine Co. v. Rolling Mill Co. of America*, 155 Fed. 321; *Gage v. Riverside Trust Co.*, 156 Fed. 1002.

¹¹ *Schultz v. Diehl*, 217 U. S. 594, 54 L. ed. 896.

¹² *Howard v. Nat. Telephone Co.*, 182 Fed. 215; *Hudson Nav. Co. v. Murray*, 233 Fed. 466, s. c., 236 Fed. 419.

¹³ *State Nat. Bank v. Syndicate Co.*, 178 Fed. 359; *Thompson v. Emmett Irr. Dist.*, C. C. A., 227 Fed. 560.

¹⁴ *Jellenik v. Huron Copper Mining Co.*, 177 U. S. 1, 44 L. ed. 647; *Sobege v. Singer Mfg. Co.*, Ch. N. J., Nov. 1907. See *Merritt v. Am.*

Steel Barge Co., 79 Fed. 228; *Ryan v. Seaboard R. Co.*, 83 Fed. 889; *Gideon v. Representatives Securities Corp.*, 232 Fed. 184. *Contra*, *Kilgour v. N. O. G. L. Co.*, 2 Woods, 144.

¹⁵ *McKane v. Burke*, 132 Fed. 688.

¹⁶ *Jones v. Gould*, C. C. A., 149 Fed. 153; affirming 141 Fed. 698.

¹⁷ *Virginia & W. Virginia Coal Co. v. Charles*, C. C. A., 251 Fed. 83.

¹⁸ *Brigham v. Ludington*, 12 Blatchf. 237. Compare *Picquet v. Swan*, 5 Mason, 35; s. c., 5 Mason, 561.

¹⁹ *Canton Roll & Machine Co. v. Rolling Mill Co.*, 155 Fed. 321.

force against the fund in the receiver's hands.²⁰ In a suit by the creditors of a corporation to set aside a conveyance of its land and a mortgage of its personalty, and also to obtain a dissolution of the corporation and a receiver.²¹ In a suit by a bondholder, to restrain the trustee of his mortgage from paying to the mortgagor, in fraud of his rights, the proceeds of the sale of land, which, by the terms of the mortgage, should be used as a sinking fund for the redemption of the bonds.²² In a suit to enjoin a foreign corporation from interfering with the complainant's right of way for a telegraph line.²³ In a suit to compel specific performance of a contract to sell real estate in a State whose laws make a decree, where the defendant does not appear, as effectual as a conveyance by him;²⁴ but where there was no such statute it was held that process could not thus be served.²⁵ Nor, it has been held, where the relief sought requires the performance, by the non-resident defendant, of a personal act, such as the acceptance of a building and pavement for the same, which cannot, like the execution of a deed, be performed on his behalf by a master.²⁶ It has been suggested that a lien on partnership assets may be thus enforced.²⁷

The phrase, "claim to . . . property;" is used in the statute in contrast to liens or encumbrances upon the property and relates only to claims in the nature of an assertion of ownership or proprietary interest, or other direct right or claim to the property itself.²⁸ The statute does not apply

²⁰ *Brown v. Pegram*, 143 Fed. 701.

²¹ *Mellen v. Moline Iron Works*, 131 U. S. 352, 33 L. ed. 178; *Single v. Scott Paper Mfg. Co.*, 55 Fed. 553, 557.

²² *Pollitz v. Farmers' Loan & Trust Co.*, 39 Fed. 707.

²³ *Western Union Tel. Co. v. Louisville & N. R. Co.*, 229 Fed. 234.

²⁴ *Morrison v. Marker*, 93 Fed. 692.

²⁵ *Municipal Inv. Co. v. Gardiner*, 62 Fed. 954; *Nelson v. Husted*, 182 Fed. 921. See *Spurr v. Scoville*, 3 Cushing (Mass.) 578. But see *So-*

hege v. Singer Mfg. Co., Ch. N. J., Nov. 1907.

²⁶ *York County Sav. Bank v. Abbott*, 139 Fed. 988. See § 64, *supra*, § 441, *infra*.

²⁷ *Jackson v. Hooper*, 171 Fed. 597.

²⁸ *Ladew v. Tennessee Copper Co.*, 179 Fed. 245, 251, per Sanford, J.: "There appears to be no direct adjudication upon the question whether a claim of this character may be properly considered a claim to property within the meaning of the statute. The statement in *Shainwald v. Lewis* (D. C.) 5 Fed. 310, 317,

to a suit by a general creditor who has acquired no lien by contract, execution, or otherwise.²⁹ The statute does not apply to a suit by a trustee in bankruptcy to set aside a preferential assignment to a non-resident of a debt due the bankrupt.³⁰ Nor to a suit by a bondholder secured by a mortgage against the lessee of the mortgagor and the purchaser of the mortgage property for

that by the words 'legal or equitable lien or claim against real or personal property' Congress 'intended to reach every case in which there should be any sort of charge upon a specific piece of property, capable of being enforced by a court of equity' which is cited in 1 Rose's Code, Fed. Pro. § 856, note C, as authority for a similar statement, was purely obiter; the only point involved in the case being that Rev. St. § 738, in which these words originally occurred, did not apply to a suit in which the plaintiff sought to subject the general property of the defendant to the payment of its debts, but only to suits to enforce some pre-existing lien or claim upon a specific piece of property. Neither is the question controlled by the definition of the word 'claim' given by Mr. Justice Story in *Prigg v. Pennsylvania*, 16 Pet. 536, 615, 10 L. ed. 1060, as 'a demand of some matter as of right, made by one person upon another, to do or forbear to do some act or thing as a matter of duty,' this definition being given in a case involving the construction of a statute providing that slaves should be delivered up 'on claim of the party' to whom their service was due; the meaning of the word 'claim' as used in a statute of this character in reference to the 'claim of' one person upon another to do a certain thing, being manifestly different from its meaning as used in

the act of 1875 in reference to the claim of one person 'to' the property of another. Evidently its meaning as used in the act of 1875 in the phrase a 'claim to * * * property' is much more nearly expressed by the next definition cited by Mr. Justice Story in this same opinion, as given by Lord Dyer in *Stowel v. Zouch*, 1 Plowd, 359, that:

" 'A claim is a challenge by a man of the propriety or ownership of a thing, which he has not in possession, but which is wrongfully detained from him.' On the whole, I am of the opinion that as it appears from the concluding portion of this section that it relates entirely to suits of which property is the 'subject,' and as the words 'claim to * * * property' are evidently used in contrast to liens or encumbrances upon property and are the only words in the section under which a claim to the direct ownership of property may be included, these words relate only to claims made to the property in the nature of an assertion of ownership or proprietary interest, or other direct right or claim to the property itself," affirmed *Ladew v. Tennessee Copper Co.*, 218 U. S. 357, 54 L. ed. 1069.

²⁹ *Bank of Commerce & Trust v. M'Arthur*, 248 Fed 139.

³⁰ *Murphy v. Ford Motor Co.*, 241 Fed. 134.

an accounting and an application of the rent to the payment of his bonds.³¹

The statute does not apply to all suits of a local nature,³² nor to a suit in equity to enjoin a nuisance.³³ Nor to a suit to set aside a transfer of insurance policies, issued by a foreign insurance company and not within the district although secured by bonds within the district,³⁴ nor to a suit to collect an insurance policy, issued by a domestic corporation, when a necessary party, is a non-resident.³⁵ Nor to a suit by an Insurance Company, paying for an inspection of the vital organs of the insured, which are in the custody of a clerk of a State court.³⁶ Nor to a suit by heirs against testamentary trustees, to recover a balance in the hands of the defendants.³⁷ Nor to a suit upon a bond, given to release an attachment by a State court.³⁸ Nor to a suit to establish and enforce a right of membership in the Associated Press, in a district where the latter corporation is not domiciled; although the right is to be exercised in such district.³⁹ Nor to a suit to cancel a promissory note.⁴⁰ It has been held that a subpoena cannot thus be served when the main object of the bill is for an accounting by an absent and non-resident defendant, although there is also a prayer for the appointment of a receiver of property within the district;⁴¹ but it seems that service can thus be made in a suit to establish a trust in real estate although the bill prays an accounting.⁴² Process cannot thus be served in a suit to remove a cloud upon the title to a patent-right although the official letters-patent evidencing the patent-right are within the jurisdiction.⁴³

³¹ *Wabash R. Co. v. West Side Belt R. Co.*, 235 Fed. 645.

³² *Ladew v. Tennessee Copper Co.*, 218 U. S. 357, 54 L. ed. 1069; affirming 179 Fed. 245.

³³ *Ibid.*

³⁴ *Evans v. Charles Scribner's Sons*, 58 Fed. 303. *Contra*, under a State Statute. *Perry v. Young* (Tenn. 1916), 182 S. W. 577.

³⁵ *Stockbridge v. Phoenix Mut. Life Ins. Co.*, 193 Fed. 558.

³⁶ *Mutual Life Insurance Company of New York v. Painter*, 220 Fed. 998.

³⁷ *Fayerweather v. Ritch*, 89 Fed. 385.

³⁸ *Filer & Stowell Co. v. Rainey*, 120 Fed. 718.

³⁹ *Lawrence v. Times Printing Co.*, 90 Fed. 24.

⁴⁰ *Manning v. Berdan*, 132 Fed. 382.

⁴¹ *Ellis v. Reynolds*, 35 Fed. 394. But see *Porter Land & Water Co. v. Baskin*, 43 Fed. 323.

⁴² *Porter Land & Water Co. v. Baskin*, 43 Fed. 323.

⁴³ *Non-Magnetic Watch Co. v. Association H. S. of Geneva*, 44 Fed.

The property affected must be actually, and not merely constructively, within the district.⁴⁴

In a suit affecting the title to shares of the capital stock of the corporation these shares are ordinarily held to be property located in the State⁴⁵ where the corporation was organized irrespective of the location of the certificates.⁴⁶

The court within the district where a will was probated cannot thus acquire jurisdiction of a suit against an absent executor, who has removed the funds from the State;⁴⁷ but after the jurisdiction of the Federal court has attached, it seems that it cannot be defeated by an order of the State court directing such a removal.⁴⁸ The existence of property within the district should be stated positively and not by inference.⁴⁹

§ 166b. Practice in statutory service of a subpoena. It has been held at circuit: that an order in pursuance of this statute may be obtained immediately on filing the bill, upon proof by affidavit that the defendant does not dwell within the district, and cannot be served or found therein;¹ that there is need in such case of a previous attempt to serve a subpoena within the district;² that the day named for his appearance need not be one of the rule-days of the court;³ that personal service of the order must be made in all cases where the residence of the absent defendant is known or can be made within a reasonable time and by the exercise of reasonable diligence; that its service by publication can only be authorized upon proof by affidavit of

6; *Standard Gas Power Co. of Ga. v. Standard Gas Power Co. of Dela.*, 224 Fed. 990.

⁴⁴ *Chase v. Wetzlar*, 225 U. S. 79, 56 L. ed. 990; *Meisukas v. Greenough Red Ash Coal Co.*, 244 U. S. 54.

⁴⁵ *Jellenik v. Huron Copper Min. Co.*, 177 U. S. 1, 44 L. ed. 647; *Gideon v. Representative Securities Corp.*, 232 Fed. 184; *Hudson Nav. Co. v. Murray*, 233 Fed. 466, s. c., 236 Fed. 419; *Holmes v. Camp*, 219 N. Y. 359, 114 N. E. 841.

⁴⁶ *Black v. Foreman Bros. Banking Co.*, 218 Fed. 264; *Beal v. Carpenter*, C. C. A., 235 Fed. 273; *Kil-*

gour v. Northern Gas Light Co., 2 Woods 144.

⁴⁷ *Chase v. Wetzlar*, 225 U. S. 79, 56 L. ed. 990.

⁴⁸ *Ingersoll v. Coram*, 211 U. S. 335, 359, 53 L. ed. 208, 225; reversing on another point C. C. A., 148 Fed. 169; modifying and affirming 136 Fed. 689.

⁴⁹ *Jackson v. Hooper*, 171 Fed. 597, 598.

§ 166b. ¹ *Forsyth v. Pierson*, 9 Fed. 801; *U. S. v. American Lumber Co.*, 80 Fed. 309. But see *Bronson v. Keokuk*, 2 Dill. 498.

² *Ibid.*

³ *Forsyth v. Pierson*, 9 Fed. 801.

the facts showing that personal service without the jurisdiction is impracticable;⁴ that the order itself must be served; and that

⁴ *Bronson v. Keokuk*, 2 Dill. 498; *Batt v. Proctor*, 45 Fed. 515. *Cf. Marx v. Egner*, 180 U. S. 314. 45 L. ed. 547; *Hicks v. Crawford Coal & Iron Co.*, 190 Fed. 334. In *Jacob v. Roberts*, 223 U. S. 261, 264, 265, 56 L. ed. 429, 431, the following affidavit in proceedings in the State court which were attacked collaterally, when it had been supported by a sheriff's return that the defendant was not found within the district, was held to be sufficient: "That the cause of action is fully set forth in his verified complaint on file herein; that said defendants, or either or any of them, after due diligence, cannot be found within this State, and this affiant, in support thereof, states the following facts and circumstances: That affiant, for the purpose of finding said defendants and ascertain their place of residence, has made due and diligent inquiry of the old residents of the City of San Diego, the former neighbors of said defendants, and is informed by D. Choate, who has lived in the City of San Diego over twenty-five years, that he thinks the defendants are not within the State of California, and he does not know of their residence and has not heard anything of them, or either of them or of their residence or post-office address, for more than twenty years, and this affiant is informed by George W. Hazzard, who has lived in San Diego for over twenty-five years that he has no knowledge as to the whereabouts of the said defendants or either of them. Plaintiff also made inquiry of Ed. Dougherty, who is an old resident of San Diego, and said Ed. Dougherty in-

formed plaintiff that he did not know the address or residence or where the defendants, or either of them, could be found, and did not believe that they were in the State." The affidavit also stated that inquiry was made of certain county, and city officers and that they all—"stated to affiant that they did not know the residence of the defendants or either of them, their post-office address or where they could be found; and none of the above-named parties had heard of the post-office address or residence of the defendants, or either of them, since they have resided in the said city of San Diego. The affiant has made other diligent inquiry to find said defendants, or either or any of them, and has not been able to find them or any of them within—. The affiant has no knowledge of the residence or post-office address of the defendants or either of them or where the defendants, or either of them, could be found. This affiant, therefore, says that personal service of said summons cannot be made on the defendants—Thomas E. Jacob, Thomas Hobson, Edward Hobson, Jacob Hobson and Frank Hobson, or either or any of them." The court said (267): "We have set out the affidavit. It shows inquiry of the whereabouts of plaintiffs in error of their former neighbors and other residents of San Diego. One of them replied that he had not heard of them, of their residence or post-office address, for over twenty-five years. Another also had not heard from them and did not believe they were in the State. Inquiry was also made of nineteen

the requirements of the statute are not met by service of a subpoena by the marshal of the other district, in accordance with an order so directing, made by the court where the suit is pending.⁵

When the person in possession was made a defendant and personally served with process within the jurisdiction, it was held that service of the order upon him was not required.⁶

The affidavit should state the known places of residence of the absent defendants, and show that diligence has been used to ascertain the places of residence which are unknown.⁷ The fact that it would be very expensive to make personal service upon the absent defendant whose residence was known was held no ground for allowing service by publication.⁸ If the absent defendant reside in another district of the United States, the safer practice is to obtain an order directing the marshal of that district to serve him.⁹

A substantial misnomer of a defendant, thus served, who does not appear, will invalidate the whole proceedings.¹⁰ A defendant

county officers and three state officers, sheriffs, county clerks; tax collectors, county and state; assessors, county and state, and of the postmasters of the State. Neighbors, residents and officers who, in the intercourse and business of life would almost necessarily come in contact with plaintiffs in error or hear from them, had no knowledge of them. It may, however, be said, and indeed it is said, that other parts of the State were not searched, and that this was necessary, as the process of the court could run to every county in the State. The requirement is extreme and we are cited to no cases in which it is decided to be necessary. The affidavit shows besides that defendant in error made diligent inquiry to find plaintiffs in error and had no knowledge of their residence or post-office address or of either of them or where they or either of them could be found. We think plaintiffs in error were afforded due process."

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⁵ *Jennings v. Johnson*, C. C. A., 148 Fed. 337; *Kent v. Honsinger*, 167 Fed. 619.

⁶ *Black v. Foreman Bros. Banking Co.*, 218 Fed. 264.

⁷ *Batt v. Proctor*, 45 Fed. 515. An affidavit sworn to four months previously was held to be insufficient. *Spreen v. Delsignore*, 94 Fed. 71.

⁸ *Batt v. Proctor*, 45 Fed. 515.

⁹ *Bronson v. Keokuk*, 2 Dill. 498; *Forsyth v. Pierson*, 9 Fed. 801.

¹⁰ *Meyer v. Kuhn*, 65 Fed. 705.

In *Fanning v. Krapf*, 61 Iowa, 417, 420, the court said: "A published notice is not necessarily sufficient if it is such that the defendant, upon actually seeing it, would probably conclude that it was intended for him. The office of the notice is in part to give the pendency of the action notoriety. It should be such that others than the defendant, seeing it and knowing the defendant, or knowing of him, would not prob-

whose name is misspelled in the process; the publication and the address cannot safely because of the misnomer ignore the

ably be misled by it as to the person for whom it was intended."

In *Karr v. Karr*, 19 N. J. Eq. 427, the court said: "Two substantial parts of the notice are that it shall not be entitled in the cause and shall be directed to the defendant. The notice published is entitled in the cause and is not directed to the defendant, although he was named in the title." In *Pana v. Bowler*, 107 U. S. 529, 27 L. ed. 424, it was held that the publication by an Illinois court of a notice to the "unknown holders and owners of bonds issued by the town of Pana" was *insufficient* to acquire jurisdiction over non-resident bondholders. *Priest v. Trustees of Las Vegas*, 232 U. S. 604, 610, publication of a notice against the "unknown claimants of the interests in the premises and lands described in the complaint who claim adversely to the complainants" which complainants were named; should not bind the town where the land was situated nor any other persons who could be definitely located and served with process.

In *Meyer v. Kuhn*, 65 Fed. 705, C. C. A., per Fuller, C. J., it was held that publication of a summons against "Sarah E. Meyers, and the unknown heirs of Henry Meyers, deceased," was insufficient to acquire jurisdiction over Elizabeth Meyer, who was the executrix and devisee of Henry Meyer, deceased, and was so described in the bill.

In *Virginia & W. Virginia Coal Co. v. Charles*, 251 Fed. 83, 141, held that an advertisement of a general tax sale which named one of the

owners as "Robert" instead of "Richard" did not bind Richard.

In *D'Autremont v. Anderson Iron Co.* (Minn., May, 1908), 116 N. W. 357; that a judgment against George W. Leslie was not affected by a partition suit in which the judgment creditor was named in service by publication as George H. Leslie. In *Hardester v. Sharretts*, 84 Md. 146, 34 Atl. 1122, that where a bill was filed "against the unknown heirs of the children of Benjamin Hardester, deceased," a publication summoning the children of Abraham Hardester was insufficient, although they were the persons referred to in the bill and came within that description, Abraham being the son of Benjamin. In *Purdy v. Henslee*, 97 Ill. 389, that a publication addressed to "the unknown heirs and legal representatives of Thomas Osborn, deceased," was insufficient to bring the heirs at law of Susanna Osburn before the court, although her heirs at law were the same as those of Thomas.

In *Ferriss v. Louis*, 2 Tenn. Ch. 291, that a publication against the unknown heirs of Doolin did not bring before the court Doolin's devisees in remainder. In *Corrigan v. Schmidt*, 126 Mo. 304, 28 S. W. 874; that service by publication against "Owen Corrigan" and "Elisha Corrigan" did not bind John Owen Corrigan and Elizabeth Alicia Corrigan. In *Colton v. Rupert*, 60 Mich. 318, 27 N. W. 520, that a publication against "Grant B. Hunt" did not bind Garrett B. Hunt. In *Entrekim v. Chambers*, 11 Kan. 368, that service by pub-

proceeding.¹¹ Where there has been a misnomer the test of the validity of the service is neither whether the names are *idem sonans* nor whether there is a substantial similarity in appearance in print; but whether the writ as published and mailed gives sufficient constructive notice to the party erroneously named.¹² A defect in personal service, or the fact that personal

lication against "Robert Brimford" did not bind Robert Brimford. In *Chamberlain v. Blodgett*, 96 Mo. 482, 10 S. W. 44, that a publication against "M. B. Miller" did not bind M. B. Millen, although the tract books of the county gave the name of the landowner as Miller. In *Marx v. Hanthorn*, 148 U. S. 172, 37 L. ed. 410, that notice of the sale for taxes of the property of "Ida J. Hawthorn" gave no jurisdiction over the property of Ida J. Hanthorn. In *Gonzalla v. Barelsman*, 143 Ill. 634, 32 N. E. 532, that an affidavit referring to "Fred Meyers" could not be construed as applicable to Fred Meyer. But see *Smurr v. State*, 88 Ind. 504. In *Detroit v. Detroit City Ry. Co.*, 54 Fed. 1, that where the advertisement named the defendant as "The Washington Trust Co.," a Michigan court did not acquire jurisdiction over "The Washington Trust Co. of the City of New York."

¹¹ *Grannus v. Ordeau*, 234 U. S. 385.

¹² In *Grannis v. Ordean*, 234 U. S. 385, it was held that a summons served by publication and mail upon Albert B. Geilfuss, assignee, was sufficient, although it described him as "Albert Guilfuss, assignee." In *Steinmann v. Strimple*, 29 Mo. App. 478, it was held that an order intended for Benjamin F. S. was sufficient when directed to Frank S., that being the name by which Ben-

jamin was usually known. In *Lane v. Innes*, 43 Minn. 137, 45 N. W. 4, that a change of the name of "Berlah M. Plimpton" to "Beulah M. Plimpton" was not fatal. In *Snyder v. Parezo*, 151 App. Div. (N. Y.) 110, that a partition sale was valid when the parties had been designated, by publication, under thirteen fictitious names, as "being fictitious, and being intended to designate the wife, if any, of the said Lawrence Kelly, and if he be dead, his widow, heirs at law, devisees, and their legal representatives, and their wives, widows, or husbands, if any, and the heirs at law, devisees, and legal representatives of any who may be dead." In *Emery v. Kipp*, 154 Cal. 83, 19 L.R.A. (N. S.) 983, 129 Am. St. Rep. 141, 16 Ann. Cas. 792, 97 Pac. 17, that a judgment quieting the title to land deeded to a woman under the name of Louisa Munro was not void because, when sued, she was married and was known as Madeline Louisa Munro Emery, the record of her marriage designating her as Madeline L. Munro. In *D'Autremont v. Anderson Iron Co.*, 104 Minn. 165, 17 L.R.A. (N.S.) 236, 124 Am. St. Rep. 615, 15 Ann. Cas. 114. In *Green v. Myers* (Mo. App.), 72 S. W. 128, that Seibert and Sibert are *idem sonans*, and the variance between them immaterial. In *Gottlieb v. Alton Grain Co.*, 87 App. Div. (N.

service was obtained by fraud, will not prejudice proceedings regularly taken under this statute.¹³ Where the publication was duly made, the premature entry of a decree before the statutory time for answer had expired is an irregularity which does not make the decree void or subject to collateral attack.¹⁴

No personal judgment can be entered against a defendant who does not appear.¹⁵ But such a clause in a judgment although void does not invalidate so much as affects the title to the property.¹⁶

This statute does not change the law as to the difference of citizenship essential to jurisdiction.¹⁷ It has been doubted whether it can be applied to a suit removed from a State court.¹⁸ Compliance with State statutes providing for service upon non-residents, by publication¹⁹ or by attachment,²⁰ will not give a Federal court jurisdiction either in law or equity except in a case which has been removed when the Federal Court will continue the jurisdiction acquired by publication under the State statute provided that is due process of law.²¹

State statutes are void which authorize a judgment against a nonresident or absentee on five days notice,²² or personal judgment upon publication against a person who has left the State with the intention not to return.²³ In the State courts judg-

Y.) 380, a judgment against W. B. Gottlieb was enforced by an action in another State against William B. Gottlieb. In *White v. McClellan*, 62 Md. 347, that the omission of a middle initial of a party's name did not invalidate the notice; and in *Fanning v. Krapf*, 61 Iowa, 417; s. c., 68 Iowa, 544, 14 N. W. 727, 16 N. W. 293, 26 N. W. 133, and *Buchanan v. Roy's Lessee*, 2 Ohio St. 257, that the publication was sufficient where the names were incorrectly spelled but they were accompanied by another description which made the identification clear.

¹³ *Fitzgerald & M. C. Co. v. Fitzgerald*, 137 U. S. 98, 34 L. ed. 608.

¹⁴ *Sheffey v. Davis Colliery Co.*, 219 Fed. 465.

¹⁵ *Albert v. Bascom*, 245 Fed. 149.

¹⁶ *Andes v. Highland Land & Building Co.*, C. C. A., 205 Fed. 862.

¹⁷ *Tug River Coal & Salt Co. v. Brigel*, 67 Fed. 625.

¹⁸ *Adams v. Heckscher*, 80 Fed. 742, 744.

¹⁹ *Bracken v. Union Pac. Ry. Co.*, C. C. A., 75 Fed. 347; s. c., 56 Fed. 447.

²⁰ *U. S. v. Brooke*, 184 Fed. 341.

²¹ *Hudson Nav. Co. v. Murray*, 236 Fed. 419.

²² *Roller v. Holly*, 176 U. S. 398.

²³ *McDonald v. Mabec, March*, 1917, 243 U. S. 90, 37 Sup. Ct. 343.

ments by substituted service of process against residents temporarily absent from the State have been sustained.²⁴

An order of a Federal Court for such service is, when attacked collaterally, at least *prima facie* evidence of the existence of the jurisdictional facts.²⁵

Upon a motion to vacate the order for substituted service, the sufficiency of the bill may be considered and the order vacated, where the bill shows no cause for relief in equity; although the subject matter is within the statute.²⁶ It has been held: that the order for service may be set aside as to part of the bill and left in force as to the remainder.²⁷

The right of the defendant to appear and defend within a year is absolute.²⁸ It is not lost because he had knowledge of the proceedings.²⁹ The court cannot impose any other condition than that prescribed by the statute, namely, the payment of costs.³⁰ An order requiring the application to show a meritorious defense to the bill is erroneous.³¹ Where the defendants, who have been served by publication, appear and defend upon the merits, the suit is converted from a proceeding *in rem* to a suit *in personam*.³²

The Act of June 29, 1906, which authorizes proceedings to cancel certificates of citizenship, provides: "If the holder of such certificate be absent from the United States or from the district in which he last had his residence, such notice shall be given by publication in the manner provided for service of summons by publication or upon absentees by the laws of the State or the place where such suit is brought." ³³

In the eastern district of Louisiana, it was held to be sufficient

²⁴ *Huntley v. Baker*, 33 Hun (N. Y.) 578; *Grubel v. Nassauer*, 210 N. Y. 149. But see *Raher v. Raher*, 150 Iowa 511; *Nicholas v. Vaughan* (Mass.), 105 N. E. 376.

²⁵ *Woods v. Woodson*, C. C. A., 100 Fed. 515.

²⁶ *Canton Roll & Machine Co. v. Rolling Mill Co.*, 155 Fed. 321; *Gage v. Riverside Trust Co.*, 156 Fed. 1002.

²⁷ *Evans v. Charles Scribner's Sons*, 58 Fed. 303.

²⁸ *Perez v. Fernandez*, 220 U. S. 224, 55 L. ed. 443.

²⁹ *Ibid.*

³⁰ *Ibid.*

³¹ *Ibid.*

³² *Beamer v. Werner*, C. C. A., 159 Fed. 99. See *Ingersoll v. Coram*, 136 Fed. 689, 692, 693; affirmed 211 U. S. 335, 53 L. ed. 208, which reversed C. C. A., 148 Fed. 169.

³³ Ch. 3592 § 15, 34 St. at L. 596, 601, Comp. St. Supp. 1909, p. 485.

to serve the notice upon an attorney-at-law, appointed *curator ad hoc* to represent an absentee, without publication.²⁴

§ 167. Exemptions from service of subpoena or other process, legal or equitable, other than arrest. Chief Justice Marshall, in the course of the trial of Aaron Burr, ordered that a *subpœna duces tecum* should issue against President Jefferson. Jefferson, however, refused to obey the subpoena, while expressing his perfect willingness to furnish the paper desired, if requested in what he considered a proper way. The dispute went no farther.¹ Subsequently, a motion was made for leave to file a bill in the Supreme Court, praying for an injunction against President Johnson to restrain him from executing the reconstruction laws. The Attorney-General then took the position that the President was not amenable to process; but that point was not then and has not since been decided.² On the trial of Guiteau for the murder of President Garfield, a written statement signed by President Arthur was admitted in evidence, by consent without his personal attendance.³ No other officer or person has claimed to be above the law.

²⁴ U. S. v. Ellis, 185 Fed. 546.

§ 167. ¹ Burr's Trial.

² Mississippi v. Johnson, 4 Wall. 475, 18 L. ed. 437. See Jefferson's Works, vol. v, p. 102.

³ Guiteau's Trial, 741, 896. In Coler v. Brooklyn Eagle, New York Supreme Court (Kings County), the plaintiff requested President Roosevelt to give his testimony. The following answer was received: "Hon. Bird S. Coler; The President of the United States does not testify in court nor does he give evidence by deposition. Wm. Loeb, Jr., Secretary." Plaintiff then applied for an order to show cause why a commission should not issue. His application was denied by Thomas, J., as follows: "The order to show cause is denied for the following reasons: First, the papers do not show that the evidence sought relates to the plaintiff. This is tech-

nical. Second, the Executive of a sovereign nation may, with the highest right and dignity, decide whether he will lay aside his official duties to become a witness in the court of another jurisdiction and if the evidence pertain to his duties as a Governor of a State some eight years earlier his refusal to testify would be doubly justified. In the present instance, through his secretary, he has made a statement tantamount to such refusal and the issuance of a commission would be a useless if not indecorous act, inasmuch as he is the Commander-in-Chief of the army and navy of the United States, and in effect paramount executive authority in the District of Columbia, and his refusal could not and should not be gainsaid. The law and its history may be found in the appeal of Hartranft 85 Penn. 433, 27 Amer-

The Federal Constitution provides that Senators and Representatives "shall in all cases, except Treason, Felony, and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same."⁴ This has been construed at circuit to exempt them from service of process, unaccompanied by arrest of the person, when on their way to attend a session of Congress;⁵ and it has been further held that such exemption is not lost by a slight deviation from the most direct road to the capital.⁶ In a State court the privilege has been extended to members of a Constitutional Convention.⁷

In certain cases individuals are temporarily exempt from the service of process. A person temporarily and voluntarily within the district for the purpose of attending, in a State⁸ or Federal⁹ court, either as witness,¹⁰ or as party,¹¹ or as attorney, or coun-

ican Reporter 667. See also *Rice v. Austin* 19 miscellaneous 103." (N. Y. Sun, February 10, 1909.)

⁴ Const., art. I, § 6.

⁵ *Miner v. Markham*, 28 Fed. 387.

⁶ *Miner v. Markham*, 28 Fed. 387.

⁷ *Bolton v. Martin*, 1 Dallas, 296, 1 L. ed. 144.

⁸ *Juneau Bank v. McSpedan*, 5 Biss. 64; *Matthews v. Tufts*, 87 N. Y. 568.

⁹ *Parker v. Hotchkiss*, 1 Wall. Jr. 269; *U. S. v. Bridgman*, 8 Am. L. Rec. 541; *Brooks v. Farwell*, 2 McCrary, 220; s. c., 4 Fed. 167; *Bridges v. Sheldon*, 7 Fed. 17; *Matthews v. Puffer*, 10 Fed. 606; *Larned v. Griffin*, 12 Fed. 590.

¹⁰ *Stewart v. Ramsay*, 242 U. S. 128; *Person v. Grier*, 66 N. Y. 124, 23 Am. Rep. 35, and cases there cited; *Kauffman v. Kennedy*, 25 Fed. 785. A non-resident voluntarily came to another jurisdiction to plead to an indictment against him, under which he might have been compulsorily removed, and on the same day was served with a subpoena requiring him to testify be-

fore a Grand Jury on a specified date. He then appeared and testified and was directed, without service of further process, to reappear eight days later. He then again attended and was not asked to testify further, but was privately interrogated by an assistant district attorney, and while leaving the Federal Building was served with a summons in a civil action brought in the State court. After removal of the case, the Federal court set aside the summons. *Dwelle v. Allen*, 193 Fed. 546. The Appellate Division of the New York court held subsequently to the contrary. *Dwelle v. Allen*, 151 App. Div. (N. Y.) 717.

¹¹ *Parker v. Hotchkiss*, 1 Wall. Jr. 269; *Juneau Bank v. McSpedan*, 5 Biss. 64; *Matthews v. Tufts*, 87 N. Y. 568; *Brooks v. Farwell*, 2 McCrary, 220; s. c., 4 Fed. 167; *Bridges v. Sheldon*, 7 Fed. 17; *Matthews v. Puffer*, 10 Fed. 606; *Larned v. Griffin*, 12 Fed. 590; *Read v. Neff*, 207 Fed. 890; *Stewart v. Ramsay*, 242 U. S. 128; *Smith v. Govern-*

sel¹² a trial¹³ or other proceedings,¹⁴ civil or criminal,¹⁵ including the argument of a demurrer,¹⁶ or attendance before a coroner's jury,¹⁷ or a referee in bankruptcy¹⁸ or to have his deposition taken¹⁹ or to attend the hearing of a motion;²⁰ is, while there, exempt from the service of process *eundo, morando, et redeundo*.²¹ The officer of a corporation which is a party is entitled to the same privileges as if he were a party himself.²² Service upon a foreign corporation by delivering the process to its secretary while attending court as a witness in the corporation's litigation is invalid.²³ A similar exemption would probably be applied to any person while temporarily within the district in the discharge of a public duty.²⁴ The privilege of a

ment of Canal Zone, 249 Fed. 273; *Diamond v. Earle* (Mass.), May, 1914, 105 N. E. 363. A service of process, made upon a party attending specially the trial of a case in another State, was set aside by a Federal court, although the suit was begun in a court of the State whose courts held such service good. *Holt v. Wharton*, C. C. A., 73 Fed. 392. But see *Skinner & Mounce Co. v. Waite*, 155 Fed. 828.

¹² *Matthews v. Tufts*, 87 N. Y. 568.

¹³ *Read v. Neff*, 217 Fed. 890; *contra*, *Robbins v. Lincoln*, 27 Fed. 342; *Coleman v. Tim*, 18 W. N. C. Pa. 240; *Greenleaf v. Bank*, 133 N. C. 292, 49 S. E. 638, 63 L.R.A. 499, 98 Am. St. Rep. 709; *Nelson v. McNulty* (Minn.), January, 1917, 160 N. E. 795; *Kutner v. Hodnett*, 59 Misc. (N. Y.) 21, per Hendrick, J.; *Paul v. Stuckey* (Ark.), 189 S. W. 676, L.R.A. 1917 B. 888. See *Hoffman v. Bay Circuit Court*, 113 Mich. 109, 71 N. W. 480, 38 L.R.A. 663, 67 Am. St. Rep. 458.

¹⁴ *U. S. v. Bridgman*, 8 Am. Law Record. 541; *Newton v. Askew*, 6 Hare, 319; *Matthews v. Tufts*, 87 N. Y. 568; *Parker v. Marco*, 136 N. Y. 585, 20 L.R.A. 45, 32 Am.

St. Rep. 770; *Stratton v. Hughes*, 211 Fed. 557 (hearing upon an application to revoke a license). But see *Jaster v. Currie*, 198 U. S. 144, 49 L. ed. 988.

¹⁵ *U. S. v. Bridgman*, 8 Am. L. Rec. 541. But see *Jenkins v. Smith*, 57 How. Pr. (N. Y.) 171.

¹⁶ *Kims v. Lant*, 68 Fed. 436.

¹⁷ *Feister v. Hulick*, 228 Fed. 821; *Morrow v. U. H. Dudley & Co.*, 144 Fed. 441; *Peet v. Fowler*, 170 Fed. 618; *U. S. v. Zavelo*, 177 Fed. 536.

¹⁸ *Re Smith Const. Co.*, 224 Fed. 228; *Powell v. Pangborn*, 161 App. Div. (N. Y.) 453.

¹⁹ *Central Ry. Signal Co. v. Jackson*, 238 Fed. 625.

²⁰ *Smith v. Government of Canal Zone*, C. C. A., 249 Fed. 273.

²¹ *Stewart v. Ramsay*, 242 U. S. 128; *Diamond v. Earle* (Mass.), May, 1914, 105 N. E. 363.

²² *Am. Woodenware Co. v. Stein*, 63 Fed. 676; *Powell v. Pangborn*, 161 App. Div. (N. Y.) 453.

²³ *American Woodenware Co. v. Stem*, 63 Fed. 676.

²⁴ *Lyell v. Goodwin*, 4 McLean, 29; *Nichols v. Horton*, 14 Fed. 327; 4 McCrary, 560. But see *Fitzhugh v. Reid*, 252 Fed. 234.

witness does not exempt him from liability to service in a suit arising out of his acts upon that same visit to the jurisdiction.²⁵ Nor where the witness remains within the jurisdiction more time than is reasonably necessary for his attendance upon the case.²⁶

A Federal court will not punish as a contempt the arrest of, or service of process by a State court upon, a foreign witness in attendance before it;²⁷ though it might perhaps upon *habeas corpus* discharge the witness from such arrest,²⁸ or punish the party who molested the witness by a stay of proceedings in a case pending between him and the witness in the Federal court.²⁹ A party to a suit in a Circuit Court of the United States was granted a protective writ to prevent, during his attendance upon the trial, his arrest as a lunatic under a previous order of a court of the State, when subsequently thereto his sanity had been adjudicated by a court of another State, where he then lived.³⁰

If a person be fraudulently enticed within the district and then served with process by those who thus induced him to come, the service may be set aside.³¹ In one case, where a man was induced by a forged telegram to enter the jurisdiction of the court, the party who served him there was held to be presumptively connected with the fraud.³² The service of a notice that a deposition will be taken in another city, when such deposition is subsequently taken in pursuance thereof, cannot be considered a fraudulent device to entice the party within the jurisdiction.³³

²⁵ *Iron Dyke Copper Min. Co. v. Iron Dyke R. Co.*, 132 Fed. 208.

²⁶ *Finch v. Gallagher*, 25 Abb. N. C. (N. Y.) 404; 12 N. Y. Supp. 487; *Marks v. La Societe*, 19 N. Y. Supp. 470; *Woodruff v. Austin*, 37 N. Y. Supp. 22. But see *Pope v. Negus*, 3 N. Y. Supp. 796.

²⁷ *Ex parte Schulenburg*, 25 Fed. 211.

²⁸ *Ex parte Hurst*, 1 Wash. C. C. 1866. See *Ex parte Schulenburg*, 25 Fed. 211, 212.

²⁹ *Bridges v. Sheldon*, 7 Fed. 17, 42; *Ex parte Schulenburg*, 25 Fed. 211, 212.

³⁰ *Chanler v. Sherman*, C. C. A., 22 L.R.A.(N.S.) 992, 162 Fed. 19; *Fitzgerald & M. C. Co. v. Fitzgerald*, 137 U. S. 98, 105, 34 L. ed. 608, 611.

³¹ *Blandin v. Ostrander*, C. C. A., 239 Fed. 700; *Union Sugar Refinery v. Mathiesson*, 2 Cliff. 304; *Steiger v. Boon*, 4 Fed. 17; *Blair v. Turtle*, 5 Fed. 394; s. c., 23 Alb. L. J. 435; *Baker v. Wales*, 15 Abb. Pr. N. S. (N. Y.) 331.

³² *Steiger v. Bonn*, 4 Fed. 17.

³³ *Jaster v. Currie*, 198 U. S. 144, 49 L. ed. 988.

It has been held that a party to a suit in a State court is not on his journey there exempt from service of process in another State.³⁴

The privilege must be claimed promptly, or otherwise will be waived.³⁵ It was waived by a delay of nearly four months and a half, during which plaintiff had entered judgment by default;³⁶ but a delay of three weeks was held not to operate as a waiver.³⁷

A voluntary appearance waives the objection;³⁸ but, it has been held, that the objection may be raised by a plea in abatement;³⁹ even when united with a defense upon the merits.⁴⁰ It has been held: that the execution of a bail bond is not a waiver.⁴¹

A judgment is not void so that it can be attacked collaterally, where process was served upon a party while attending a trial.⁴²

§ 167a. Return and proof of service of process. If the marshal or his deputy make the service, his unverified return is sufficient.¹ This may be contradicted,² although there is a rem-

³⁴ *Holyoke & S. H. F. I. Co. v. Ambden*, 21 L.R.A. 319, 55 Fed. 593.

³⁵ *Matthews v. Puffer*, 10 Fed. 606, 20 Blatchf. 233; *Watson Town Nat. Bank v. Messenger*, 66 Pa. Co. Ct. 609.

³⁶ *Sebring v. Streyker*, 10 Misc. (N. Y.) 289, 30 N. Y. Supp. 1053.

³⁷ *Morrow v. U. H. Dudley & Co.*, 144 Fed. 441.

³⁸ *Anonymous*, 9 N. J. L. J. 166. But see *Larned v. Griffin*, 12 Fed. 590; *Stewart v. Howard*, 15 Barbour (N. Y.) 26; *infra*, § 170.

³⁹ *Larned v. Griffin*, 12 Fed. 590.

⁴⁰ *Larned v. Griffin*, 12 Fed. 590; *Christian v. Williams*, 35 Mo. App. 297; *O'Loughlin v. Bird*, 128 Mass. 600.

⁴¹ *Larned v. Griffin*, 12 Fed. 590; *Washburn v. Phelps*, 24 Vt. 506; *U. S. v. Edme*, 9 S. & R. (Pa.) 147.

⁴² *Jaster v. Currie*, 198 U. S. 144, 49 L. ed. 988; *Walker v. Collins*, 59

Fed. 70. A number of authorities are collected in an article by Mr. Alexander H. Robbins, 65 Cent. L. J. 105.

§ 167a. ¹ *Von Roy v. Blackman*, 3 Woods, 98, 101; *Phoenix Ins. Co. v. Wulf*, 1 Fed. 775; Equity Rule 16. Where the defendant was named in the bill as Jacob Kraig, a return that the subpoena had been served on Jacob King was held insufficient. *McClaskey v. Barr*, 45 Fed. 151.

² *Mechanical Appliance Co. v. Castleman*, 215 U. S. 437, 54 L. ed. 272; *Peper Automobile Co. v. Am. Motor Car Sales Co.*, See *McClaskey v. Barr*, 45 Fed. 151; *Park Bros. & Co. v. Oil City Boiler Works*, 204 Pa. St. 453, 54 Atl. 334. *Contra*, Dicta in *Von Roy v. Blackman*, 3 Woods, 98, 100; *Joseph v. New Albany S. F. & R. M. Co.*, 53 Fed. 180; *U. S. Bank v. City of Kendall*, 179 Fed. 914; *U. S. v. McHie*, 194 Fed. 894.

edy by an action against the officer for a false return.³ The marshal's return, that the corporation served was transacting business within the district, can be contradicted;⁴ so can be his return, that the person on whom the service was made was authorized to represent the defendant for that purpose,⁵ the return is not conclusive as against strangers to the writ.⁶

It is insufficient in the case of service upon a corporation, unless it shows that the defendant was transacting business within the district, or that appears elsewhere in the record.⁷ The return should show that the person served was an agent or officer of the defendant which was transacting business within the district,⁸ and also it has been held the requirements of the State statutes regulating the subject.⁹

When it states that the person served was the agent of the defendant, it will be presumed that he represented the company within the State;¹⁰ but a return of service upon a general agent,¹¹ or superintendent¹² was held to be insufficient.

The return should state where the service was made, if the defendant reside without the district,¹³ and probably in any

³ Von Roy v. Blackman, 3 Woods, 98, 100.

⁴ Peper Automobile Co. v. Am. Motor Car Sales Co., 180 Fed. 245. See St. Clair v. Cox, 106 U. S. 350, 359, 27 L. ed. 222, 226, *infra*, § 164.

⁵ Higham v. Iowa State Travelers' Ass'n, 183 Fed. 845.

⁶ U. S. v. McHie, 194 Fed. 894.

⁷ Earle v. Chesapeake & O. Ry. Co., 127 Fed. 235; Jackson v. Del. R. A. Co., 131 Fed. 134; Green v. Chicago, B. & Q. Ry. Co., 147 Fed. 767; Allen v. Yellowstone Park Transp. Co., 154 Fed. 504.

⁸ St. Clair v. Cox, 106 U. S. 350, 359, 27 L. ed. 222, 226; Swarts v. Christie Grain & Stock Co., 166 Fed. 338.

⁹ Amy v. Watertown, 130 U. S. 391, 9 Sup. Ct. 530, 32 L. ed. 946.

¹⁰ St. Clair v. Cox, 106 U. S. 350, 359, 27 L. ed. 222, 226. A marshal's return, which recited the delivery of

a true copy on the managing agent of a foreign corporation found in the county, that he was the only agent of the corporation therein, that it was a non-resident, and that none of its principal officers resided in the State, and that all of its officers, except its managing agent, were absent from the State, was held to be *prima facie* evidence of legal service. Chinn v. Foster-Milburn Co., 195 Fed. 158.

¹¹ Swarts v. Christie Grain & Stock Co., 166 Fed. 338.

¹² Boulthbee v. International Paper Co., C. C. A., First Circuit No. 1168. As to agency when two companies have the same name, see Darrow v. Postal Telegraph-Cable Co. of N. Y., 229 Fed. 314.

¹³ Allen v. Blunt, 1 Blatchf. 480, 487; Thayer v. Wales, 5 Fisher's Pat. Cas. 448.

event. If another than the marshal or his deputy serve the subpoena, proof must be made by the affidavit of the process-server.¹⁴ Where there had been personal service upon the defendant by a special deputy the fact that the return was in the name of such deputy instead of in the name of the marshal was held an irregularity which did not avoid the judgment when attacked in a collateral proceeding.¹⁵ When the return shows that the service was insufficient, a motion may be made to set the service aside.¹⁶

The marshal's return is capable of subsequent amendment.¹⁷ It has been held that the return to a State court by a sheriff cannot be amended after a removal.¹⁸ It may be subsequently supplemented by an affidavit.¹⁹

The removal of the suit from a State to a Federal court does not prevent a motion to set aside the service.²⁰ The return of the sheriff or marshal is not conclusive and may be contradictory by the production of statements in the plaintiff's pleading²¹ by affidavits²² or otherwise. The question of jurisdiction is for the ultimate determination of the Federal court.²³ A return that a foreign corporation was found within the State, may be contradicted.²⁴ There is no presumption in support of the validity of the service, aside from the facts therein set forth.²⁵

In a suit for an infringement of a patent where the defendant is a non-resident, an allegation that "defendants are now doing business at a designated place within the district," is not a sufficient allegation that they have "a regular and established place of business."²⁶ A statement that service has been made

¹⁴ Equity Rule 15.

¹⁵ Hill v. Gordon, 45 Fed. 276.

¹⁶ Scott v. Stockholders' Oil Co., 122 Fed. 835.

¹⁷ Phoenix Ins. Co., v. Wulf, 1 Fed. 775.

¹⁸ Tallman v. B. & O. R. Co., 45 Fed. 156.

¹⁹ Fountain v. Detroit M. & F. S. L. L. Ry. Co., 210 Fed. 982.

²⁰ Goldey v. Morningside News, 156 U. S. 518, 39 L. ed. 517, *supra*, § 163.

²¹ U. S. v. Southern Bridging Co., 251 Fed. 400.

²² Boulton v. International Paper Co., C. C. A., 229 Fed. 951.

²³ Gen. Inv. Co. v. Lake Shore & M. S. Ry. Co., C. C. A., 250 Fed. 160, 165; Mechanical Appliance Co. v. Castleman, 315 U. S. 437, 441, 30 Sup. Ct. 125, 54 L. ed. 272.

²⁴ Peper Automobile Co. v. Am. Motor Car Sales Co., 180 Fed. 245.

²⁵ Scheurle v. One Piece Bifocal Lens Co., 241 Fed. 270; Boulton v. International Paper Co., C. C. A., 229 Fed. 951.

²⁶ Scheurle v. One Piece Bifocal Lens Co., 241 Fed. 270.

upon the defendant's agent does not authorize the presumption that such agent had the right to receive service of process.²⁷ Upon a motion to vacate an order for substituted service or by publication, the insufficiency of the bill is immaterial when the subject-matter is within the statute.²⁸ It has been held: that the order for service by publication may be set aside as to part of the bill and left in force as to the remainder.²⁹

§ 167b. Objections to the service of process. A motion to set aside the service,¹ or a motion to quash the return,² accompanied by a special appearance for that purpose,³ is the proper method of testing the sufficiency of the service; unless the defendant prefers to disregard it and subsequently to raise the objection upon an appeal from the decree,⁴ or to resist the execution of the decree as void.⁵ Neither plea in abatement⁶ nor demurrer⁷ is necessary. The motion must definitely point out the defects in the service.⁸ It has been said that nothing beyond the scope of the motion will be considered.⁹ It might be held that the motion was addressed to the court's discretion, where the defendant has a remedy by appeal or a writ of error.¹⁰ It was held that the denial of a motion made to quash the writ because of improper service in a patent case did not compel the overruling of a plea in abatement on the ground that no act of infringement had been committed within the jurisdic-

²⁷ *Boulton v. International Paper Co.*, C. C. A., 229 Fed. 951.

²⁸ *Canton Roll & Machine Co. v. Rolling Mill Co.*, 155 Fed. 321; *Gage v. Riverside Trust Co.*, 156 Fed. 1002.

²⁹ *Evans v. Charles Scribner's Sons*, 48 Fed. 303.

§ 167b. ¹ *Mason v. N. Y. Steam Power Co.*, 87 Fed. 241; *Bourke v. Amison*, 32 Fed. 710; *Peper Automobile Co. v. Am. Motor Car Sales Co.*, 180 Fed. 245.

² *Am. Cereal Co. v. Eli P. C. Co.*, 70 Fed. 276; *Peper Automobile Co. v. Am. Motor Car Sales Co.*, 180 Fed. 245; *Higham v. Iowa State Travelers' Ass'n*, 183 Fed. 845; *U.*

S. v. Southern Dredging Co., 257 Fed. 400.

³ *Infra*, §§ 169, 170.

⁴ *O'Hara v. McConnell*, 93 U. S. 150, 23 L. ed. 840; *Butterworth v. Hill*, 114 U. S. 128, 29 L. ed. 119; *Herbert v. Bicknell*, 233 U. S. 70.

⁵ *Meyer v. Kuhn*, C. C. A., 65 Fed. 705.

⁶ *U. S. v. Southern Dredging Co.*, 257 Fed. 400.

⁷ *Meisukas v. Greenough Red Ash Coal Co.*, 244 U. S. 54.

⁸ *Bankers Surety Co. v. Town of Holly*, C. C. A., 219 Fed. 96.

⁹ *Ibid.*

¹⁰ *Herbert v. Bicknell*, 233 U. S. 70.

tion.¹¹ A subpoena will not be set aside because addressed to a non-resident over whom the court could exercise jurisdiction with his consent, but not otherwise, although the service upon him might be set aside.¹² Before the Equity Rules of 1912, it was held that the objection could not be joined with an answer to the merits.¹³ A plea in abatement, which denied that the person served "is" an agent or officer of the corporation, was held to be insufficient; since it did not negative the fact that he was such an agent on the date of service.¹⁴ Under the former practice, it was held that a plea to the jurisdiction did not raise the question that the stenographer in the employ of defendant transacting business within the State was not the proper person upon whom service should be made.¹⁵ It has been held that upon a motion to set aside service upon a foreign corporation because the writ was not served upon the proper person, the defendant need not show upon whom the service should be made or that it has no agent in the district.¹⁶ A motion to set aside the service, made six weeks after the service, was held not to be barred by laches.¹⁷ Where such a motion had been made and denied in the State court, and no appeal taken from the decision, it was held that it could not be renewed in the Federal Court after a removal,¹⁸ although after a removal the motion may be made for the first time in the Federal Court.¹⁹ It has been said that whether a foreign corporation is conducting business within the State and is liable to service therein, is primarily a question of fact.²⁰ Letterheads of defendant which describe a person as one of its officers are presumptive evidence of his

¹¹ *United Autographic Register Co. v. Egly Register Co.*, 219 Fed. 637.

¹² *Mason v. N. Y. Steam Power Co.*, 87 Fed. 241.

¹³ *Peper Automobile Co. v. Am. Motor Car Sales Co.*, 180 Fed. 245. See *Chadeloid Chemical Co. v. Chicago Wood Finishing Co.*, 180 Fed. 770.

¹⁴ *Scott v. Stockholders' Oil Co.*, 129 Fed. 615.

¹⁵ *Chadeloid Chemical Co. v. Chi-*

cago Wood Finishing Co., 180 Fed. 770.

¹⁶ *Wall v. Chesapeake & O. Ry. Co.*, C. C. A., 95 Fed. 398, Ward, J., dissenting.

¹⁷ *Phelps v. Connecticut Co.*, 188 Fed. 765.

¹⁸ *Hoyt v. Ogden Portland Cement Co.*, 185 Fed. 889.

¹⁹ *Goldey v. Morning News*, 156 U. S. 518.

²⁰ See *Peper v. Am. Motor Car Sales Co.*, 233 Fed. 245.

official capacity.²¹ This question may be referred to a master.²² A corporation is not entitled to a trial by jury of the questions whether it was transacting business within the State and whether the person upon whom service was made was its authorized representative.²³ Where upon a motion to quash service of process it appeared that the foreign corporation transacted business within the State; the court on setting aside the service authorized the issue of process to be served upon the proper agent.²⁴ In one case such a motion was granted without prejudice to the right of the complainant to apply for leave to amend his complaint by stating the facts relating to the presence of property within the district and his claim against the same, which brought the case within the statute.²⁵

²¹ Kirby v. Louismaann-Capen Co.,
221 Fed. 267.

²² Ryan v. Ohmer, 233 Fed. 165.

²³ Peper Automobile Co. v. Am.
Motor Car Sales Co., 180 Fed. 245.

²⁴ Knapp v. Bullock Tractor Co.,
242 Fed. 543, 553.

²⁵ Jackson v. Hooper, 171 Fed.
597, 598.

CHAPTER VII.

APPEARANCE.

§ 168. Definition of an appearance. An appearance is the process by which a defendant submits himself to the jurisdiction of the court. An appearance is either general or special. By a general appearance a defendant appears for all purposes in the suit. By a special appearance he appears solely for the purpose of objecting to the jurisdiction on account of a defect, an omission, or an irregularity in the service of the subpoena upon him, or perhaps for some other jurisdictional defect.¹ An appearance *gratis* is an appearance by a defendant who has not been served with process.²

Upon the former practice, a formal appearance was required.³ The Equity Rules of 1912 make no provision for an appearance other than such as is implied by the law from the filing of an answer.

§ 169. What constitutes an appearance. The formal method of entering an appearance is to deliver to the clerk a *præcipe*, that is, a written direction, ordering him to enter the appearance of the defendant who subscribes it.¹

A defendant may appear in person² or by his attorney. It is presumed that an attorney has authority from the party for whom he appears.³ It has been held to be too late for the

§ 168. ¹ National F. Co. v. Moline Malleable I. Works, 18 Fed. 863; Elliott v. Lawhead, 43 Ohio St. 171; Dorr v. Gibboney, 3 Hughes, 382; U. S. v. Am. B. T. Co., 29 Fed. 17.

² Daniell's Ch. Pr. (2d Am. ed.) 590-595.

³ Eq. Rule 17 of 1841.

§ 169. ¹ Daniell's Ch. Pr. (2d Am. ed.) 590, 591.

² U. S. R. S. § 747.

³ Cooper v. Jewett, C. C. A., 233 Fed. 618. The president of a corporation who under its by-laws is its general executive official has power to employ counsel to defend an action against it although he is not directed by the directors to employ counsel or appear, unless he is forbidden by them to do so. Blue Goose Min. Co. v. Northern Light Mining Co., C. C. A., 245 Fed. 727.

defendant after joining issue to question the authority of plaintiff's attorney to appear.⁴ No attorney-at-law can appear in a court of the United States unless authorized by a power of attorney, if he is not a member of the bar of such court.⁵ The rules as to admission to the bar of the District and Circuit courts vary with the different courts. It is the usual practice to recognize in each District and Circuit Court of Appeals a member of the bar of the Supreme Court of the United States as a member of the bar of such inferior court without requiring any formal order or motion for his admission.⁶ The Circuit Courts of the United States for the Southern District of New York⁷ and the district of New Jersey have in one or more cases refused to recognize members of the bar of the Supreme Court of the United States who had not been admitted to practice there.⁸ The taking of any proceeding other than a special appearance and a motion or plea founded thereupon, is equivalent to a general appearance and a submission of the defendant's person to the jurisdiction of the court.⁹ Such is a motion to dismiss the case upon the merits although coupled with a special appearance and an application for a dismissal for defective service or lack of residence within the district.¹⁰ Such a motion when oral and not in writing

⁴ Rouiller v. A. & B. Schuster Co., 212 Fed. 348.

⁵ *Ex parte* N. K. Fairbank Co., 194 Fed. 978; *Matter of Joseph Wood*, S. D. N. Y., explained *infra*, sections on "*Habeas Corpus*." It has been held that the court may admit an attorney to practice *nunc pro tunc* so as to validate a writ in the Federal court which he had previously obtained. *Jewett v. Garrett*, 47 Fed. 625.

⁶ See *Goodyear D. V. Co. v. Osgood*, 13 Off. Gaz. 325.

⁷ See *Matter of Joseph Wood* *infra*, §§ 466, 467.

⁸ *Rouiller v. A. & B. Schuster Co.*, 212 Fed. 348.

⁹ *New Jersey v. New York*, 6 Pet. 323; *Van Antwerp v. Hulburt*, 7 Blatchf. 426, 440; *Livingston v. Gibbons*, 4 J. Ch. (N. Y.), 94;

Blackburn v. Selma, M. & M. R. Co., 2 Flippin, 525; *Fitzgerald & M. Const. Co. v. Fitzgerald*, 137 U. S. 98, 34 L. ed. 608; *infra*, § 170.

¹⁰ *Thames & Mersey Ins. Co. v. U. S.*, 237 U. S. 19; *Marian Coal Co. v. Peale*, C. C. A., 204 Fed. 161; *Adler Goldman Commission Co. v. Williams*, 211 Fed. 530; *Lively v. Picton*, 218 Fed. 401; *Western Union Tel. Co. v. Louisville & N. R. Co.*, 229 Fed. 234; *Lehigh Valley Coal Co. v. Washko*, C. C. A., 2nd Ct., 231 Fed. 42; *Everett Ry. Light & Power Co. v. U. S.*, 236 Fed. 806; *M'Lean Lumber Co. v. U. S.*, 237 Fed. 460; *Moore Filter Co. v. Taugher*, C. C. A., 239 Fed. 105; *Morris Land & Cattle Co. v. Kilpatrick*, C. C. A., 256 Fed. 788. But see *Ex parte Indiana Transp. Co.*, 244 U. S. 436.

constitutes a general appearance.¹¹ So is an answer to the merits, although accompanied by a special appearance,¹² at least when the answer does not formally object to the jurisdiction.¹³ So it has been held are: a special appearance accompanied by a motion to set aside an order reviving a judgment upon the ground of an irregularity in the proceedings;¹⁴ obtaining a stay of proceedings pending a motion to vacate a judgment.¹⁵ A motion to make the complaint more definite and certain.¹⁶ A petition of intervention, even where the petitioner disclaims any intention to be made a party.¹⁷ Opposition to a motion for a preliminary injunction.¹⁸ Opposition on the merits to a motion to punish for contempt.¹⁹ The filing of a pleading before the court has passed upon the question of jurisdiction,²⁰ even when filed pending the decision of a motion to set aside the service of process,²¹ at least when such pleading does not specifically take that objection,²² and a motion to set aside the service because of want of jurisdiction over both the person and the subject-matter.²³

¹¹ *Everett Ry. Light & Power Co. v. U. S.*, 236 Fed. 806; *Budris v. Consolidation Coal Co.*, 251 Fed. 673.

¹² *Caskey v. Chenoweth*, C. C. A., 62 Fed. 712. See *Texas & Pac. Ry. Co. v. Saunders*, 151 U. S. 105, 38 L. ed. 90; *Hankinson v. Page*, 31 Fed. 184. See *Morris Land & Cattle Co. v. Kilpatrick*, C. C. A., 256 Fed. 788.

¹³ *Wood v. Wilbert*, 226 U. S. 384, 57 L. ed. —.

¹⁴ *Crawford v. Foster*, 84 Fed. 939.

¹⁵ *Crane v. Penny*, 2 Fed. 187.

¹⁶ *Case v. Mountain Timber Co.*, 210 Fed. 565; *Commonwealth Cotton Oil Co. v. Hudson* (Oklahoma, 1916), 155 Pac. 577. *Contra*, *Valentine v. Myers*, 36 Hun (N. Y.), 201. *Columbia Law Review*, June 1916.

¹⁷ *Bowdoin College v. Merritt*, 59 Fed. 6; *Jack v. D. M. & Ft. D. R. Co.*, 49 Iowa, 627; *Frank v. Wedderin*, C. C. A., 68 Fed. 818.

¹⁸ *Twin Lakes Land & Water Co. v. Dohner*, C. C. A., 242 Fed. 399; *Great Lakes & St. Lawrence Transp. Co. v. Scranton*, C. C. A., 239 Fed. 603.

¹⁹ *Bradstreet Co. v. Bradstreet's Collection Bureau*, C. C. A., 249 Fed. 958.

²⁰ *Texas & Pac. Ry. Co. v. Cox*, 145 U. S. 593, 36 L. ed. 829.

²¹ *Barnes v. W. U. Tel. Co.*, 120 Fed. 550; *Perkins v. Hayward*, 132 Ind. 95, 31 N. E. 670; *Cf. Wetzel & T. Ry. Co. v. Tennis Bros. Co.*, C. C. A., 145 Fed. 458. But see *Wheeler v. Wilkins*, 19 Mich. 78.

²² See Eq. Rule 79; *Wood v. Wilbert*, 226 U. S. 384, 57 L. ed. —. As to moving to set aside an order appointing a receiver, see *Lively v. Picton*, 218 Fed. 401.

²³ *Mahr v. Union Pac. R. Co.*, 140 Fed. 921.

Where the defendant, appearing specially for that purpose, moved to quash a return of service of a summons and prayed judgment whether it should be compelled to plead on the ground that it was a non-resident corporation, it was held that the appearance was not thereby made general.²⁴ It was so held: of a motion to quash service upon a party in another district on the ground that "it appears from the face of the bill of complaint that the relief sought is of such nature that he cannot lawfully be called upon to defend against the same in this district."²⁵ Of a motion to set aside service upon the ground that the court was without jurisdiction of the subject-matter of the suit.²⁶ Of an application for leave to take a deposition in support of a motion to set aside the service of process.²⁷ Of an application to vacate an attachment²⁸ even when made on the ground that the papers did not state a cause of action.²⁹ Of a motion to vacate an order directing the payment of money.³⁰ Of a prayer for costs upon the motion to set aside the service.³¹ Of an affidavit containing an argument upon the merits submitted on behalf of another person who had appeared.³²

It seems that there is no general appearance or waiver by the defendant's obtaining an order extending his time to plead to

²⁴ *N. K. Fairbanks & Co. v. Cincinnati, N. O. & T. P. Ry. Co.*, C. C. A., 54 Fed. 420; *Am. Cereal Co. v. Eli Pettijohn C. Co.*, 70 Fed. 276. It is said in the *Encyclopedia of Pleading and Practice*, article II, section 626, that "where a party appears in court and objects to the jurisdiction of the court over his person, he must state specifically the grounds of objection; by not so stating them his appearance will be construed a general one, although he moves to dismiss on that ground." Citing *Bell Bros. v. White Lake Lumber Co.*, 21 Neb. 525; *Aultman v. Steinman*, 8 Neb. 109; *Bucklin v. Strickler*, 32 Neb. 602; *Layne v. Ohio River R. Co.*, 35 W. Va. 438.

²⁵ *Jones v. Gould*, C. C. A., 149 Fed. 153.

²⁶ *Smith v. Government of Canal Zone*, C. C. A., 249 Fed. 273.

²⁷ *Garvey v. Compania Metalurgica Mexicana*, 222 Fed. 732.

²⁸ *Davis v. Cleveland, Cincinnati, Chicago & St. Louis Ry. Co.*, 217 U. S. 157, 54 L. ed. 708.

²⁹ *Lowe v. Swinehart Tire & Rubber Co.*, 211 Fed. 165; *Wood v. Fertick*, 17 Misc. (N. Y.), 561.

³⁰ *Chatham & Phenix Nat. Bank of the City of New York v. Guaranty Trust Company of New York*, C. C. A., 256 Fed. 90.

³¹ *Budris v. Consolidation Coal Co.*, 251 Fed. 673.

³² *G. & C. Merriam Co. v. Saalfeld & Ogilvie*, 241 U. S. 22.

the merits if the court denies his application,³³ nor by his obtaining an adjournment of the motion³⁴ nor by his asking for a stay of proceedings pending such decision.³⁵

A removal of a cause from a State to a Federal court is not a general appearance whether or not the petitioner states that he appears specially for the purpose of the removal only.³⁶ Even when he joins in the petition for removal with a party properly served.³⁷ Nor, it has been held, is a demand for service of a copy of the complaint, made by a defendant in person or by an attorney.³⁸

The later authorities hold: that when an objection to the jurisdiction over the person of the defendant is filed with a formal appearance, the latter will be considered to be special

³³ *Meisukas v. Greenough Red Ash Coal Co.*; 244 U. S. 54, 37 Sup. Ct. 593, 61 L. ed. 987 (Where the extension was granted at the Court's own motion); *Waters v. Central Trust Co.* (2d Ct.), C. C. A., 126 Fed. 469; *Yanuszauckas v. Mallory S. S. Co.*, C. C. A., 2nd Ct., 232 Fed. 132; *Kuzma v. Witherbee Sherman & Co.*, 232 Fed. 286; *Budris v. Consolidation Coal Co.*, 251 Fed. 673; *Paine Lumber Co. v. Galbraith*, 38 App. Div. (N. Y.) 68; *Bell v. Good*, 22 Civ. Proc. Rep. (N. Y.) 356, 46 N. Y. St. Rep. 572; *Benedict v. Arnoux*, 38 N. Y. Supp. 882. *Contra*, *Hupfeld v. Automaton Piano Co.*, 66 Fed. 788; *Kneeland v. Austin*, 2 Law Bull. (N. Y.) 56; *Krause v. Averill*, 66 How. Pr. (N. Y.) 97; *Briggs v. Stroud*, 58 Fed. 717; *Midland Contracting Co. v. Toledo Foundry & Machine Co.*, C. C. A., 154 Fed. 797. In *Murphy v. Herring-Hall-Marvin Safe Co.*, 184 Fed. 495, 498, where defendants procured the order *ex parte* at chambers and did not serve or file it, until long after the removal of the case, when they procured a certified copy of the record. Cf. *Lukosewicz*

v. Phila. & Read. Coal & Iron Co., 232 Fed. 292 (where defendant also made objection to the merits); *Enright v. Heckscher*, C. C. A., 2nd Ct. 240 Fed. 863; (where the extension contained a stipulation that the issue should be of a day certain and there was a general appearance.)

³⁴ *Meisukas v. Greenough Red Ash Coal Co.*, 244 U. S. 54, 37 Sup. Ct. 593, 61 L. ed. 987. (Where plaintiff asked for the adjournment.)

³⁵ *Harasimowicz v. Pennsylvania R. Co.*, 232 Fed. 295.

³⁶ *Goldey v. Morning News*, 156 U. S. 518, 39 L. ed. 517; *Wabash W. R. Co. v. Brow*, 164 U. S. 271, 41 L. ed. 431; *National Accident Society v. Spiro*, 164 U. S. 281, 41 L. ed. 435; *Cain v. Commercial Pub. Co.*, 232 U. S. 124; *Am. Oil & Supply Co. v. Western Gas Const. Co.*, C. C. A., 239 Fed. 505; *Wright v. Ankeny*, 217 Fed. 983.

³⁷ *Garvey v. Compania Metalurgica Mexicana*, 222 Fed. 732.

³⁸ *Murphy v. Herring-Hall-Marvin Safe Co.*, 184 Fed. 495; *Hoyt v. Ogden Portland Cement Co.* (N. D. Y. Y.), 185 Fed. 889.

and not general,³⁹ and that a party may file a special appearance with an objection to the jurisdiction over his person joined with other objections, such as a want of equity,⁴⁰ or want of jurisdiction over the subject-matter of the suit,⁴¹ without submitting to the jurisdiction of the court.⁴²

The defense by its attorneys at its expense of a suit against another in pursuance of a contract with him is not an appearance by a foreign corporation; nor will it support an application by the plaintiff to make it a party.⁴³

It has been held: that after the question of jurisdiction has been properly raised, and the court has reserved its decision thereupon, a subsequent defensive proceeding, such as an appeal from an injunction order,⁴⁴ or the cross-examination of a witness, whose deposition is taken by the plaintiff, and stipulating that copies of letters and telegrams may be used by either party in lieu of the originals,⁴⁵ is no waiver of the objection.

A State statute providing that a special appearance for the sole purpose of questioning the jurisdiction is equivalent to a general appearance is constitutional;⁴⁶ and has been followed in collateral proceedings, in which a State judgment was offered in evidence,⁴⁷ but it does not bind the Federal courts at law or in equity even in a case originally instituted in a State court and brought into a court of the United States by removal.⁴⁸

³⁹ Wood v. Wilbert, 226 U. S. 384, 386, 57 L. ed. 11.

⁴⁰ Southern Pacific Co. v. Arlington Heights Fruit Co., C. C. A., 191 Fed. 101. But see Peale v. Marian Coal Co., 172 Fed. 639.

⁴¹ Kelley v. T. L. Smith Co., C. C. A., 196 Fed. 466.

⁴² Ibid.

⁴³ Nelson v. Husted, 182 Fed. 921. But see Texas & Pac. Ry. Co. v. Saunders, 151 U. S. 105, 38 L. ed. 90; Hankinson v. Paige, 31 Fed. 184; Caskey v. Chenoweth, 62 Fed. 712.

⁴⁴ Bidwell v. Toledo Canal St. Ry. Co., 72 Fed. 10.

⁴⁵ Central Grain & Stock Ex-

change v. Board of Trade, C. C. A., 125 Fed. 463.

⁴⁶ York v. Texas, 137 U. S. 15, 34 L. ed. 604 (The Texan statute); Western Life Ind. Co. v. Rupp, 235 U. S. 261 (Kentucky statute); Chinn v. Foster-Milburn Co., 195 Fed. 158 (Kentucky statute).

⁴⁷ Southern Pacific Co. v. Denton, 146 U. S. 202, 36 L. ed. 943; Mexican Central Ry. Co. v. Pinckney, 149 U. S. 194, 37 L. ed. 699; Galveston H. & S. A. Ry. Co. v. Gonzales, 151 U. S. 496, 38 L. ed. 248; all of which arose under the Texan statute.

⁴⁸ Western Life Indemnity Co. v. Rupp, 235 U. S. 261 (Kentucky

Rule 22 of the Circuit Court of the Ninth circuit provided that any party appearing specially shall state in the paper which he serves and files that the appearance is special, "and that if the purpose for which such special appearance is made shall not be sanctioned or sustained by the court he will appear generally in the cause," and that if such statements be not made "the appearance shall be deemed and treated as a general appearance." This has been upheld.⁴⁹ A special appearance, it would seem, is regularly made by special leave of the court obtained by an *ex parte* motion,⁵⁰ and it is the safer practice to accompany it with an undertaking by the defendant to abide by the further orders of the court.⁵¹ By styling a paper a special appearance the draftsman does not prevent the appearance from becoming general.⁵² An appearance *gratis* can only be made by a defendant named in the introduction or prayer for process in the bill, unless by consent of all the parties to the suit.⁵³

§ 170. Effect of an appearance. A general appearance waives all objections to the form or manner of service of the subpoena,¹ including the objections that the defendant was not found and did not reside within the district² and that neither

statute); *Cain v. Commercial Pub. Co.*, 232 U. S. 124 (Mississippi statute); *Louden Machinery Co. v. Am. Mercantile Iron Co.*, 127 Fed. 1008, under the Iowa statute.

⁴⁹ *Mahr v. Union Pac. Ry. Co.*, 140 Fed. 921.

⁵⁰ *Thayer v. Wales*, 5 Fisher's Pat. Cas. 448; *Romaine v. Union Ins. Co.*, 28 Fed. 625. But see *Dorr v. Gibboney*, 3 Hughes, 382; *National F. Co. v. Moline M. I. Works*, 18 Fed. 863; *York County Sav. Bank v. Abbot*, 139 Fed. 988.

⁵¹ *Romaine v. Union Ins. Co.*, 28 Fed. 625.

⁵² *Crawford v. Foster*, C. C. A., 84 Fed. 939; *Caskey v. Chenoweth*, C. C. A., 62 Fed. 712; *Chicago Title & Trust Co. v. Newman*, C. C. A., 187 Fed. 573.

⁵³ *Attorney-General v. Pearson*, 7 Simons, 290, 302; *Kentucky S. Min.*

Co. v. Day, 2 Saw. 468, 473. See *Anderson v. Watt*, 138 U. S. 694, 34 L. ed. 1078; *Beck & Pith Co. v. Wacker & B. B. & M. Co.*, C. C. A., 76 Fed. 10; *Roberts v. Brooks*, 71 Fed. 914.

§ 170. 1 *Segee v. Thomas*, 3 Blatchf. 11; *Goodyear v. Chaffee*, 3 Blatchf. 268; *Hale v. Continental L. Ins. Co.*, 12 Fed. 359; *Provident Sav. L. Assur. Soc. v. Ford*, 114 U. S. 635, 639; *Toledo Rys. & Light Company v. Hill*, 244 U. S. 48; *Norfolk Southern Ry. Co. v. Foreman*, C. C. A., 244 Fed. 353. In 29 L. ed. 261, 263; *Robinson v. Nat. S. Co.*, 12 Fed. 361; s. c., 20 Blatchf. 513; *Moore Fitker Co. v. Taugher*, C. C. A., 239 Fed. 105.

² *Thames & Mersey Ins. Co. v. United States*, 237 U. S. 19; *Texas & Pac. Ry. Co. v. Cox*, 145 U. S. 593, 603, 36 L. ed. 829, 832; *St.*

party resides within the district even where the case was originally brought in the District Court of the United States, and the jurisdiction depends upon diversity of citizenship;³ that the summons was served in another district;⁴ that a case pending in a Territorial court was after admission of the Territory as a State improperly transferred to a Federal instead of to a State court;⁵ and in equity that the plaintiff has an adequate remedy at law⁶ unless the latter objection is specifically taken by a concurrent motion or by answer,⁷ although the court may take this objection at any time.⁸ It has been held that a general appearance waives the objection that an action by the trustee in bankruptcy was not brought in the proper district,⁹ and that a

Louis & S. F. Ry. Co. v. McBride, 141 U. S. 127, 132, 35 L. ed. 659, 661; Sayles v. Northwestern Ins. Co., 2 Curt. 212; Shields v. Thomas, 18 How. 253, 259, 15 L. ed. 368, 370; Toland v. Sprague, 12 Pet. 300, 331, 9 L. ed. 1093, 1105; Provident Sav. L. Assur. Soc. v. Ford, 114 U. S. 635, 639, 29 L. ed. 261, 263; Central Tr. Co. v. McGeorge, 151 U. S. 129, 38 L. ed. 98; Int. Constr. & I. Co. v. Gibney, 160 U. S. 217, 40 L. ed. 401; Texas & Pac. Ry. Co. v. Saunders, 151 U. S. 105, 38 L. ed. 90; Lowry v. Tile M. & G. Ass'n, 98 Fed. 817; Fosha v. W. U. Tel. Co., 114 Fed. 701; A. L. Wolff & Co. v. Choctaw, O. & G. R. Co., 133 Fed. 601; Mahr v. Union Pac. R. Co., 140 Fed. 921. Cf. Mexican Central Ry. Co. v. Robinson, C. C. A., 128 Fed. 1020. Budris v. Consolidation Coal Co., 251 Fed. 673; General Inv. Co. v. Lake Shore & M. S. Ry. Co., C. C. A., 250 Fed. 160; Blue Goose Min. Co. v. Northern Light Min. Co., C. C. A., 245 Fed. 727. The above statement in the text was quoted with approval in McKane v. Burke, 132 Fed. 688. But see Noyes v. Canada, 30 Fed. 665; Reinstadler v. Reeves, 33 Fed. 308. It has been said that consent of the parties does not waive the

objection that the non-resident defendant to a suit for infringement of a patent has no regular and established place of business within the district. U. S. Envelope Co. v. Franco Paper Co., 229 Fed. 576, 579.

³ Matter of Moore, 209 U. S. 490, 52 L. ed. 904; Western L. & Sav. Co. v. Butte & B. Consol. Min. Co., 210 U. S. 368, 52 L. ed. 1101; Horn v. Pere Marquette E. Co., 151 Fed. 626; Midland Contracting Co. v. Toledo Foundry & Machine Co., C. C. A., 154 Fed. 797; U. S. Gypsum Co. v. Sliwienka, C. C. A., 183 Fed. 688; Title Guaranty & Surety Co. v. U. S., C. C. A., 187 Fed. 98. See Southern Pac. Co. v. Denton, 146 U. S. 205, 36 L. ed. 945; *supra*, § 62a.

⁴ See Budris v. Consolidation Coal Co., 251 Fed. 673.

⁵ Arizona & New Mexico Ry. Co. v. Clark, 235 U. S. 669.

⁶ Corban v. Conklin, C. C. A., 208 Fed. 231.

⁷ Reynes v. Dumont, 120 U. S. 354, 32 L. ed. 1005; *infra*, § 376.

⁸ Lewis v. Bocks, 23 Wall. 466, 23 L. ed. 70; *infra*, § 376.

⁹ McEldowney v. Card, 193 Fed. 475.

general appearance by a foreign receiver waives any question of the jurisdiction of the court to adjudicate concerning the internal affairs of a foreign corporation.¹⁰

"Ordinarily jurisdiction over a person is based on the power of the sovereign asserting it to seize that person and imprison him to await the sovereign's pleasure. But when that power exists and is asserted by service at the beginning of a cause, or if the party submits to the jurisdiction in whatever form may be required, we dispense with the necessity of maintaining the physical power and attribute the same force to the judgment or decree whether the party remain within the jurisdiction or not. This is one of the decencies of civilization that no one would dispute."¹¹

Where the want of a residence essential to the jurisdiction appears upon the face of the plaintiff's pleading, the objection may be raised by a motion to dismiss.¹² It is not waived by answer after a motion upon this ground has been overruled,¹³ provided that the answer specifically reserves the objection.¹⁴ Where the complaint misstates the residence, the objection may be raised by answer.¹⁵ If the misstatement of residence is subsequently discovered before or at the trial defendant's remedy is a motion for leave to withdraw his general appearance and answer and to plead specially to the jurisdiction.¹⁶ Should the plea to the jurisdiction be overruled or successfully traversed in the Second Circuit leave to answer upon the merits may then be given.¹⁷ It has been held: That if a party joins with a special appearance and motion to set aside service of process a motion to dismiss the suit on another ground, he thereby waives his

¹⁰ *Chicago Title & Trust Co. v. Newman*, C. C. A., 187 Fed. 573.

¹¹ *Michigan Trust Co. v. Ferry*, 228 U. S. 346, 353, per Holmes, J.

¹² *Southern Pac. Co. v. Denton*, 146 U. S. 262, 36 L. ed. 943; *Tice v. Hurley*, 145 Fed. 391. But see *contra*, *Ches. & O. Coal Agency Co. v. Fire Creek C. & C. Co.*, 119 Fed. 942.

¹³ *Leonard v. Merchants' Coal Co.*, C. C. A., 162 Fed. 885; *Blandin v. Ostrander*, C. C. A., 239 Fed. 700.

¹⁴ *Norfolk Southern R. Co. v.*

Foreman, C. C. A., 244 Fed. 353; *Chicago, R. I. & P. Ry. Co., v. Jaber*, 85 Ark. 232, 107 S. W. 1170.

¹⁵ *Leonard v. Merchants' Coal Co.*, C. C. A., 162 Fed. 885.

¹⁶ *Lehigh Valley Coal Co. v. Yensavage*, C. C. A., 218 Fed. 547. *Certiorari denied*, 235 U. S. 705. *Lehigh Valley Coal Co. v. Washko*, C. C. A., 231 Fed. 42. See *supra*, § 62a.

¹⁷ *Kever v. Phila. & R. R. R. Co.*, C. C. A., 260 Fed. 534. *Certiorari denied*, 250 U. S. 665, 40 Sup. Ct. 13; 63 L. ed. 1197.

objection to the irregularity of service, and his proceeding is equivalent to a general appearance.¹⁸ After a special appearance for the purpose of objecting to the jurisdiction has been made, and the objection overruled, the right to insist upon this objection on an appeal is not lost by a subsequent appearance and defense to the suit upon the merits.¹⁹

A general appearance does not waive an objection to the jurisdiction of the court upon the ground of a lack of the requisite difference of citizenship;²⁰ nor admit the validity of a writ of foreign attachment previously issued,²¹ nor, it has been held, authorize an amendment of the plaintiff's pleading so as to set forth a new cause of action, upon which the defendant could not originally have been sued in the jurisdiction.²² It is not a waiver of the right of removal.²³

The court has power to allow a general appearance to be changed by amendment to a special appearance,²⁴ or to be withdrawn.²⁵ This has been permitted when the original complaint has misstated the plaintiff's residence and that subsequently appears to be such as to defeat the jurisdiction;²⁶ and where a general appearance was made, after the service of a summons,

¹⁸ *Fitzgerald & M. C. Co. v. Fitzgerald*, 137 U. S. 98, 34 L. ed. 608; *Jones v. Andrews*, 10 Wall. 327, 19 L. ed. 935; *St. Louis & S. F. Ry. Co. v. McBride*, 141 U. S. 127, 132, 35 L. ed. 659, 661; *Edgell v. Felder*, C. C. A., 84 Fed. 69. But see U. S. v. *Am. Bell Tel. Co.*, 29 Fed. 17; *McGillin v. Claffin*, 52 Fed. 657. But see *Kelley v. T. L. Smith Co.*, C. C. A., 196 Fed. 466; see § 169, *supra*.

¹⁹ *Harkness v. Hyde*, 98 U. S. 476, 25 L. ed. 237; *Mexican C. Ry. Co. v. Pinckney*, 149 U. S. 194, 37 L. ed. 699. See § 169, *supra*.

²⁰ *Mansfield, C. & L. M. Ry. Co. v. Swan*, 111 U. S. 379; *Martin v. Baltimore & O. Ry. Co.*, 151 U. S. 673, 689, 14 Sup. Ct. 533, 38 L. ed. 311; *Chicago, B. & O. Ry. Co. v. Willard*, 220 U. S. 413, 420, 421, 31 Sup. Ct. 460, 55 L. ed. 521; *Ro-*

maine v. Union Ins. Co., 28 Fed. 625.

²¹ *Sackett v. Rumbaugh*, 45 Fed. 23; *U. S. Envelope Co. v. Franco Paper Co.*, 229 Fed. 576.

²² *Western Wheeled Scraper Co. v. Gahagan*, 152 Fed. 648. See *Toledo Railways & Light Co. v. Hill*, 244 U. S. 48.

²³ *Judson v. Knights of the Macabees of the World*, 220 Fed. 1004.

²⁴ *U. S. v. Yates*, 6 How. 605, 12 L. ed. 575; *Hohorst v. Hamburg Am. P. Co.*, 38 Fed. 273.

²⁵ *Rhode Island v. Massachusetts*, 13 Pet. 23, 10 L. ed. 41; *First Nat. Bank v. Cunningham*, 48 Fed. 510; *Chicago Title & Trust Co. v. Newman*, C. C. A., 187 Fed. 573, 577.

²⁶ *Hagstoz v. Mutual Life Ins. Co. of New York*, 179 Fed. 569. See *Leonard v. Merchants' Coal Co.*, C. C. A., 162 Fed. 885.

but before a pleading was filed or served, and the defendant did not then know that the sole ground of jurisdiction was a diversity of citizenship;²⁷ but not ordinarily where, before appearing, a defendant had notice of the facts upon which he relies or reasonable opportunity to ascertain them and his employment in the case was not limited by his client.²⁸ Permission to withdraw a general appearance, if conditioned that it is granted without prejudice to the plaintiff, does not deprive the latter of rights founded upon a rule that a general appearance is a waiver of a defect in the service of process.²⁹ Otherwise it does.³⁰

²⁷ *Crown Cotton Mills v. Turner* (S. D. N. Y.), 82 Fed. 337.

²⁹ *Graham v. Spencer*, 14 Fed. 603.

²⁸ *Lamborn v. Louisiana Sugar Co.*, Mack, J., N. Y. L. J., Dec. 2, 1912.

³⁰ *Graham v. Spencer*, 14 Fed. 603, 607; *First Nat. Bank of Denver v. Cunningham*, 48 Fed. 510, 517.

CHAPTER VIII.

TAKING BILLS PRO CONFESSO.

§ 171. When a bill may be taken *pro confesso*. "It shall be the duty of the defendant, unless the time shall be enlarged, for cause shown, by a judge of the court, to file his answer or other defense to the bill in the clerk's office within the time named in the subpoena as required by rule 12. In default thereof the plaintiff may, at his election, take an order as of course that the bill be taken *pro confesso*; and thereupon the cause shall be proceeded in *ex parte*." ¹

§ 171. ¹Eq. Rule 16. By the early practice of the civil law failure to appear on the day to which the cause was adjourned, was deemed to be a confession of the action; but later this rule was changed, so that the plaintiff, notwithstanding the defendant's contumacy only obtained judgment in accordance with the truth of the case as established by an *ex parte* examination. Keller *Proced. Rom.* § 69. The original Chancery practice was in accordance with the later Roman law. Hawkins v. Crook, 2 Peere Williams, 556. But at least as early as the Seventeenth Century, bills were taken *pro confesso* for contumacy. *Ibid.* This, however, was not done until after an attachment to compel an answer, an attachment with proclamations, a commission of rebellion, and sequestration. *Forum Romanum*, 36; Boudinot v. Symmes, Wallace, C. C. 139, Fed. Cas. No. 1,695. In Thomson

v. Worcester, 114 U. S. 104, 119, 29 L. ed. 105, 110. See the report of Master Hoffman to Chancellor Sanford in *Williams v. Corwin*, Hopkins, Ch. 471. The English Chancery practice prevailed in the courts of the United States as late as 1801. Boudinot v. Symmes, Wallace, C. C. 139, Fed. Cas. No. 1,695. A decree taking a bill in equity *pro confesso* presents striking analogies to a judgment by *nil dicat*, and to judgment for plaintiff on demurrer to the defendant's plea. *Davis v. Davis*, 2 Atk. 21; *Hawkins v. Crook*, 2 Peere Williams, 556, quoted in 2 Eq. Cas. Ab. R., 179.

Eq. Rule 12 of 1842 provided: "The defendant is to enter his appearance in the suit in the clerk's office on or before the day at which the writ is returnable; otherwise, the bill may be taken *pro confesso*." According to Eq. Rule 18 of 1842, the defendant was allowed until the rule day next succeeding that of

"If the defendant move to dismiss the bill or any part thereof, the motion may be set down for hearing by either party upon five days' notice, and, if it be denied, answer shall be filed within five days thereafter or a decree *pro confesso* entered."²

"If the answer include a set-off or counter-claim, the party against whom it is asserted shall reply within ten days after the filing of the answer, unless a longer time be allowed by the court or judge. If the counter-claim is one which affects the rights of other defendants they or their solicitors shall be served with a copy of the same within ten days from the filing thereof, and ten days shall be accorded to such defendants for filing a reply. In default of a reply, a decree *pro confesso* on the counter-claim may be entered as in default of an answer to the bill."³ "In every case where an amendment to the bill shall be made after answer filed, the defendant shall put in a new or supplemental answer within ten days after that on which the amendment or amended bill is filed, unless the time is enlarged or it is otherwise ordered by a judge of the court; and upon a default, the like proceedings may be had as upon an omission to put in an answer."⁴

entering his appearance before he was required to file his plea, demurrer, or answer to the bill. "In default thereof, the plaintiff may, at his election, enter an order (as of course) in the order-book, that the bill be taken *pro confesso*; and thereupon the cause shall be proceeded in *ex parte*, and the matter of the bill may be decreed by the court at any time after the expiration of thirty days from and after the entry of said order, if the same can be done without an answer, and is proper to be decreed; or the plaintiff, if he requires any discovery or answer to enable him to obtain a proper decree, shall be entitled to process of attachment against the defendant to compel an answer, and the defendant shall not, when arrested upon such process, be discharged therefrom, unless upon fil-

ing his answer, or otherwise complying with such order as the court or a judge thereof may direct, as to pleading to or fully answering the bill, within a period to be fixed by the court or judge, and undertaking to speed the cause."

² Eq. Rule 29.

³ Rule 31.

⁴ Rule 32. Under the Equity Rules of 1842, in a proper case part of the bill might be taken as confessed. *Suydam v. Beals*, 4 McLean 12; *Hale v. Continental Life Ins. Co.*, 20 Fed. 344. Thus, where the defendant had repeatedly failed to answer an interrogatory, the parts of the bill which the same affected were ordered taken as confessed. *Hale v. Continental Life Ins. Co.*, 20 Fed. 344. Eq. Rule 64 of 1842 provided: that where exceptions to an answer for insufficiency had been

Under the former practice, where the bill when the subpoena was served did not show jurisdiction against a defendant, a subsequent amendment stating facts sufficient to show jurisdiction against it would not warrant the entry of an order taking the bill as confessed without a second service of the subpoena, or an appearance by such defendant.⁵ The same practice seems to have been observed when the bill was amended so as to state a new case or to bring in new parties.⁶ As to the rule when trivial amendments are added to the bill, the practice in the United States is not settled.⁷ Where an amended bill filed without leave after a default in defendant's appearance was withdrawn without the payment of costs or furnishing a copy to him, it was held that the right to have the original bill taken as confessed had not been waived.⁸ In a proper case, part of the bill might be taken as confessed.⁹ Thus, where the defendant had repeatedly failed to answer an interrogatory, the parts of the bill which the same affected were ordered taken as confessed.¹⁰ So where exceptions to an answer for insufficiency had been sustained, the complainant might, if he chose, enter an order taking as confessed the parts of the bill to which the exceptions related.¹¹ It seems, that, in the absence of a rule upon the subject, the complainant in such a case might, at his election, have either the whole bill or the parts insufficiently answered

sustained, the defendant might, if he chose, enter an order taking as confessed the parts of the bill to which the exceptions related. It seems that, in the absence of a rule upon the subject, the complainant in such a case might, at his election, have either the whole bill or the parts insufficiently answered taken as confessed.

⁵ *Cuebas v. Cuebas*, 223 U. S. 376; *Non-Magnetic Watch Co. v. Asso. H. of Geneva*, 45 Fed. 210. But see *Brown v. Lake Sup. Iron Co.*, 134 U. S. 530, 33 L. ed. 1021; *Nelson v. Eaton*, 66 Fed. 376.

⁶ *Nelson v. Eaton*, 66 Fed. 376; *Bank of Utica v. Finch*, 1 Barb. Ch. (N. Y.) 75; *Weightman v.*

Powell, 2 De G. & S. 570; *Beecher v. Ireland*, 46 Kan. 97.

⁷ The English rule was that a new subpoena must be served. *Weightman v. Powell*, 2 De G. & S. 570. See also *Blythe v. Hinckley*, 84 Fed. 228; *Harris v. Deitrich*, 29 Mich. 366. *Contra*, *Bond v. Howell*, 11 Paige (N. Y.), 283.

⁸ *Sheffield Furnace Co. v. Withe-row*, 149 U. S. 574, 576, 37 L. ed. 853, 855.

⁹ *Suydam v. Beals*, 4 McLean, 12; *Hale v. Cont. L. Ins. Co.*, 20 Fed. 344.

¹⁰ *Hale v. Cont. L. Ins. Co.*, 20 Fed. 344.

¹¹ Eq. Rule 64 of 1842; *infra*, § 194.

taken as confessed.¹² It was formerly uncertain whether, when the defendant after answering the original bill failed to file a further answer to material amendments thereof, the complainant was to have the whole bill taken as confessed, or only the part unanswered.¹³

It is doubtful whether a bill can be taken as confessed against an infant or other person under a disability.¹⁴ Certainly, it cannot before a guardian *ad litem* has been appointed.¹⁵ Should the guardian refuse to answer, the safer course for the complainant would be to obtain a reference to a master and prove the allegations of the bill before him.¹⁶

§ 172. Practice in taking a bill pro confesso. When a defendant fails to appear or to plead in due time, "the plaintiff may, at his election, enter an order (as of course) in the order-book; that the bill be taken *pro confesso*; and thereupon the cause shall be proceeded in *ex parte*." ¹ The order is entered by the clerk without the intervention of a judge.²

Doubts have been expressed as to the propriety of entering such an order pending a motion upon a special appearance to quash a subpoena, or in the case of a cross-bill pending a motion to dismiss the original bill as against the cross-complainants.³ If a bill is fatally defective and shows that the court has no jurisdiction, it is improper to enter an order or decree taking the same *pro confesso*.⁴ By the former practice, there was no need of serving the order taking the bill *pro confesso*.⁵

¹² *Abergavenny v. Abergavenny*, 2 Eq. Ca. Abr. 178; *Weaver v. Livingston*, Hopk. Ch. (N. Y.) 595; *Turner v. Turner*, 1 Dickens, 316; *Smith v. St. Louis Mut. L. Ins. Co.*, 2 Tenn. Ch. 605. But see *Bacon v. Griffith*, 2 Dickens, 473; *Dennison v. Bassford*, 2 Paige (N. Y.), 370.

¹³ *Suydam v. Beals*, 4 McLean, 12, 15. The latter practice seems to be favored in *Trust & Fire Ins. Co. v. Jenkins*, 8 Paige (N. Y.), 589, 593, 594; *Hawkins v. Crook*, 2 P. Wms. 559; *Davis v. Davis*, 2 Atk. 23.

¹⁴ Compare the positive language of Equity Rule 16 of 1842, with *Mills v. Dennis*, 3 J. Ch. (N. Y.)

367; *O'Hara v. MacConnell*, 93 U. S. 151, 23 L. ed. 842; *Massie v. Donaldson*, 8 Ohio, 377; *Chaffin v. Kimball*, 23 Ill. 36, 38.

¹⁵ *O'Hara v. MacConnell*, 93 U. S. 151, 23 L. ed. 842.

¹⁶ *Mills v. Dennis*, 3 J. Ch. (N. Y.) 367.

§ 172. ¹ Eq. Rule 16 copied from Eq. Rule 18 of 1842. See *Read v. Consequa*, 4 Wash. 174; *O'Hara v. MacConnell*, 93 U. S. 150, 152, 23 L. ed. 840, 842.

² Eq. Rule 5.

³ *Blythe v. Hinckley*, 84 Fed. 228.

⁴ *Cuebas v. Cuebas*, 223 U. S. 376, 56 L. ed. 476.

⁵ Eq. Rule 17; *Bank of U. S. v.*

"When the bill is taken *pro confesso* the court may proceed to a decree at any time after the expiration of thirty days from and after the entry of the order to take the bill *pro confesso*; and such decree shall be deemed absolute, unless the court shall, at the same term, set aside the same, or enlarge the time for filing the answer, upon cause shown, upon motion and affidavit. No such motion shall be granted unless upon payment of the costs of the plaintiff in the suit up to that time, or such part thereof as the court shall deem reasonable, and unless the defendant shall undertake to file his answer within such time as the court shall direct, and submit to such other terms as the court shall direct, for the purpose of speeding the cause."⁶

The application in the Federal courts should be made by motion⁷ supported by an affidavit showing the excuse for the default, and also, unless a verified answer accompanies the application, which is the better practice, showing the nature of the defense.⁸ Great liberality should be shown to non-residents served by publication.⁹ An error of the clerk of the court;¹⁰ or a default, which resulted from an oversight of the defendant's counsel;¹¹ or was caused by his attorney's lack of knowledge of the proper mode of procedure in equity;¹² or a justifiable reliance upon the defense of a suit by a person in privity with the default,¹³ is a reason for allowing the defendant to appear and defend. Where due service was made, a default will not be opened unless a defense on the merits is shown.¹⁴ It has been

White, 8 Peters, 262, 8 L. ed. 938. See Oakley v. O'Neill, 2 N. J. Eq. 287.

⁶ Eq. Rule 17, copied in substance from Eq. Rule 19 of 1842. See Maynard v. Pomfret, 3 Atk. 468; Heyn v. Heyn, Jacob, 49.

⁷ French v. Stewart, 22 Wall. 238, 22 L. ed. 854.

⁸ Schofield v. Horse S. C. Co., 65 Fed. 433; Massachusetts B. L. Ass'n v. Lohmiller, 74 Fed. 23; Wells v. Cruger, 5 Paige (N. Y.), 164; Winship v. Jewett, 1 Barb. Ch. (N. Y.) 173; Goodhue v. Churchman, 1 Barb. Ch. (N. Y.) 596; Keil v. West, 21 Fla. 508; Emery v.

Downing, 13 N. J. Eq. 59; U. S. v. Whitmire, C. C. A., 188 Fed. 422. But see Metcalf v. Landers, 3 Baxt. (Tenn.) 35.

⁹ American F. L. M. Co. v. Thomas, C. C. A., 71 Fed. 782.

¹⁰ Blythe v. Hinckley, 84 Fed. 228.

¹¹ Benjamin Schwarz & Sons v. Kennedy, 156 Fed. 316. But see City of Kansas City, Kan. v. Union Pac. R. Co., C. C. A., 192 Fed. 316.

¹² McFarland v. State Savings Bank, 129 Fed. 244.

¹³ D. & W. Fuse Co. v. Trumbull El. Mfg. Co., 183 Fed. 784.

¹⁴ Massachusetts Ben. Life Ass'n v. Lohmiller, C. C. A., 74 Fed. 23.

said: that the same rule applies when there is color of claim that due service was made.¹⁵

If the defense seems to the court to be unconscientious, the application may be denied.¹⁶ In the State courts, applications to open defaults have been denied where the defendants wished to plead a discharge in bankruptcy,¹⁷ and in one case where the complainant's principal witness had died between the default and the motion.¹⁸ Where defendants wished to plead usury, relief has been conditioned upon payment of the principal,¹⁹ and upon a waiver of defense to the claim for the principal and legal interest.²⁰ An assignee of the subject-matter of the suit, by an assignment made after the default, has no more right to come in and defend than was possessed by the original defendant;²¹ but special favor is shown to assignees for the benefit of creditors.²²

It has been held that after the term, a decree taking a bill as confessed cannot be set aside on motion,²³ unless the motion was made or noticed at the term when the decree was entered,²⁴ even where there is a rule of the State court permitting such a practice.²⁵ Thus, the entry of a final decree by default upon notice to the defendants, without the entry of a formal order or interlocutory decree taking the bill as confessed, was held to be an irregularity for which the decree would not be set aside upon motion at a subsequent term.²⁶ But a decree taking a bill

See *White v. Crow*, 110 U. S. 183, 28 L. ed. 113.

¹⁵ *Massachusetts Ben. Life Ass'n v. Lohmiller*, C. C. A., 74 Fed. 23.

¹⁶ *Parker v. Grant*, 1 J. Ch. (N. Y.) 434; *Quincy v. Foot*, 1 Barb. Ch. (N. Y.) 496; *Freeman v. Warren*, 3 Barb. Ch. (N. Y.) 635; *Baxter v. Lansing*, 7 Paige (N. Y.), 350; *National Fire Ins. Co. v. Sackett*, 11 Paige (N. Y.), 660.

¹⁷ *Freeman v. Warren*, 3 Barb. Ch. (N. Y.) 635.

¹⁸ *Wooster v. Woodhull*, 1 J. Ch. (N. Y.) 529.

¹⁹ *Bard v. Fort*, 3 Barb. Ch. (N. Y.) 632.

²⁰ *Quincy v. Foot*, 1 Barb. Ch.

(N. Y.) 496; *Watt v. Watt*, 2 Barb. Ch. (N. Y.) 371; *National Fire Ins. Co. v. Sackett*, 11 Paige (N. Y.) 660.

²¹ *Watt v. Watt*, 2 Barb. Ch. (N. Y.) 371.

²² *Blanchard v. Cooke*, 144 Mass. 207.

²³ *Allen v. Wilson*, 21 Fed. 881; *Linder v. Lewis*, 1 Fed. 378; *Stuart v. St. Paul*, 63 Fed. 644; *Electric Vehicle Co. v. De Dietrich Import Co.*, 159 Fed. 492.

²⁴ *Stuart v. St. Paul*, 63 Fed. 664.

²⁵ *Austin v. Riley*, 55 Fed. 833.

²⁶ *Linder v. Lewis*, 1 Fed. 378. See *Stuart v. St. Paul*, 63 Fed. 688.

as confessed was set aside upon motion at a later term when it had been entered after appearance and before the time to plead had expired.²⁷ And in a proper case such a decree can be set aside by an original bill.²⁸

A decree *pro confesso* is not as of course according to the prayer of the bill, nor such as the complainant chooses to take; but it is made by the court according to what is proper to be decreed upon the assumption that the statements in the bill are true.²⁹ It has been held that there is an exception to this rule in the case of a bill to compel the issue of a patent, since the public are interested in the result, and that then the court may require a copy of the proceedings and testimony in the patent-office and call for any other competent evidence that the complainant may have to offer.³⁰ "The matter of the bill ought at least to be opened and explained to the court whenever the decree is applied for, so that the court may see that the decree is a proper one."³¹ "The bill, when confessed by the default of the defendant, is taken to be true in all matters alleged with sufficient certainty; but in respect to matters not alleged with due certainty, or subjects which, from their nature and the course of the court, require an examination of details, the obligation to furnish proofs rests on the complainant."³²

In the State courts a decree *pro confesso* is usually not taken against an infant without proof of the facts.³³ The Federal practice in this respect is not settled. When the bill relates to an unsettled account, a reference to a master is always necessary.³⁴

The equity rules provide that, after an order taking the bill

²⁷ *Fellows v. Hall*, 4 McLean, 281.

²⁸ *Thomson v. Wooster*, 114 U. S. 104, 112, 29 L. ed. 105, 107; *infra*, §§ 450-452.

²⁹ *Bradley, J.*, in *Thomson v. Wooster*, 114 U. S. 104, 113, 29 L. ed. 105, 108; *Andrews v. Cole*, 20 Fed. 410; *Rose v. Woodruff*, 4 J. Ch. (N. Y.) 547, 548.

³⁰ *Davis v. Garrett*, 152 Fed. 723, 725.

³¹ *Bradley, J.*, in *Thomson v. Wooster*, 114 U. S. 104, 113, 114, 29 L. ed. 105, 108.

³² *Master Hoffman in Williams v. Corwin*, Hopkins Ch. 471; quoted by *Bradley, J.*, in *Thomson v. Wooster*, 114 U. S. 104, 110, 111, 29 L. ed. 105, 107. See *Ohio Central R. Co. v. Central Tr. Co.*, 133 U. S. 83, 91, 33 L. ed. 561, 563.

³³ *Chaffin v. Kimball*, 23 Ill. 36, 38; *Ingersoll v. Ingersoll*, 42 Mass. 155; *Massie v. Donaldson*, 8 Ohio, 377, 381. Cf. *O'Hara v. MacConnell*, 93 U. S. 151, 23 L. ed. 842.

³⁴ *Pendleton v. Evans*, 4 Wash. 104, 112.

pro confesso for a default in pleading, "thereupon the same shall be proceeded in *ex parte*." ³⁵ Whether this deprives the defendant of the right to notice of subsequent proceedings and to appear before the master is doubtful. ³⁶ It has been held that he has no right to a notice and hearing on the settlement of the final decree. ³⁷ By the English practice, the defendant, after a decree *pro confesso* and a reference for an account, was entitled to have notice of the proceedings and to a hearing before the master. ³⁸ The same rule prevailed in the Second, ³⁹ in the Third, ⁴⁰ and in the Ninth, ⁴¹ Circuits. It has been held otherwise in the Eighth Circuit. ⁴² A decree upon a bill taken as confessed is *res adjudicata* between the same parties and their privies in subsequent proceedings. ⁴³

Where a bill for the infringement of a patent alleges infringement of "the invention" of the plaintiffs, and is taken as confessed, it seems that it cannot be claimed in subsequent proceedings in the same suit that the patent is void upon its face. ⁴⁴

When more than one defendant is charged with a joint liability, after the bill has been taken as confessed against one, no final decree can be made against him, unless and until a decree is entered against those who appear and defend the suit; ⁴⁵ and if the bill is finally dismissed upon the merits as to them, it will be dismissed as to the defaulter also. ⁴⁶ But the rule seems to be

³⁵ Equity Rule 16. This phrase is not used in the Rules of 1822. 7 Wheat. vii, 5 L. ed. 376.

³⁶ Bradley, J., in Thomson v. Wooster, 114 U. S. 104, 119, 120, 29 L. ed. 105, 110.

³⁷ Provident Life & Trust Co. of Philadelphia v. Camden & T. Ry. Co., C. C. A., 177 Fed. 854 (Third Circuit).

³⁸ Bennett v. Hoefner, 17 Blatchf. 341.

³⁹ Davis v. Garrett, 152 Fed. 723.

⁴⁰ Southern Pac. Co. v. Temple, 59 Fed. 17.

⁴¹ Austin v. Riley, 55 Fed. 833.

⁴² Heyn v. Heyn, Jacob, 49. So in the New York Chancery, 1

Hoffman Ch. Pr. 520; 1 Barb. Ch. Pr. 479. In New Jersey the rule was discretionary. Brundage v. Goodfellow, 4 Halst. Ch. 513; Thomson v. Wooster, 114 U. S. 104, 119, 120, 29 L. ed. 105, 110.

⁴³ Last Chance Min. Co. v. Tyler Min. Co., 157 U. S. 683, 39 L. ed. 859. *Infra*, § 186m.

⁴⁴ Dobson v. Hartford Carpet Co., 114 U. S. 439, 446, 447, 29 L. ed. 177, 179, Reedy v. Western El. Co., C. C. A., 83 Fed. 709.

⁴⁵ Frow v. De La Vega, 15 Wall. 552, 21 L. ed. 60.

⁴⁶ Terry v. Fontaine's Adm'r, 83 Va. 451; Petty v. Hannum, 2 Humph. (Tenn.) 102, 36 Am. Dec.

otherwise where his liability is distinct and several.⁴⁷ Where a decree *pro confesso* had been entered, adjudicating that one of the defendants had no right to the fund mentioned in the bill, it was held to be error for a final decree, after a hearing on issues raised by other defendants, to give to the defaulter an interest in the fund.⁴⁸

It seems that a decree taking a bill as confessed is of no effect unless followed by, or included in, a final decree.⁴⁹ An appeal can be taken from the decree, after a bill has been taken as confessed. Upon such an appeal the decree may be reversed for a defect in the service of the subpoena;⁵⁰ for failure to appoint a guardian *ad litem*, when required;⁵¹ it seems for a want of indispensable parties,⁵² and for a failure to set aside the decree upon a proper application.⁵³ The only question for the consideration of the court is whether the allegations in the bill are sufficient to support the decree.⁵⁴ It seems that the objection that the complainant had an adequate remedy at law rests in the discretion of the court of first instance, and that it cannot be waived in the appellate court by a defendant who is in default.⁵⁵ Where the defendant had not moved until nine months after the appointment of a receiver, and meanwhile the bill had been taken as confessed, it was held to be too late to take this objection.⁵⁶

303; *Butler v. Kenzie*, 90 Tenn. 31; s. c., 15 S. W. 1068; *Clason v. Morris*, 10 Johns. (N. Y.) 524; *Kooper v. Dyer*, 59 Vt. 477, 59 Am. Rep. 742.

⁴⁷ *Andrew v. Lee*, 1 Dev. & B. Eq. (N. C.) 318; *Simpson v. Moore*, 5 Lea. (Tenn.) 376.

⁴⁸ *Third Nat. Bank of Atlantic City*, C. C. A., 130 Fed. 751.

⁴⁹ *Frow v. De La Vega*, 15 Wall. 552, 51 L. ed. 60; *Butterworth v. Hill*, 114 U. S. 128, 29 L. ed. 119.

⁵⁰ *O'Hara v. MacConnell*, 93 U. S. 150, 23 L. ed. 840; *Butterworth v. Hill*, 114 U. S. 128, 29 L. ed. 119.

⁵¹ *O'Hara v. MacConnell*, 93 U. S. 150, 23 L. ed. 840.

⁵² *Ibid.*

⁵³ *American F. L. M. Co. v. Thomas*, C. C. A., 71 Fed. 782; *Nelson v. Eaton*, C. C. A., 66 Fed. 376.

⁵⁴ *Masterson v. Howard*, 18 Wall. 99, 21 L. ed. 764; *Ohio C. R. Co. v. Central Tr. Co.*, 133 U. S. 83, 33 L. ed. 561.

⁵⁵ *Brown v. Lake Superior Iron Co.*, 134 U. S. 530, 33 L. ed. 1021; *Western Elec. Co. v. Reedy*, 66 Fed. 163.

⁵⁶ *Brown v. Lake Superior Iron Co.*, 134 U. S. 530, 33 L. ed. 1021; *Anderson v. Hultberg*, C. C. A., 247 Fed. 273; *Miller v. Bely Oil Co.*, C. C. A., 248 Fed. 83; *Venner v. Pennsylvania Steel Co.*, 250 Fed. 292; *United States Oil & Land Co. v. Bell*, 219 Fed. 785; *Rowe v. Hill*, C. C. A., 215 Fed. 518. When a deed was delivered but not recorded before the suit, the grantee is not bound by the decree.

CHAPTER IX.

ANSWERS.

§ 173. **Answers in general.** "It shall be the duty of the defendant, unless the time shall be enlarged, for cause shown, by a judge of the court, to file his answer or other defense to the bill in the clerk's office within the time named in the subpoena as required by rule 12. In default thereof the plaintiff may, at his election, take an order as of course that the bill be taken *pro confesso*; and thereupon the cause shall be proceeded in *ex parte*." ¹

"Demurrers and pleas are abolished. Every defense in point of law arising upon the face of the bill, whether for misjoinder, nonjoinder, or insufficiency of fact to constitute a valid cause of action in equity, which might heretofore have been made by demurrer or plea, shall be made by motion to dismiss or in the answer; and every such point of law going to the whole or a material part of the cause or causes of action stated in the bill may be called up and disposed of before final hearing at the discretion of the court. Every defense heretofore presentable by plea in bar or abatement shall be made in the answer and may be separately heard and disposed of before the trial of the principal case in the discretion of the court. If the defendant move to dismiss the bill or any part thereof, the motion may be set down for hearing by either party upon five days' notice, and, if it be denied, answer shall be filed within five days thereafter or a decree *pro confesso* entered." ²

"The defendant in his answer shall in short and simple terms set out his defense to each claim asserted by the bill, omitting any mere statement of evidence and avoiding any general denial of the averments of the bill, but specifically admitting or denying or explaining the facts upon which the plaintiff relies, unless the defendant is without knowledge, in which case he shall so

§ 173. ¹ Eq. Rule 16.

² Eq. Rule 29.

state, such statement operating as a denial. Averments other than of value or amount of damage, if not denied, shall be deemed confessed, except as against an infant, lunatic, or other person non compos and not under guardianship, but the answer may be amended, by leave of the court or judge, upon reasonable notice, so as to put any averment in issue, when justice requires it. The answer may state as many defenses, in the alternative, regardless of consistency, as the defendant deems essential to his defense. The answer must state in short and simple form any counter-claim arising out of the transaction which is the subject-matter of the suit, and may, without cross-bill, set out any set-off or counter-claim against the plaintiff which might be the subject of an independent suit in equity against him, and such set-off or counter-claim, so set up, shall have the same effect as a cross-suit, so as to enable the court to pronounce a final judgment in the same suit both on the original and cross-claims."³

"If the counter-claim is one which affects the rights of other defendants they or their solicitors shall be served with a copy of the same within ten days from the filing thereof."⁴

An answer in equity serves two purposes: the setting up of the defenses to the suit and discovery. It may now pray relief against the complainant⁵ and against a co-defendant.⁶ Formerly this could not ordinarily be done without the filing of a cross-bill.⁷

§ 174. Admissions and denials and discovery. The Equity Rules now provide that the answer must specifically admit, deny, or explain the facts upon which the plaintiff relies, unless the defendant is without knowledge, in which case he shall so state, such statement operating as a denial.¹

The rules are silent as to whether an answer under oath to the bill is required, although they make a provision for answers under oath to interrogatories filed after issue is joined.² They are also silent as to whether the complainant may waive an

³ Eq. Rule 30; *Coalston v. H. Franke Steel Range Co.*, 221 Fed. 671.

⁴ Eq. Rule 31.

⁵ Eq. Rule 30.

⁶ Eq. Rule 31.

⁷ *Carnochan v. Christie*, 11 Wheat. 446, 6 L. ed. 516; *Veach v. Rice*, 131 U. S. 293, 33 L. ed. 163. *Infra*,

§ 197.

§ 174. ¹ Eq. Rule 30.

² Eq. Rule 58.

answer under oath and as to the effect of an answer under oath as evidence.

The Equity Rules of 1842, which seem in this respect to follow the former practice in chancery,³ provided: "If the complainant, in his bill, shall waive an answer under oath, or shall only require an answer under oath with regard to certain specified interrogatories, the answer of the defendant, though not under oath, shall not be evidence in his favor, unless the cause be set down for hearing on bill and answer only; but may nevertheless be used as an affidavit with the same effect as heretofore upon a motion to grant or dissolve an injunction, or on any other incidental motion in the cause; but this shall not prevent a defendant from becoming a witness in his own behalf under section 3 of the act of Congress of July 2, 1864."⁴ Consequently, under those rules, an answer under oath was usually waived by the complainant.⁵ It was held that, where an answer under oath was waived, a discovery could not be required,⁶ and that defendant

³ See *Daniell's Ch. Pr.*, First Am. Ed., 846; *Curling v. Townshend*, 19 Vesey 628, 629; *Billingslea v. Gilbert*, 1 Bland (Md.) 567; *Contee v. Dawson*, 2 Bland (Md.) 264; *Fulton Bank v. Beach*, 2 Paige, (N. Y.) 307; *Story's Eq. Pl.*, §§ 874, 875a.

⁴ Eq. Rule 41 of 1842 as amended December, 1871. The statute cited is now U. S. R. S., § 858. See *Woodruff v. Dubuque & S. C. R. Co.*, 30 Fed. 91.

⁵ See *Slessinger v. Buckingham*, 17 Fed. 454, 456.

⁶ *Tillinghast v. Chace*, 121 Fed. 435; *McFarland v. State Sav. Bank*, 132 Fed. 399; *Victor G. Bloede Co. of Baltimore City v. Carter*, 148 Fed. 127; *Gorham Mfg. Co. v. Weintraub*, 180 Fed. 639. See also *Harrington v. Harrington*, 15 R. I. 341, 5 Atl. 502; *McCulla v. Beadleston*, 17 R. I. 20, 26, 20 Atl. 11; *Starkweather v. Williams*, 21 R. I. 55, 41 Atl. 1003; *Ward v. Peck*, 114 Mass. 121; *Badger v. McNamara*, 123

Mass. 117, 120; *McCormick v. Chamberlain*, 11 Paige (N. Y.) 543; U. S. v. *McLaughlin* (C. C.) 24 Fed. 823; *Sheppard v. Akers*, 1 Tenn. Ch. 326; *Goodwin v. Bishop*, 145 Ill. 421, 34 N. E. 47; *Field v. Hastings & Bradley Co.*, 65 Fed. 279; *Story's Eq. Pldg.* § 875; *Daniell's Ch. Pr.* (3d. Am. ed.) 799. But see *Johnston v. Forsyth Merc. Co.*, 127 Fed. 845, 848; *John Church Co. v. Zimmerman*, 131 Fed. 652. *Contra*, *Bates on Equity Federal Procedure*, Vol. I, § 355; criticised by *Brewer, J.*, in *Tillinghast v. Chace*, 121 Fed. 435, 436. Citing *Kittredge v. Claremont Bank*, 1 Woodb. & M. 244, Fed. Cas. No. 7,859; *Whittemore v. Patten*, 81 Fed. 527; *Nat'l Hollow Brake Beam Co. v. Interchangeable Brake Beam Co.*, 83 Fed. 26; *Uhlmann v. Arnhold & Schaeffer Brewing Co.*, 41 Fed. 369; *Gamewell Fire-Alarm Tel. Co. v. Mayor* (C. C.), 31 Fed. 312; *Colgate v. Compagnie Francaise*, 23 Fed. 82; *Reed v. Cumberland Mut. Ins. Co.*, 36 N. J. Eq. 393; *Manley*

then could not be required to answer interrogatories attached to the bill.⁷ Where no such waiver was made, the former rule then still prevailed; and the sworn statement by the defendant, in direct response to an allegation in the bill, was deemed to be true, unless contradicted by two witnesses or a single witness and corroborating circumstances.⁸

Under the new rules this doctrine has been applied.⁹ Such a waiver does not relieve the defendant from answering interrogatories subsequently propounded.¹⁰ Irresponsive allegations were not evidence,¹¹ nor was the court bound by the construction placed in the answer upon facts that were therein pleaded.¹² Such an answer was not evidence of new facts, set up by way of evidence of the allegations of the bill.¹³ Neither were allegations upon information and belief,¹⁴ nor allegations sworn to positively, concerning facts of which it was evident the respondent could have no personal knowledge.¹⁵

The admissions of the defendant are binding upon him; and unless he can obtain leave to amend his answer by withdrawing them, he cannot disprove them at the hearing.¹⁶

v. Mickle, 55 N. J. Eq. 567, 37 Atl. 738.

⁷ Independent Baking Powder Co. v. Boorman, 130 Fed. 726; Victor G. Bloede Co. v. Carter, 148 Fed. 127. But where he undertook to answer, it was held, that he must answer fully. Ibid.

⁸ Clark's Ex'rs v. Van Riemsdyk, 9 Cranch, 153, 160, 3 L. ed. 688, 690; Union Bank of Georgetown v. Geary, 5 Pet. 99, 110, 3 L. ed. 60, 64; Seitz v. Mitchell, 94 U. S. 580, 582, 24 L. ed. 179, 180; Vigel v. Hopp, 104 U. S. 441, 26 L. ed. 765; Slessinger v. Buckingham, 17 Fed. 454, 456; Kennedy v. Custer, C. C. A., 174 Fed. 972. See the Responsive Answer in Equity, considered as Evidence for the Defendant, by J. M. Gest, 52 Am. L. Reg. 5.

⁹ Wilcox v. El. Banco, C. C. A., 255 Fed. 442. But see Watts v. Crabb, C. C. A., 257 Fed. 717.

¹⁰ Luten v. Camp, 221 Fed. 424. *Infra*, § 348.

¹¹ Pennsylvania Co. v. Cole, 132 Fed. 668.

¹² Northern Pac. Ry. Co. v. Boyd, C. C. A., 177 Fed. 804.

¹³ Sargent v. Larned, 2 Curt. 340; Seitz v. Mitchell, 94 U. S. 580, 24 L. ed. 179.

¹⁴ Berry v. Sawyer, 19 Fed. 286; Allen v. O'Donald, 28 Fed. 17; Earle v. Art L. Pub. Co., 95 Fed. 54.

¹⁵ Clark's Ex'rs v. Van Riemsdyk, 9 Cranch, 153, 161, 3 L. ed. 688, 690; Allen v. O'Donald, 28 Fed. 17.

¹⁶ Gold & S. O. S. Co. v. U. S. Dis. O. Co., 6 Blatchf. 207, 310. See Troy I. & N. Factory v. Corning, 6 Blatchf. 328, 336. Historical Pub. Co. v. Jones Bros. Pub. Co., C. C. A., 231 Fed. 638. An allegation that the patented machine had been used by the defendant be-

It was held that an admission of defendant's indebtedness to complainant in the amount named in the complaint was a waiver of an objection because of the omission of the complainant to allege that the claim had been reduced to judgment and execution returned unsatisfied.¹⁷ The defendant must answer every allegation in the bill which is material to the plaintiff's case, and an answer admitting which would not expose him to a penalty, forfeiture or criminal prosecution, or expose a privileged communication.¹⁸ A failure to answer an allegation, a discovery of which might incriminate defendant, might be a ground for taking that part of the bill as confessed by him.¹⁹

Under the chancery practice, the complainant was obliged to answer specifically and categorically, distinguishing between matters within his personal knowledge and those within his information and belief.²⁰ He had then to answer not only as to all facts within his knowledge, but as to all which he could ascertain from an inspection of books and papers in his possession or under his control.²¹ He was also required to give a full answer concerning any information that he could obtain upon the subject from persons in his employ.²² If he asserted ignorance as to any matter, he was required to aver that he was ignorant both of his own knowledge and as to information and belief.²³ But if

fore the application and that he was the inventor when not supported upon proof was held to be an admission of infringement. *Reed v. Cropp Concrete Mach. Co.*, C. C. A., 225 Fed. 764.

¹⁷ *Re Wm. S. Butler & Co.*, C. C. A., 207 Fed. 705.

¹⁸ *Atwill v. Ferret*, 2 Blatchf. 39, *infra*, §§ 348, 349; *Boyd v. N. Y. & H. R. Co.*, 220 Fed. 174. Where in a suit to remove a cloud on title a defendant who has charged with having conspired with the others to create the cloud and he answered merely by disclaiming any interest, right or title in or to the lands, his disclaimer was stricken out because he had failed to answer as to the conspiracy charged. *McDonald v.*

McDonald, 203 Fed. 724. See § 196, *infra*.

¹⁹ *Webb v. Samuels*, 227 Fed. 948.

²⁰ *Brooks v. Byam*, 1 Story, 296; *Kittredge v. Claremont Bank*, 3 Story, 596; s. c., 1 W. & M. 244; *Victor G. Bloede Co. v. Carter*, 148 Fed. 127. It has been said that the defendant must answer not only as to all facts within his knowledge, but to all which he can ascertain from an inspection of books and papers in his possession or under his control. *Davis v. Mapes*, 2 Paige (N. Y.) 105.

²¹ *Davis v. Mapes*, 2 Paige (N. Y.) 105.

²² *Rasbotham v. Shropshire Union Ry. Co.*, 24 Ch. D. 110.

²³ *Odger's Pleading*, 4th ed. p.

he denied knowledge and information he was not required to state his belief.²⁴ He could not deny that he had knowledge as to a subject which the bill charged as a personal transaction in which he took part.²⁵

This last rule, it has been said applies, as well as the others to officers of corporations.²⁶ If new officers have succeeded those in office at the time when the matters charged are said to have occurred, it is their duty, when called upon for discovery, to ascertain the facts by searching the records of the corporation and by inquiry of their predecessors.²⁷ It has been said that "a corporate answer should be made by the principal officer of the corporation, who should be able to admit or deny the facts charged and interrogated about, or to state want of knowledge clearly and truly as a reason for not doing it."²⁸ Where one or all of the officers of the corporation could not answer without self-incrimination, it was held that it was the duty of the corporation to select or provide an officer who would not be incriminated.²⁹

It is insufficient to deny any "recollection or belief" as to a transaction in which the defendant is said to have been personally engaged.³⁰ "The defendant in his answer must state the facts as they then are."³¹ But where a bill charged that the

271. See *infra*, § 348. It has been held that it is insufficient to deny fraud charged to have been committed by an agent upon the information of the agent and the belief of the principal. *Mason v. Jones*, 1 Hayw. & H. 329; s. c., Fed. Cas. No. 9,240. *Brooks v. Byam*, 1 Story, 296; *Kittredge v. Claremont Bank*, 1 W. & M. 244. It has been held that when the bill asks for testimony concerning his recollection he must give it accordingly. *Brooks v. Byam*, 1 Story, 296.

²⁴ *Victor G. Bloede Co. v. Carter*, 148 Fed. 127.

²⁵ *Burpee v. First Nat. Bank*, 5 Biss. 405. In extraordinary cases, answers as to the defendants' remembrance have been allowed, even when there was no request for the

remembrance upon the subject. *Hall v. Bodily*, 1 Vernon, 470; *Carey v. Jones*, 8 Ga. 516; *Hall v. Wood*, 1 Paige (N. Y.), 404; *Story's Eq. Pl.*, § 855. But see *Talbot v. Seabee's Heirs*, 31 Ky. 56.

²⁶ *Burpee v. First Nat. Bank*, 5 Biss. 405; *Kittredge v. Claremont Bank*, 1 W. & M. 244.

²⁷ *Kittredge v. Claremont Bank*, 1 W. & M. 244.

²⁸ *Wheeler, J.*, in *Hale v. Continental L. Ins. Co.*, 16 Fed. 718, 719.

²⁹ *Simon v. Am. Tobacco Co.*, 192 Fed. 662.

³⁰ *Taylor v. Luther*, 2 Sumner, 228.

³¹ *Sir Thomas Plumer, V. C.*, in *Knight v. Matthews*, 1 Madd. 566.

defendant would in future infringe a patent as he was charged to have done before, it was held insufficient for him to deny merely that he had done so since the trial of an action at law which established the complainant's rights.³² He should also answer as to his future intentions.³³ The Equity Rules of 1912 merely provide that the defendant shall answer concerning his knowledge, and that when he is without knowledge he shall so state, such statement operating as a denial.³⁴

A denial of two allegations conjunctively is not a denial of each.³⁵ An admission in the disjunctive is binding.³⁶ The statement that the respondent believes an allegation to be true is equivalent to an admission;³⁷ but the statement that he has no knowledge upon the subject seems to be equivalent to a denial,³⁸ although, if full discovery be required, it is subject to exception for insufficiency.³⁹ The denial⁴⁰ and the averment⁴¹ of a conclusion of law, have no effect.

A few of the earlier cases hold that a general traverse of the allegations concerning the citizenship and residence of the respective parties, do not raise an issue.⁴² An averment that land

³² *Poppenhusen v. N. Y. G. P. C. Co.*, 4 Blatchf. 185, s. c., 2 Fish. 74.

³³ *Poppenhusen v. N. Y. G. P. C. Co.*, 4 Blatchf. 185; s. c., 2 Fish. 74.

³⁴ Eq. Rule 30.

³⁵ *Pierson v. Ryerson*, 5 N. J. Eq. 196.

³⁶ *Adams Exp. Co. v. Adams*, C. C. A., 159 Fed. 62.

³⁷ There the plaintiff alleged that the defendant was a corporation organized under the laws of the State of New York, and the defendant, in its petition for removal and answer, alleged that it was "a corporation or joint stock company organized and existing under and by virtue of the laws of New York."

³⁸ *Brown v. Pierce*, 7 Wall. 205, 212, 19 L. ed. 134, 136; *Brooks v. Byam*, 1 Story, 296.

³⁹ *Kittredge v. Claremont Bank*, 1 W. & M. 244.

⁴⁰ *Union M. Ins. Co. v. Commer-*

cial M. M. Ins. Co., 2 Curt. 524; s. c. on appeal, as *Commercial M. Ins. Co. v. Union M. Ins. Co.*, 19 How. 318, 319, 15 L. ed. 636, 637. Thus, when the bill alleged that the defendant executed and delivered a deed, a denial by the defendant of its delivery, accompanied by an admission that he made the deed and placed it upon record, is equivalent to an admission of its delivery. *Adams v. Adams*, 21 Wall. 185, 22 L. ed. 504. An admission that a deed bears a certain date does not estop the respondent from showing that it was fraudulently antedated. *Holbrook v. Worcester Bank*, 2 Curt. 244.

⁴¹ *Klenk v. Byrne*, 143 Fed. 1008, 1011.

⁴² *Hill v. Walker*, C. C. A., 167 Fed. 241; *Bettes v. Brower*, 184 Fed. 342. See *supra*, § 40, *infra*, § 454.

which is the subject of the suit was at the time of its commencement unoccupied is not denied by an affirmative allegation in the answer that defendants "are now in the quiet and peaceable possession" of the same.⁴³ In a suit in equity, submitted on bill and answer, the complainant's title to real estate was deemed to be admitted by an answer in which the defendant pleaded an adverse claim of title, deraigned from a void judicial decree in a proceeding against the complainant to foreclose a lien for taxes, notwithstanding a denial of the complainant's title in the same answer.⁴⁴

In drawing such an answer, it is usual and often advantageous to interweave the discovery with a narrative of the transactions from the defendant's point of view in a continuous statement, so that it will be hard for the plaintiff to read as evidence the defendant's admissions without also reading the latter's own explanation and account of the controversy.⁴⁵

§ 175. Pleading defenses in answer. Inconsistent defenses may now be pleaded.¹

⁴³ *Klenk v. Byrne*, 143 Fed. 1008. Where the holder of a tax title sued out a writ of possession from a State court, and, in a suit to set aside his deed as a cloud on title, filed a cross-bill praying possession, held that he thereby confessed that the possession was in complainant. *Collier v. Goessling*, C. C. A., 160 Fed. 604. Complainant in a suit to quiet title alleged the recovery of judgment in ejectment against defendant, and that plaintiff had been put in possession by the marshal on execution of a writ of possession. Defendant answered, denying that the marshal had executed the writ, and filed a cross-bill alleging possession since 1899, as also of a 20-acre tract south and adjoining the land in controversy; that the marshal, in executing the writ of possession, removed defendant from such south 20-acre tract, and placed plaintiff's agent in possession thereof afterwards filing a return that

he had executed the writ by placing plaintiff's agent in possession of the land in controversy; but the cross-bill did not allege that the marshal did not in fact place plaintiff in possession of the land in controversy, nor was there any averment that defendant had paid taxes on such land. Held, that the cross-bill was demurrable for failure to show that the writ of possession was not executed according to its return. *Center v. Cady*, C. C. A., 184 Fed. 605.

⁴⁴ *Klenk v. Byrne*, 143 Fed. 1008.

⁴⁵ It has been held that where the original answer intermingles objectionable and irrelevant matter with allegations that are good, so that the result of striking out what is objectionable would be to leave the remaining parts disjointed and not in good form, an entirely new answer must be filed. *Dr. Miles Medical Co. v. Snellenburg*, 152 Fed. 661.

§ 175. 1 Eq. Rule 30. This prac-

Matters in abatement, such as *lis pendens* and objections to the jurisdiction of the court, can now be set up by answer.² Formerly, matters in abatement which did not affect the jurisdiction and objections to the character of the parties and matters of form, could not be so pleaded.³

Facts that have occurred since the filing of the bill may be so pleaded by the defendant.⁴

The defenses must be pleaded with sufficient certainty, although it seems that the same degree of certainty is not required in an answer as in a bill⁵ nor as formerly, in a plea.⁶

The general rule is that no affirmative defense can be proved unless it has been set up in the answer,⁷ but the failure of the

tice was first authorized by the New York Code of Procedure, written by David Dudley Field. Lord Chancellor Loreburn (Harv. Law Rev., xxvi., p. 101): "A litigant may state in his defense what facts he relies upon, and at the same time may state that he contends that even if the facts be as alleged by the plaintiff, yet they furnish no cause of action. That is in effect a demurrer. There is no doubt that this practice is beneficial. It may be convenient that the question of law decided by the demurrer should be decided first, and if decided in favor of the defendant it will end the case, unless the plaintiff is allowed to amend and raise a fresh contention. It may be, and generally is, convenient first, to ascertain all the facts at a trial, and then to apply the law or equity, as the case may be. Which course is to be taken is usually agreed to by the parties, but, if not agreed, the judge can direct what is to be done. We find it very useful to have as much elasticity as possible in these things, and I am sure no one doubts that all relevant contentions both of fact and law ought to be stated in the pleadings. An answer to a bill in equity may

plead a former judgment in bar in connection with matters of defense to the merits. *Mound City Co. v. Castleman*, 171 Fed. 520. In a patent case the defendant may deny complainant's title to the patent and allege his own ownership therein and at the same time deny its validity. *Cleveland Eng. Co. v. Galion Dynamic Motor Truck Co.*, 243 Fed. 405. See *infra*, § 188. *Todd Protectograph Co. v. New Era Mfg. Co.*, 236 Fed. 768.

² Eq. Rule 29.

³ Eq. Rule 39, of 1842; *Pierce v. Feagans*, 39 Fed. 587.

⁴ *Earl of Leicester v. Perry*, 1 Brown Ch. C. 305; *Turner v. Robinson*, 1 Sim. & S. 3.

⁵ *Daniell's Ch. Pr.* (5th Am. ed.) 714.

⁶ *Maury v. Mason*, 8 Porter (Ala.) 213, 228.

⁷ *Stanley v. Robinson*, 1 Russ. & M. 527; *Cummings v. Coleman*, 7 Rich. (S. C.) Eq. 509, 520, 62 Am. Dec. 402; *Burnham v. Dalling*, 3 C. E. Green (18 N. J. Eq.) 132; *Daniell's Ch. Pr.* (5th Am. ed.) 712; *Black v. Thorne*, 10 Blatchf. 66, 84; *Sperry v. Erie Ry. Co.*, 6 Blatchf. 425.

opposite party to make this a ground of objection to the introduction of evidence in support of such omitted defense waives the defect.⁸

Estoppel⁹ and purchase in good faith for a valuable consideration¹⁰ are such affirmative defenses. The defense that complainant has an adequate remedy at law unless raised by motion to dismiss should be set up in the answer¹¹ although the court may raise the same on its own motion.¹² It has been held: that when the fact appears, that the complainant has come into court with unclean hands because of fraudulent misrepresentations to the public concerning the subject-matter of the suit, his bill will be dismissed, although the defense is not pleaded.¹³ It has been said: that, if a defendant states in his answer certain facts as evidence of a particular case, which he represents to be the consequence of those facts, and upon which he rests his defense, he is not permitted afterwards to make use of the same facts, for the purpose of establishing a different defense from that to which by his answer he has drawn the plaintiff's attention.¹⁴ Thus it has been said that where fraud is set up in the answer "the party making the charge, if it is denied in a proper pleading, will be confined to that issue."¹⁵

§ 176. Defenses in answer. In general. The defenses which were formerly usually or always included in pleas may now be set up by answer. Pleas have been abolished, and with them a vast amount of learning has been rendered obsolete.¹ Defenses,

⁸ Lusk v. Bush, C. C. A., 199 Fed. 369.

⁹ Pennsylvania Co. v. Cole, 132 Fed. 668. But see Curtain Supply Co. v. Nat. Lock Washer Co., 174 Fed. 45; cited *infra*, § 188.

¹⁰ Great Northern Ry. Co. v. Hower, 236 U. S. 702; U. S. v. Grand Canyon Cattle Co., C. C. A., 247 Fed. 446.

¹¹ Thomas v. South Butte Min. Co., C. C. A., 230 Fed. 968; *infra*, § 376.

¹² Reynes v. Dumont, 130 U. S. 354, 32 L. ed. 934; *infra*, § 376.

¹³ Memphis Keeley Institute v. Leslie E. Keeley Co., C. C. A., 16

L.R.A. (N.S.), 921, 155 Fed. 964.

¹⁴ Langdell's Eq. Pl., § 79; Bennett v. Neale, Wightwick, 324.

¹⁵ French v. Shoemaker, 14 Wall. 314, 335, 20 L. ed. 852, 857. See § 70.

§ 176. 1 A plea was a pleading which set up some reason not apparent upon the face of the bill why the defendant should not be obliged to answer the whole or a part thereof. Lord Redesdale defines a plea as "a special answer to a bill, differing in this from an answer in the common form, as it demanded the judgment of the court, in the first instance, whether the special matter

which formerly might be set up by plea and can now be included in an answer, are either defenses in abatement or defenses in bar to the suit. Objections in abatement include among them,

urged by it did not debar the plaintiff from his title to that answer which the bill required." *Roche v. Morgell*, 2 Sch. & Lef. 721, 725. A plea might be to the whole or to a part of the bill. Usually but a single ground of defense could be presented by a plea, which, though it might state more than one fact, must bring the matters in issue to a single point. *Whitbread v. Brockhurst*, 1 Brown, Ch. C. 404, 416, note 9; s. c., 2 Ves. & Bea. 154, note; *Watkins v. Stone*, 2 Sim. 49; *Rhode Island v. Massachusetts*, 14 Pet. 210, 250, 10 L. ed. 423, 446; *Story's Eq. Pl.*, § 654. See *Rhino v. Emery*, 79 Fed. 483. Otherwise, it was opened to the charge of duplicity and multifariousness, and would be overruled. *Rhode Island v. Massachusetts*, 14 Pet. 210, 259, 10 L. ed. 423, 446. *Gaines v. Mauseaux*, 1 Woods, 118; *Whitbread v. Brockhurst*, 1 Brown, Ch. C. 404, 416, note 9; s. c., 2 Ves. & Beau. 154, note; *London v. Liverpool*, 3 Anst. 738; *Watkins v. Stone*, 2 Simons, 49; *Saltus v. Tobias*, 7 J. Ch. (N. Y.) 214; *Giant Powder Co. v. Safety N. P. Co.*, 19 Fed. 509; *M'Closkey v. Barr*, 38 Fed. 165; *Story's Eq. Pl.*, §§ 653-655. But see *Reissner v. Anness*, 12 Off. Gaz. 842; s. c., 3 Bann. & A. Pat. Cas. 148; *MacVeagh v. Denver C. W. W. Co.*, 85 Fed. 74; *Societe Fabriques v. Lueders*, 105 Fed. 632; *Hazard v. Durant*, 25 Fed. 26; *Fayerweather v. Hamilton College*, 103 Fed. 546. If a bill contained different prayers for relief based upon different grounds, the defendant might file a

plea to each part of the relief. *Emmott v. Mitchell*, 14 Sim. 432. And in other cases, where great inconvenience could thus be saved, the court might upon motion, after notice to the complainant's solicitor, give special leave to file a double plea, *Gibson v. Whitehead*, 4 Madd. 241; *Kay v. Marshall*, 1 Keen, 190, 192. But see *Reissner v. Anness*, 12 Off. Gaz. 842; s. c., 3 Bann. & A. Pat. Cas. 148; or rather, according to Professor Langdell, two separate pleas, each containing a single defense, *Langdell's Eq. Pl.*, § 98. Pleas were either pure, negative, or anomalous. A pure plea set up new matter as a defense which was not apparent upon the face of the bill, *McCloskey v. Barr*, 38 Fed. 165. A negative plea, which was sometimes also termed an anomalous plea, merely denied certain allegations contained in the bill, *Story's Eq. Pl.*, § 651; *Rhino v. Emery*, 79 Fed. 483. An anomalous plea set up a fact in avoidance of the bill, but one which the bill had anticipated and without confessing replied to, *Langdell's Eq. Pl.*, § 102; *Story's Eq. Pl.*, § 651; *McDonald v. Salem C. F. M. Co.*, 31 Fed. 577; *McCloskey v. Barr*, 38 Fed. 165; *Hilton v. Guyott*, 42 Fed. 249. But see *Milligan v. Milledge*, 3 Cranch, 220, 2 L. ed. 417. The main object of filing a plea was to avoid discovery, and in their drafting and defense much learning and subtlety was employed. Those interested in stating their history and refinement are referred to *Beames on Pleas*, *Wigram on Discovery*, and

objections to the jurisdiction, objections to the person and objections to the bill.² Objections to the jurisdiction are: (1) That the subject of the suit is not within the jurisdiction of a court of equity;³ (2) that some other court of equity has the proper jurisdiction;⁴ (3) that the defendant has not been properly served with process.⁵ Objections to the person are: (1) That the plaintiff has not the legal capacity to sue; either at all if an alien enemy,⁶ or alone if an infant,⁷ or without leave from the court if a receiver.⁸ (2) That the plaintiff is not the person whom he pretends to be, or does not sustain the character which he assumes; as, for example, that he is not executor,⁹ or not assignee,¹⁰ or not a corporation,¹¹ when suing as such; or that the suit is brought in the name of a fictitious person;¹² or that it is brought in the name of a person who sues for the benefit of another, through collusion or champerty;¹³ or, it seems, in a

Langdell on Equity Pleading, where they will find the subject discussed at length with full references to the cases. They were abolished in England by the Judicature Act of 1873, but they endured in the Federal courts until the end of the year 1912 and are still used in the courts of a few of the States. It was as true when they were abolished as in the time of Beames, that the subject of pleas in equity is one "concerning which so much still remains to be elucidated, that it may be said of them, *maxima pars eorum quas scimus est minima eorum quas ignoramus*," Beames on Pleas, 61. See *Am. Sulphite Pulp Co. v. Bayless Pulp & Paper Co.*, 163 Fed. 843, 844.

² See Beames on Pleas, ch. 2; Story's Eq. Pl., §§ 705-708; Rule 39; *Memphis City v. Dean*, 8 Wall. 64, 19 L. ed. 326.

³ Story's Eq. Pl., §§ 710-713.

⁴ Story's Eq. Pl., §§ 714-716.

⁵ *Larned v. Griffin*, 12 Fed. 590; *Williams v. Empire Tr. Co.*, 1 N. J. L. 315.

⁶ *Albrech v. Sussman*, 2 V. & B. 323; Story's Eq. Pl., § 724; *Mumford v. Mumford*, 1 Gall. 366.

⁷ Story's Eq. Pl., § 725. But see *Dudgeon v. Watson*, 23 Fed. 161.

⁸ See *Newman v. Moody*, 19 Fed. 858.

⁹ See *Rubber Co. v. Goodyear*, 9 Wall. 788, 792, 19 L. ed. 566, 567; *Ord. v. Huddleston*, 2 Dick. 510; Story's Eq. Pl., § 727.

¹⁰ *Nicholas v. Murray*, 5 Saw. 320.

¹¹ *Dental V. Co. v. Wetherbee*, 2 Cliff. 555; *Blackburn v. Selma, M. & M. R. Co.*, 2 Flap. 525; *Emerson Co. v. Nimrocks*, 88 Fed. 280. A limited partnership, organized under the laws of Michigan, was allowed, in the Second Circuit, to sue in equity in its copartnership name, where jurisdiction did not depend upon the citizenship. *Sanitas Nut Food. Co. v. Force Food Co.*, 124 Fed. 302.

¹² *Chapman v. School Dist. No. 1, Dady*, 108, 116.

¹³ *Dinsmore v. Central R. Co.*, 19 Fed. 153. But see *Sperry v. Erie Ry. Co.*, 6 Blatchf. 425.

stockholder's suit founded upon a right which may properly be asserted by the corporation, that the corporation has not refused to sue.¹⁴ It was held that the objection that the plaintiff was a lunatic and could not sue without a next friend could not be taken by plea, and that the proper course for the defendant was to move either to strike the bill off the file on account of the complainant's mental incapacity, or for a stay of the proceedings until a committee or next friend was appointed.¹⁵ (3) That the defendant cannot be sued except upon the happening of some event which has not occurred, as under the former practice, that he was a receiver, and no leave to sue him had been obtained from the court by which he was appointed.¹⁶ (4) That the defendant is not the person he is alleged to be, or does not sustain the character which he is alleged to bear;¹⁷ or that the person named as a defendant is not a corporation when sued as such, in which case the person served with process on its behalf may file the answer in his own name,¹⁸ or was not incorporated under the laws of the State which is named in the bill as its creator;¹⁹ or that the defendant has become a bankrupt or insolvent, and his interest in the subject-matter has passed to his assignee.²⁰ It is improper to file an answer in the name of a defunct corporation by its successor.²¹ It was held: that it was too late to file a plea that the defendant corporation had been dissolved, when, after the alleged dissolution, counsel had argued on its behalf in support of a judgment in its favor, which was subsequently reversed.²² Objections to the bill are: (1) That there is another suit depending in a domestic court of equity for the same matter. (2) That there is a want of proper parties.

¹⁴ *Newby v. Oregon Cent. Ry. Co.*, 1 Saw. 63, 67.

¹⁵ *Dudgeon v. Watson*, 23 Fed. 161.

¹⁶ *Barton v. Barbour*, 104 U. S. 126, 26 L. ed. 672; *Jerome v. McCarter*, 94 U. S. 734, 737, 24 L. ed. 136, 137; *In re Young*, 7 Fed. 855. But see 24 St. at L. ch. 373, § 3; *infra*, § 314.

¹⁷ *Story's Eq. Pl.*, §§ 732-734.

¹⁸ *Kelly v. Mississippi C. R. Co.*, 1 Fed. 564; s. c., 2 Flip. 581. See

also *Williams v. Empire Tr. Co.*, 1 N. J. L. J. 315.

¹⁹ *Blackburn v. Selma, M. & M. R. Co.*, 2 Flip. 525.

²⁰ *Kittredge v. Claremont Bank*, 3 Story, 590; *Story's Eq. Pl.*, § 732. See also *Doggett v. Emerson*, 1 Woodb. & M. 196.

²¹ *Underwood Typewriter Co. v. Fox Typewriter Co.*, 158 Fed. 476.

²² *L. Bucki & Son Lumber Co. v. Atlantic Lumber Co.*, C. C. A., 128 Fed. 332.

(3) That the bill will cause an improper multiplicity of suits.

(4) Multifariousness.²³

Defenses which consist of matters of law may also be pleaded in the answer.²⁴ When an objection to the jurisdiction has been previously overruled it is the safer practice to reassert the same in the answer.²⁵ Otherwise the court might hold that it had been waived when capable of waiver.²⁶ Where complainant had filed answers in suits in a State court it was held that he could not thereafter maintain in the Federal court a bill to enjoin the prosecution of those actions because of a multiplicity of suits.²⁷

§ 177. The pendency of another suit. A defense, that another suit in equity is pending for the same cause in the same court is, if true, a sufficient defense to a bill.¹ The pendency of an action at law for the same matter is not, however, in itself a defense,² for the very fact that relief cannot be had at law is the usual ground for resorting to equity. Thus the pendency of an action at law upon a contract was held to be no bar to a subsequent bill in equity by the same plaintiff to reform it so as to obviate a cross-action on the contract by the defendant.³

Conversely it has been held that the pendency of a suit in

²³ Story's Eq. Pl., §§ 735-748.

²⁴ *Boyd v. N. Y. & H. R. Co.*, 220 Fed. 174, 178.

²⁵ *Tate v. Brinser*, 226 Fed. 878; *Fry v. Denver & R. G. R. Co.*, 226 Fed. 898. *Supra*, §§ 169, 170.

²⁶ *Granite Brick Co. v. Titus, C. C. A.*, 226 Fed. 557.

²⁷ *Robinson v. Wemmer*, 253 Fed. 790.

§ 177. ¹ Mitford's Pl., ch. 2, § 2, part 2; Story's Eq. Pl., § 736; *Umlin v. Hudson*, 1 Vern., 332; *Foster v. Vassall*, 3 Atk. 587, 590; *Crofts v. Wortley*, 1 Ch. Ca. 241; *Tarleton v. Barnes*, 2 Keen, 632, 635; *Insurance Co. v. Brune*, 96 U. S. 588, 592, 593, 24 L. ed. 737, 739, 740. See also *Memphis v. Dean*, 8 Wall. 64, 19 L. ed. 326. The pendency of a suit to enjoin the removal of ore from a mining claim, brought in as-

sistance to an action of ejectment to recover possession of a part of such claim, is not a bar to a subsequent suit by the same complainant to remove a cloud on its title to the entire claim, which includes extralateral rights not in controversy in the former suit. *Empire State-Idaho M. & D. Co. v. Bunker Hill & S. M. & C. Co.*, C. C. A., 121 Fed. 973. Where the former suit was by a trustee who had removed and the second by the beneficiary of the trust, it was held that there should be no abatement of the latter. *Alexander v. Fidelity Trust, C. C. A.*, 249 Fed. 1.

² *Graham v. Meyer*, 4 Blatchf. 129; *Thorne v. Towanda T. Co.*, 15 Fed. 289, 292.

³ *Providence S. E. Co. v. Hathaway Mfg. Co.*, 79 Fed. 512.

equity is no ground for a plea in abatement of an action at law.⁴ If, however, there appeared to be no sufficient reason for the maintenance of both, the court at equity might, after the defendant has answered, put the plaintiff to his election, whether he will proceed at law or in equity; and if he elects the latter, then his proceeding at law would be enjoined; if the former, his bill would be dismissed.⁵

The pendency of another suit in personam in a court of another State of the Union⁶ or of a foreign country⁷ is not a bar to a suit for the same relief in a District Court of the United States when the object is not to obtain the possession of property in the custody of the former court⁸ or the former court has acquired jurisdiction by garnishee process or attachment.⁹

The pendency of a similar suit in a court, held within the same State and district where the Federal court is held, is under similar circumstances, not a bar to a suit for the same relief in a District Court of the United States;¹⁰ where the Federal

⁴ Jarrett v. Halsey, C. C. A., 244 Fed. 392.

⁵ Story's Eq. Pl., § 742; Beames' Orders in Ch., 11, 12; Mitford's Pl., ch. 2, § 2, part 2; Royle v. Wyne, 1. C. & Ph. 252; Thorne v. Towanda T. Co., 15 Fed. 289, 292; *infra*, § 368.

⁶ Insurance Co. v. Brune, 96 U. S. 588, 592, 593, 24 L. ed. 737, 739. 740; Stanton v. Embrey, 93 U. S. 548, 23 L. ed. 983; O'Callaghan v. O'Brien, 116 Fed. 934; Robinson v. Suburban Brick Co., C. C. A., 127 Fed. 804. But see Dady v. Georgia & A. Ry. Co., 112 Fed. 838.

⁷ Lord Dillon v. Alvares, 4 Vesey, 357; Story's Eq. Pl., § 747; The Kongsli, 252 Fed. 267 (a suit in personam in Admiralty).

⁸ Briggs v. Stroud, 58 Fed. 717, 720; Mankato v. Barber Asphalt Paving Co., C. C. A., 142 Fed. 329, *supra*, § 57.

⁹ Lowenstein v. Levy, C. C. A., 212 Fed. 383.

¹⁰ Latham v. Chafee, 7 Fed. 520;

White v. Whitman, 1 Curt. 494; Sharon v. Hill, 22 Fed. 28; Washburn & M. Mfg. Co. v. v. Scutt, 22 Fed. 710; Loring v. Marsh, 2 Cliff. 322; Gordon v. Gilfoil, 99 U. S. 168, 178, 25 L. ed. 383, 386; Dwight v. Cent. Vt. R. Co., 9 Fed. 785; Crescent City L. S. Co. v. Butchers' U. L. S. Co., 12 Fed. 225; North Muskegon, v. Clark, C. C. A., 62 Fed. 694; Marshall v. Otto, 59 Fed. 249; Rejall v. Greenhood, 60 Fed. 884; Short v. Hepburn, 75 Fed. 113; Shaw v. Lyman, 79 Fed. 2; Brooks v. Vermont Cent. R. Co., 14 Blatchf. 463, Fed. Cas. No. 1,964; Beekman v. Hudson River West Shore Ry. Co., 35 Fed. 3; Barber Asphalt Paving Co. v. Morris, C. C. A., 67 L. R. A. 761, 132 Fed. 945; Burk v. McCaffrey, 136 Fed. 696; Mankato v. Barber Asphalt Paving Co., C. C. A., 142 Fed. 329; Barnadall v. Waltemeyer, C. C. A., 142 Fed. 415; New York Cotton Exch. v. Hunt, 144 Fed. 511; Weir v. Winnett, 155 Fed. 824; Borden's Condensed Milk

jurisdiction is founded upon difference of citizenship, although the suit was begun in a State court where the first action was pending and was subsequently removed.¹¹ But it is usually a ground for a stay of its own proceedings by the Federal court, where the action in the State court was first instituted,¹² pro-

Co. v. Baker, 177 Fed. 906, Chicago, B. & Q. R. Co. v. Weil, 183 Fed. 956; People's Gaslight & Coke Co. v. City of Chicago, 192 Fed. 398; Bixler v. Pennsylvania R. Co. v. Will, Fed. 553; Commission Co. v. Williams, 211 Fed. 530; Rouiller v. A. & B. Schuster Co., 212 Fed. 348; City of Ironton, Ohio, v. Harrison Const. Co., C. C. A., 212 Fed. 353; Land v. Ferro-Concrete Const. Co., 221 Fed. 433; *Re Lasserot*, C. C. A., 240 Fed. 325; Doane v. California Land Co., C. C. A., 243 Fed. 67; Jarrett v. Halsey, C. C. A., 244 Fed. 392; Knudsen v. First Trust & Savings Bank, C. C. A., 245 Fed. 81; W. D. Reeves Lumber Co. v. Leavenworth, C. C. A., 248 Fed. 686; Latham v. Chafee, 7 Fed. 520; White v. Whitman, 1 Curt. 494; Sharon v. Hill, 22 Fed. 28; Washburn & M. Mfg. Co. v. Scutt, 22 Fed. 710; Loring v. Marsh, 2 Cliff. 322; Gordon v. Gilfoil, 99 U. S. 168, 178, 25 L. ed. 383, 386; Crescent City L. S. Co. v. Butchers' U. L. S. Co., 12 Fed. 225; Dwight v. Cent. Vt. R. Co., 9 Fed. 785; North Muskegon v. Clark, C. C. A., 62 Fed. 694; Marshall v. Otto, 59 Fed. 249; Rejall v. Greenhood, 60 Fed. 884; Short v. Hepburn, 75 Fed. 113; Shaw v. Lyman, 79 Fed. 2; Brooks v. Vermont Cent. R. Co., 14 Blatchf. 463, Fed. Cas. No. 1,964; Beekman v. Hudson River West Shore Ry. Co. 35 Fed. 3; Barber Asphalt Paving Co. v. Morris, C. C. A., 67 L.R.A. 761, 132 Fed. 945; Burk v. McCaffrey, 136 Fed. 696; Mankato v. Barber Asphalt Paving

Co., C. C. A., 142 Fed. 329; Barnsdall v. Waltemeyer, C. C. A., 142 Fed. 415; New York Cotton Exch. v. Hunt, 144 Fed. 511; Weir v. Winnett, 155 Fed. 824; Borden's Condensed Milk Co. v. Baker, 177 Fed. 906; Chicago, B. & Q. R. Co. v. Weil, 183 Fed. 956; People's Gaslight & Coke Co. v. City of Chicago, 192 Fed. 398; Curlette v. Olds, 110 App. Div. (N. Y.) 596. The fact that a counter-claim was pleaded in the State court was held to make no difference in this respect. Burk v. McCaffrey, 136 Fed. 696. But see Gamble v. San Diego, 79 Fed. 487, and *supra*, § 57. *Contra*, Radford v. Folsom, 14 Fed. 97; Brooks v. Mills County, 4 Dill. 524; Lawrence v. Remington, 6 Biss. 44; Marks v. Marks, 75 Fed. 321; South Penn Oil Co. v. Miller, C. C. A., 175 Fed. 729. See Am. Confectionery Co. v. North British & Mercantile Ins. Co., 199 Fed. 195.

See D. E. Loewe Co. v. Lawlor, 130 Fed. 633; holding that an action, founded upon an act of Congress, against monopolies of Interstate Commerce was not affected by a previous suit in the State court for similar relief.

¹¹ Land v. Ferro-Concrete Const. Co., 221 Fed. 433.

¹² Foley v. Hartley, 72 Fed. 570; Zimmerman v. So Relle, C. C. A., 80 Fed. 417; Hughes v. Green, C. C. A., 84 Fed. 833; Green v. Underwood, 86 Fed. 427. See Hughes v. Green, 75 Fed. 693; Benoist v. Smith, 191 Fed. 514. A State court

vided that the parties to the two suits are the same.¹³ Not, however, when the suit in the court of the United States is brought to enforce a cause of action of which the Federal jurisdiction is exclusive.¹⁴

The effect of the pendency of another suit for the same cause in another court of the United States has never been expressly decided.

Where the suits sought to set aside the same judgment and to subject to the payment of the judgment land in different districts, it was held that the pendency of one did not affect the institution and prosecution of the other.¹⁵ In such a case where the parties are the same, the court, where the first suit was brought, might enjoin the prosecution of the other suit.¹⁶ This might also be done if the prior suit involved an adjudication upon the validity of the right to use a machine affected by the second suit;¹⁷ but not merely because the validity of the plaintiff's patent is attacked in another suit to enjoin the use of a different machine.¹⁸ Where the pendency of the former suit appeared on the face of the complaint it was held that it was waived when not raised by demurrer.¹⁹

A defense that another suit is pending, in which the complainant might obtain by cross-bill the relief now sought by him, is bad.²⁰

refused to stay foreclosure proceedings pending a prior suit to set aside the mortgage, brought by a mortgagor in the Federal court in the same district, when it appeared that the mortgagor was an attorney in the State courts, who founded his suit upon a technical non-residence, and there were circumstances which made it probable that the action was brought to hinder and delay the mortgagee. *Curlette v. Olds*, 110 App. Div. (N. Y.) 596. See *supra*, § 57. *Contra*, *R. M. Rose & Co. v. Southern Express Co.*, 223 Fed. 868; *Woren v. Witherbee-Sherman & Co.*, 240 Fed. 1013.

¹³ *Kirkpatrick v. Eastern Milling & Export Co.*, 135 Fed. 144. See

Wheeler v. McCormick, 8 Blatchf. 267; *Steiger v. Heidelberger*, 4 Fed. 455; s. c., 18 Blatchf. 426; *Brooks v. Mills County*, 4 Dill. 524, 527.

¹⁴ *Photo Drama Motion Picture Co. v. Social U. Film Corp.* 213 Fed. 374.

¹⁵ *Ross v. Miller*, C. C. A., 252 Fed. 697, 700.

¹⁶ *Electric Vehicle Co. v. Barney*, 143 Fed. 551.

¹⁷ *Ibid.*

¹⁸ *Ibid.*

¹⁹ *Rederiaktiebolaget Amie v. Universal Transp. Co.*, C. C. A., 250 Fed. 400.

²⁰ *Washburn & M. Mfg. Co. v. Seutt*, 22 Fed. 710.

A defense of *lis pendens* should set forth the commencement of the former suit, its general nature, character, and objects, whether it is at law or in equity, the relief prayed and how far it has progressed;²¹ it should then aver specifically that the second suit is for the same subject-matter²² as the first, and seeks the same or similar relief;²³ and further, that the former suit is still pending.²⁴ It must show that the defendant was served or has appeared in the former suit.²⁵ "For it is no suit depending till the parties have appeared or been served to appear, but only a piece of parchment thrown into the office, which may lie there forever, and never come to a suit."²⁶ It is not necessary to the sufficiency of the plea that the former suit should be precisely between the same parties as the latter. For if a man institutes a suit, and afterwards sells part of the property in question to another, who files an original bill touching the part so purchased by him, a plea of the former suit depending touching the whole property will hold.²⁷ So where one part-owner of a ship filed a bill against the husband for an account, and afterwards the same part-owner and the rest of the owners filed a bill for the same purpose, the pendency of the first suit was held a good plea to the last;²⁸ for though the first bill was insufficient for want of parties, yet by the second bill the defendant was doubly vexed for the same cause. The course which the court has taken in such case has been to dismiss the first bill, and to direct the defendant in the second cause to answer upon being paid the costs of the plea allowed.²⁹ Where a former suit had been brought for a part, but not the whole, of the relief sought in the case at bar, the court held its pendency no defense,

²¹ *Crescent City L. S. Co. v. Butchers' U. L. S. Co.*, 12 Fed. 225; *Green v. Underwood*, C. C. A., 86 Fed. 427; *Foster v. Vassal*, 3 Atk. 589, 590; *Story's Eq. Pl.*, § 737.

²² *Devie v. Lord Brownlow*, 2 Dick. 611; *Mitford's Pl.*, ch. 2, § 2, part 2; *Story's Eq. Pl.*, § 737.

²³ *Behrens v. Sieveking*, 2 Myl. & Cr. 602; *Wheeler v. McCormick*, 8 Blatchf. 267; *Jenkins v. Eldridge*, 3 Story 183; *Story's Eq. Pl.*, § 737.

²⁴ *The Haytian Republic*, 57 Fed. 508, 512.

²⁵ *Moor v. Welsh, C. Co.*, 1 Eq. Cas. Abr. 39, pl. 14; *Story's Eq. Pl.*, § 737. See *Urlin v. Hudson*, 1 Vern. 332; *Mitford's Pl.*, ch. 2, § 2, part 2.

²⁶ *Ibid.*

²⁷ *Ibid.*

²⁸ *Durand v. Hutchinson*, Mich. 1771, in Chan.

²⁹ *Mitford's Pl.*, ch. 2, § 2 part 2, citing *Crofts v. Wortley*, 1 Ch. Cas. 241.

but said that proceedings in it might be stayed until the determination of the second suit.³⁰ Where a second bill is brought by the same person for the same purpose, but in a different right, as where the executor of an administrator brought a bill conceiving himself to be the personal representative of the intestate, and afterwards procured administration *de bonis non*, and brought another bill, the pendency of the former bill is not a good plea.³¹ The reason of this determination seems to have been, that, the first bill being wholly irregular, the plaintiff could have no benefit from it, and it might have been dismissed upon demurrer.

Pendency of a suit for a penalty because of the importation of a laborer under contract prevents the institution of a second suit for the same violation of the statute.³²

Where a decree is made upon a bill brought by a creditor on behalf of himself and all other creditors of the same person, and another creditor comes in before the master to take the benefit of the decree, and proves his debt, and then files a bill on behalf of himself and the other creditors, the defendants may plead the pendency of the former suit; for a man coming in under a decree is *quasi* a party.³³ The pendency of a taxpayer's bill in the same court was held to be a defense to a bill by other taxpayers for the same relief.³⁴

The pendency of a suit for the infringement of a patent in one district is no bar to a suit against the same defendant for the infringement of the same patent in another district; but, in the latter suit, the court will only consider and adjudicate upon alleged infringements within its district if the defendant resides or has made a general appearance in the former.³⁵

§ 178. Defenses in bar. Defenses in bar set up some reason founded on the substance of the case, why the plaintiff is not entitled to relief. They rest upon some matter created by either statute, matter of record or matter *in pais*, which last term

³⁰ Mass. Mut. L. I. Co. v. Chicago & A. R. Co., 13 Fed. 857.

³¹ Huggins v. York B. Co., 2 Atk. 44.

³² U. S. v. Dwight Mfg. Co., 213 Fed. 522.

³³ Mitford's Pl. ch. 2, § 2, part 2,

citing upon last point, Neve v. Weston, 3 Atk. 557.

³⁴ Gamble v. San Diego, 79 Fed. 487.

³⁵ Warren Bros. Co. v. City of Montgomery, 172 Fed. 414.

signifies a matter of fact that is not of record, and is not given by statute special effect.

§ 179. Defenses of statutes. In general. Defenses founded upon matter that is made a bar by statute rests upon the statute of limitations, the statute of frauds, or less frequently some other statute. An act of Congress ratifying the construction of an otherwise illegal structure will, if constitutional, abate a suit for an injunction against the further maintenance of the structure, although not set up by plea, answer, or demurrer.¹ Congress has enacted statutes of limitations in certain civil and criminal cases.

§ 180. Statute of limitations to suits for infringement of patents. "In any suit or action brought for the infringement of any patent, there shall be no recovery of profits or damages for any infringement committed more than six years before the filing of the bill of complaint or the issuing of the writ in such suit or action, and this provision shall apply to existing causes of action."¹ Less than six years' delay will rarely bar a suit to enjoin the infringement of a patent;² although it may prevent interlocutory relief.³ The fact that the owner of a patent permitted a suit for its infringement to be dismissed before trial without prejudice is not such laches as to bar a second suit against the same defendant when the statutory period has not expired,⁴ but a delay before suit by the owner of a patent, of seven,⁵ or of nine years,⁶ after knowledge of an infringement was held to be such laches as to defeat him, although in the latter

§ 179. ¹The Clinton Bridge, 10 Wall. 454, 19 L. ed. 969. But see *Griffing v. Gibb*, 2 Black, 519, 17 L. ed. 353; *Liverpool, N. Y. & P. S. S. Co. v. Comrs. of Emigration*, 113 U. S. 33, 38, 28 L. ed. 899, 900.

§ 180. ¹29 St. at L. 694.

²*Ide v. Trorlicht, D. & N. Carpet Co.*, C. C. A., 115 Fed. 137, 147.

³*Infra*, §§ 277, 294.

⁴*Welsbach Light Co. v. Cohn*, 181 Fed. 123.

⁵*General El. Co. v. Yost Electric Mfg. Co.*, 208 Fed. 719.

⁶*Hall v. Frank*, 195 Fed. 946. In *Layton Pure Food Co. v. Church & Dwight Co.*, C. C. A., 32 L.R.A. (N.S.) 274, 182 Fed. 35, it was held that a delay for the same period in a trademark case did not deprive the complainant of the right to an injunction, although the accounting must be limited to the time subsequent to the commencement of the suit.

case he claimed that his partner in the ownership of the patent had prevented the previous institution of the litigation.⁷

A delay of six years with failure to mark the patented articles was held to bar the owners claim for damages and claims, but not his right to an injunction although he had known of the infringement during the whole time.

Where the complainant duly notified the defendant that the latter was infringing its trade-mark and threatened suit, subsequent delay for eight years was held to be no laches when the defendant had not changed its position in consequence.⁸

It has been held: that the Federal statute of limitations need not be pleaded to bar the collection of profits or damages for infringement of patents more than six years before the suit.⁹

§ 180a. Statute of limitations to applications for patents. "All applications for patents shall be completed and prepared for examination within one year after the filing of the application, and in default thereof, or upon failure of the applicant to prosecute the same within one year after any action therein, of which notice shall have been given to the applicant, they shall be regarded as abandoned by the parties thereto, unless it be shown to the satisfaction of the Commissioner of Patents that such delay was unavoidable."¹ It has been held that this requires a bill in equity to compel the issue of a patent, to be filed within one year after the refusal thereof.²

⁷ For laches which will not bar a suit for an accounting in patent and trade mark cases. *A. R. Mosler & Co. v. Lurie*, C. C. A., 209 Fed. 364; *Drum v. Turner*, 219 Fed. 188; *Closez & Howard Mfg. Co. v. J. I. Case Threshing Mach. Co.*, 216 Fed. 937. See *Wm. A. Rogers v. H. O. Rogers Silver Co.*, 237 Fed. 887.

⁸ *Aunt Jemima Mills Co. v. Rigney & Co.*, C. C. A., 247 Fed. 407. For laches which will defeat a suit for an accounting in patent and trade mark cases, see: *Valvoline Oil Co. v. Havoline Oil Co.*, 211 Fed. 189; *Wright's Automatic T. P. Mach. Co. v. American T. Co.*, 220 Fed. 163; *Vacuum Cleaner Co.*

v. Innovation Electric Co., Inc., 234 Fed. 942; *Allen v. Walker & Gibson*, 235 Fed. 230, 233; *Ashley v. Samuel C. Tatum Co.*, 240 Fed. 979; *O. & W. Thum Co. v. Dickinson*, C. C. A., 245 Fed. 609; *Hills v. Hamilton Watch Co.*, 248 Fed. 499.

⁹ *Peters v. Hanger*, C. C. A., 127 Fed. 820; *Johnson v. Roe*, 1 Fed. 692; *Etting v. Marx's Ex'r*, 4 Fed. 673. But see *Pratt v. Northam*, 5 Mason, 95.

§ 180a. 1 U. S. R. S. § 4894, as amended 29 St. at L. 692, § 4, 5 Fed. St. Ann. 488, Comp. St. 3384, *Pierce Fed. Code*, § 8760.

² *Westinghouse El. & Mfg. Co. v. Ohio Brass Co.*, 196 Fed. 518.

§ 180b. Statutes of limitations to copyright suits. The Copyright Act of March 4, 1909 provides: "That no criminal proceedings shall be maintained under the provisions of this Act unless the same commenced within three years after the right of action arose."¹

The Revised Statutes provide: "No action shall be maintained in any case of forfeiture or penalty under the copyright law, unless the same is commenced within two years after the cause of action has arisen."² Whether this section is still in force has not been decided.

This statute does not apply to a bill in equity for an injunction and damages,³ nor to an action for the statutory damages for the violation of a dramatic copyright.⁴ Actions at common law for damages under the copyright law are subject to the State statutes of limitations.⁵ Suits in equity for an injunction and damages or profits, are not subject to any statutes of limitation.⁶ They may, however, be barred by laches.⁷

When the statute imposing a penalty was in force each printing from plates created a new cause of action.⁸

Where within a month after the decision of a Circuit Court of Appeals giving a narrow construction to a patent, the patentee presented the matter to the Patent Office, and on the advice of that office filed in the court a petition for rehearing, and later a petition for writ of certiorari, which latter was denied fourteen months after the original decision. Seven months thereafter the patentee applied for a reissue of his patent with a written description. *Held*, that he was not guilty of such laches, as would invalidate his reissued patent. *Ashley v. Samuel C. Tatum Co.*, 240 Fed. 979.

§ 180b. 136 St. at L. 1075, § 39, Pierce Fed. Code Supp., § 1589.

¹ U. S. R. S., § 4968, 2 Fed. St. Ann. 271, Pierce Fed. Code, § 8861.

² *Greene v. Bishop*, 10 Fed. Cases 576, 1 Clifford 186.

³ *Brady v. Daly*, 175 U. S. 148, 20 Sup. Ct. 62, 44 L. ed. 109.

⁴ *Ibid*, but see § 181, *infra*.

⁵ See *infra*, § 181, Hale on Copyright and Literary Property, 13 Corpus Juris. 1198.

⁶ *Tinsley v. Lacy*, 32 L. J. Ch. 535, 538; *Robinson v. Wilkins*, 8 Ves. Jr. 224; *Platt v. Button*, 19 Ves. Jr. 447; *Campbell v. Scott*, 11 Sim. 31, 34 Eng. Ch. 31; *Pitman v. Hine*, 1 T. L. R. 39; *Rundel v. Murray Jac.* 311, 4 Eng. Ch. 311; *Bailey v. Taylor*, 1 Russ & M. 73, 5 Eng. Ch. 73, Taml. 295, 12 Eng. Ch. 295; *Mawman v. Tegg*, 2 Russ. 385, 3 Eng. Ch. 385; *Buxton v. James*, 5 De. G. & Sm. 80; *Lewis v. Chapman*, 3 Beav. 133, 43 Eng. Ch. 133; *Mexborough v. Bower*, 7 Beav. 127, 29 Eng. Ch. 127, Hogg v. Scott, L. R., 18 Eq. 144.

⁷ *West Pub. Co. v. Edward Thompson Co.*, 176 Fed. 833, 838.

§ 180c. Statute of limitations to vacation of patents for lands. The Act of March 3, 1891, provides:

"Suits by the United States to vacate and annul any patent heretofore issued shall only be brought within five years from the passage of this act, and suits to vacate and annul patents hereafter issued shall only be brought within six years after the date of the issuance of such patents."¹

This statute applies to all suits by the Government to vacate and annul patents to public lands issued under any laws of the United States.² It is strictly a statute of limitations and does not create the right to maintain a suit to set aside a patent.³ The lapse of the statutory period of time gives to the patent the same effect against the United States that it would have had if it had been originally valid.⁴

The statute does not apply to suits by the United States praying a decree that the patentees or their successors hold lands for the benefit of others.⁵ Nor to suits brought on behalf of Indian tribes issued by mistake for lands within their reservations.⁶ Nor to suits by the United States to cancel trust patents for allotments of reserved Indian lands.⁷ Nor to suits to quiet the title to public land upon the ground that no patent thereto has ever been issued.⁸ Nor to recover the value of lands, a patent to which has been issued by mistake⁹ or fraud,¹⁰ nor to recover damages for such a fraud.¹¹

100 C. C. A., 303 [mod. 169 Fed. 833].

§ 180c. 1 Act of March 3, 1891, § 559, 26 St. at L. 1093.

² U. S. v. Norris, C. C. A., 222 Fed. 14.

³ U. S. v. Koleno, 226 Fed. 180.

⁴ U. S. v. Chandler Dunbar Water Pow. Co., 209 U. S. 447, 450, 28 Sup. Ct. 579, 52 L. ed. 881; U. S. v. New Orleans Pac. Ry. Co., C. C. A., 235 Fed. 833, 837; U. S. v. Whited & Wheless, C. C. A., 232 Fed. 139, reversed U. S.

⁵ U. S. v. New Orleans Pac. Ry. Co., 248 U. S. 507, 518.

⁶ Northern Pac. Ry. Co. v. U. S., C. C. A., 191 Fed. 947.

⁷ La Rogue v. U. S. 239 U. S. 62 affirming 198 Fed. 645.

⁸ U. S. v. Lee Wilson & Co., 214 Fed. 630.

⁹ U. S. v. Jones, C. C. A., 242 Fed. 609; Union Coal & Coke Co. v. U. S., C. C. A., 247 Fed. 106.

¹⁰ U. S. v. Whited & Wheless, 246 U. S. 552, reversing C. C. A., 232 Fed. 139; U. S. v. Jones, C. C. A., 242 Fed. 669.

¹¹ U. S. v. Jones, 218 Fed. 973; Bistline v. U. S., C. C. A., 229 Fed. 546; Pitan v. U. S., C. C. A., 241 Fed. 364.

In case of fraud the statute is suspended until its discovery.¹² The Government should, however, alleged and prove specific facts showing that its failure to discover the cause of action within the statutory period was due to concealment by the adverse party or because the fraud was of a self concealing nature and that the government was not guilty of negligence or want of diligence.¹³ Running of the statute is stopped by the filing of the bills to set aside the patents and the issue and delivery for service of the subpoena provided the Government shows reasonable diligence in making service of the same thereof.¹⁴ The commencement of the suit against the patentee does not suspend the running of the limitations in favor of a prior grantee until he is made a party.¹⁵ Service of process in such a suit against an individual stops the running of the statute against a corporation which he has secretly formed, of which all the capital stock is owned by him, and the existence of which was unknown to the officers of the Government.¹⁶

§ 180d. Statute of limitations to suits upon official bonds.

“If, upon the statement of the account of any official of the

¹² *Exploration Co. v. U. S.*, 247 U. S. 435, affirming C. C. A., 235 Fed. 110, D. C., 225 Fed. 854. See C. C. A., 203 Fed. 387, 190 Fed. 405; *Linn & Lane Timber Co. v. U. S.*, C. C. A., 203 Fed. 394; *U. S. v. Southern Pac. Co.*, 225 Fed. 197; *U. S. v. Albright*, 234 Fed. 202.

¹³ *U. S. v. Puget Sound Tr. Lt. & Power Co.*, 215 Fed. 436. For cases where it was held that this was shown, see *U. S. v. Southern Pac. Co.*, 225 Fed. 197; *U. S. v. Booth-Kelly Lumber Co.*, 246 Fed. 970; *U. S. v. Diamond Coal & Coke Co.*, C. C. A., 254 Fed. 266, 267.

“There is no material averment in it of how and when the plaintiff first came to a knowledge of the matters alleged in the bill. The averment on that subject fails to state any pertinent or material fact except that the plaintiff and all its officers having authority in the

premises were ignorant of the fraud until and except that in November, 1916, a special agent of the Interior Department filed a report on the entries on which complaint is made. But the bill contains no statement of the facts this report revealed, of who discovered them, when they were discovered or how or why the special agent made the report, or of any other material facts tending to show that the knowledge of the fraud could not have been discovered as well in 1904 as in 1916.”

¹⁴ *Linn & Lane Timber Co. v. U. S.*, 236 U. S. 574.

¹⁵ *U. S. v. Cooper*, 217 Fed. 846; *U. S. v. Norris*, C. C. A., 222 Fed. 14, where it was sought to bring in the grantee by an amended bill. See § 131 *supra*.

¹⁶ *Linn & Lane Timber Co. v. U. S.*, C. C. A., 196 Fed. 593.

United States, or of any officer disbursing or chargeable with public money, by the accounting officers of the Treasury, it shall thereby appear that he is indebted to the United States, and suit therefor shall not be instituted within five years after such statement of said account, the sureties on his bond shall not be liable for such indebtedness."¹

"No suit on a marshal's bond shall be maintained unless it is commenced within six years after the right of action accrues, saving, nevertheless, the rights of infants, married women, and insane persons, so that they sue within three years after their disabilities are removed."²

"If on the settlement of the account of any postmaster it shall appear that he is indebted to the United States, and suit therefor shall not be instituted within three years after the close of such account, the sureties on his bond shall not be liable for such indebtedness."³

The bankruptcy law provides: "Suits upon referees' bonds shall not be brought subsequent to two years after the alleged breach of bond."⁴ "Suits upon trustees' bonds shall not be brought subsequent to two years after the estate has been closed."⁵

§ 180e. Statute of limitations to suits on contractors' bonds. Actions by laborers and materialmen upon bonds given to the United States by contractors for the construction or repair of public buildings and public works "shall not be commenced until after the complete performance of said contract and final settlement thereof, and shall be commenced within one year after the performance and final settlement of said contract, and not later."¹ The preceding language of this statute forbids the commencement of such a suit by a laborer or materialman until six months after "the completion and final settlement of the contract."² During that period, the United States alone can

¹ § 180d. 125 St. at L. 387, Comp. St., § 3292.

² U. S. R. S., § 3838, Comp. St. § 7197.

³ U. S. R. S. 786, Comp. St. § 1310; *supra*, § 33.

⁴ See *infra*, § 638.

⁵ Act of July 1, 1898, ch. 541, § 50; 30 St. at L. 558, Comp.

St. § 9634, see *infra*, §§ 642, 654.

¹ § 180e. 1 Act of August 13, 1894, ch. 280, 28 St. at L. 278, Comp. St. 1901, p. 2523, as amended by Act of February 24, 1905, ch. 778, 33 St. at L. 811, Comp. St. Supp. 1909, p. 948. See § 5a, *supra*.

² *Ibid.* Stitzer v. U. S., C. C. A., 182 Fed. 513, 516.

sue, although the creditors have the right to intervene in a suit brought by the United States.³ The work must not only be completed, but there must be a final settlement of the contract. So long as the matter is under consideration by the Department and the final payment has not been made, the contract has not been finally settled.⁴ The guarantee by the contractor to keep the work and materials in repair for a year after completion and acceptance,⁵ the retainer by the United States of five per cent of the contract price for a year after such acceptance,⁶ the retainer by the United States of part of the contract price to cover the cost of completing part of the work, the balance to be paid after the completion,⁷ and the refusal of the contractor to agree to the settlement made by the department;⁸ do not postpone the running of the six months. The limitation of the time to sue is the same in case of the original plaintiff and an intervenor.⁹ It has been held that this statute of limitations is a condition to the cause of action granted by the statute¹⁰ and consequently need not be pleaded;¹¹ and that so much of the statute as requires notice to all known creditors and publication of the commencement of the action need not be complied with within this period of time;¹² and that the commencement of an action upon such a bond in a State court, which had no jurisdiction of the same, does not extend the statutory period.¹³

The action is not begun until a summons or subpoena or writ is issued although the plaintiff's pleading was previously filed.¹⁴

³ U. S. v. Winkler, 162 Fed. 397; Title Guaranty & Trust Co. v. Puget Sound Engine Works, C. C. A., 163 Fed. 168, 89 C. C. A., 618; U. S. v. McGee, 171 Fed. 209; Stitzer v. U. S., C. C. A., 182 Fed. 513, 516.

⁴ Stitzer v. U. S., C. C. A., 182 Fed. 513, 517.

⁵ U. S. v. Ill. Surety Co., 195 Fed. 306.

⁶ Ibid.

⁷ Robinson v. U. S., C. C. A., 251 Fed. 461, 464.

⁸ Ibid.

⁹ Pederson v. United States, C. C. A., 255 Fed. 622.

¹⁰ Illinois Surety Co. v. U. S., 240 U. S. 414. See U. S. for the benefit of Starrett-Fields Co. v. Massachusetts Bonding & Ins. Co., 215 Fed. 241.

¹¹ U. S. ex rel. Texas Portland Cement Co. v. McCord, 233 U. S. 157; Baker Contract Co. v. U. S., C. C. A., 204 Fed. 390; Stitzer v. U. S., C. C. A., 182 Fed. 513, 516.

¹² U. S. v. United Surety Co., 192 Fed. 992.

¹³ U. S. v. Boomer, C. C. A., 183 Fed. 726.

¹⁴ U. S. v. Scheurman, 218 Fed. 915.

The premature commencement of an action by one of the claimants before the six months have expired does not toll the statute.¹⁵ When the suit was duly begun, the plaintiff's pleading may be amended after the statutory period has expired provided the amendment states no new cause of action.¹⁶ But if the suit was prematurely brought, a petition for intervention by another creditor filed within the prescribed time does not toll the statute, nor can the bill be amended after the period of limitation has expired.¹⁷ An amendment substituting for the surety a company which had succeeded to its business and assumed its liability cannot be made after the statutory term has expired.¹⁸ The statute does not limit the time within which creditors can intervene in a suit brought by the United States;¹⁹ nor the time for service or publication of notice on the creditors.²⁰

§ 180f. Statute of limitations to claims against the United States. "Every claim against the United States, cognizable by the Court of Claims, shall be forever barred unless the petition setting forth a statement thereof is filed in the court, or transmitted to it by the Secretary of the Senate or the Clerk of the House of Representatives as provided by law, within six years after the claim first accrues: *Provided*, That the claims of married women first accrued during marriage, of persons under the age of twenty-one years first accrued during minority, and of idiots, lunatics, insane persons, and persons beyond the seas at the time the claim accrued, entitled to the claim, shall not be barred if the petition be filed in the court or transmitted, as aforesaid within three years after the disability has ceased; but no other disability than those enumerated shall prevent any claim from being barred, nor shall any of the said disabilities

¹⁵ U. S. ex rel. Texas Portland Cement Co. v. McCord, 233 U. S. 157.

¹⁶ Bankers' Surety Co. v. Town of Holly, 219 Fed. 96; Illinois Surety Co. v. U. S., C. C. A., 215 Fed. 334. See *infra*, § 211.

¹⁷ U. S. ex rel. Texas Portland Cement Co. v. McCord, 233 U. S. 157.

¹⁸ U. S. v. Scheurman, 218 Fed. 915.

¹⁹ U. S. v. Marsha, 225 Fed. 687.

²⁰ U. S. for the use of Alexander Bryan Co. v. N. Y. Steam Fitting Co., 235 U. S. 327; U. S. for the use of Pittsburgh Planing Mill Co. v. Scheurman, 218 Fed. 915; Vermont Marble Co. v. National Surety Co., C. C. A., 213 Fed. 429.

operate cumulatively."¹ A similar statute regulates suits against the United States in the District Courts."²

The Act of March 17, 1883, as subsequently amended authorized the payment in certain cases of the claims of postmasters for the loss of money, stationery and postal savings certificates belonging to the United States and their possessions provides "That this Act shall not embrace any claim for losses as aforesaid which accrues more than four years prior to the date of approval of Act; and all such claims must be presented within six months after such date, and no claim for losses which hereafter accrue shall be allowed unless presented within six months from the time the loss occurred."³

"All claims for the refunding of any internal tax alleged to have been erroneously or illegally assessed or collected or any penalty alleged to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, must be presented to the Commissioner of Internal Revenue within two years next after the cause of action accrued: *Provided*, That claims which accrued prior to June sixth, eighteen hundred and seventy-two, may be presented to the Commissioner at any time within one year from said date. But nothing in this section shall be construed to revive any right of action which was already barred by any statute on that date."⁴

The Act of October 6, 1912, for the reimbursement of officers and enlisted men for loss or destruction of, or damage to their personal property and effects in the Naval Service, due to the operation of the war, or by shipwreck or other marine disaster contains the following provision: "That all claims now existing under this Act shall be presented within two years from the passage hereof and not thereafter; and all such claims hereafter

§ 180f. 1 U. S. R. S., § 1069, Pierce's Fed. Code, § 7798, 2 Fed. St. Ann. 65. See chapter on Court of Claims, *infra*.

² Jud. Code, § 24, subd. 20, 36 St. at L. 1087.

³ Act of March 17, 1882, c. 41, § 1, 22 St. at L. 29, amended May 9, 1888, c. 231, § 1, 25 St. at L. 135,

June 11, 1896, c. 424, 29 St. at L. 458, and Jan. 21, 1914, c. 12, § 1, 38 St. at L. 279, Comp. St. § 7211. See U. S. v. Smythe, C. C. A., 107 Fed. 376, affirming 120 Fed. 30; Henderson v. U. S., 42 Ct. Cl. 449, 18 Op. A. G. 369, 20 Op. A. G. 315. ⁴ U. S. R. S., § 3228, Comp. St. § 5951.

arising shall be presented within two years from the occurrence of the loss, destruction or damage."⁵

The act for the reimbursement of officers, enlisted men, and members of the Nurse Corps of the Army for the loss of property in the military service since April 5, 1917, requires the presentation of such a claim within one year from the time that it accrued and within six months after peace is established.^{5a}

The Act of March 29, 1918, which directs the deposit of money and sale of other property belonging to deceased persons in the Naval Service which have not been claimed provides: "That claims may be presented hereunder at any time within five years after such moneys or proceeds have been so deposited in the Treasury and, when supported by competent proof in any case after such deposit in the Treasury, shall be certified to Congress for consideration."⁶

The Act of October 6, 1917, amending the Act of September 2, 1914, concerning compensation for death or disability contracted in the line of duty by commanding officers or enlisted men, or by women who are members of the Army Nurse Corps or the Navy Nurse Corps, when employed in active service, provides: "No compensation shall be payable unless a claim therefor be filed, in case of disability, within five years after discharge or resignation from the service, or, in case of death during service, within five years after such death is officially recorded in the department under which he may be serving: *Provided, however,* That where compensation is payable for death or disability occurring after discharge or resignation from the service, claim must be made within five years after such death or beginning of such disability. The time herein provided may be extended by the director not to exceed one year for a good cause shown. If at the time that any right accrues to any person under the provisions of this article, such person is a minor, or is of unsound mind or physically unable to make a claim, the time herein provided shall not begin to run until such disability ceases."⁷ No compensation shall be payable for any period more than two

⁵ Ch. 85, 40 St. at L. 389, Comp. St. § 2869a.

⁷ § 309, added, October 6, 1917, ch. 105, § 2, 40 St. at L. 407, Comp. St. § 514.

^{5a} The Act of March 28, 1918, ch. 28, 40 St. at L.

⁶ Ch. 31, 40 St. at L., Comp. St. § 2980a.

years prior to the date of claim therefor, nor shall increased compensation be awarded to revert back more than one year prior to the date therefor.⁸

"That the Act approved January twenty-first, nineteen hundred and fourteen, authorizing the Postmaster General to adjust certain claims of postmasters for loss by burglary, fire or other unavoidable casualty, be so amended as to include United States War Savings Certificate Stamps, United States Government Thrift Stamps, War tax revenue stamps, and funds received from the sale of such stamps: *Provided*, that this Act shall not embrace any claim for losses as aforesaid which accrued prior to September twenty-fourth, nineteen hundred and seventeen, and all such claims must be presented, within six months from the time the loss occurred."⁹

Statutes creating claims against the United States usually also prescribe of limitation for suits thereunder.¹⁰

§ 180g. Statute of limitations to Interstate Commerce cases.

By the Interstate Commerce Act as provides concerning claims thereunder against Railroad Companies: "All actions at law by carriers subject to this Act for recovery of their charges, or any part thereof, shall be begun within three years from the time the cause of action accrues, and not after. All complaints for the recovery of damages shall be filed with the Commission within two years from the time the cause of action accrues, and not after, unless the carrier, after the expiration of such two years or within ninety days before such expiration begins an action for recovery of charges in respect of the same service in which case such period for two years shall be extended to and including ninety days from the time such ac-

⁸ § 310, added, October 6, 1917, ch. 105, § 2, 40 St. at L. 408, Comp. St. § 514t. E. G. The Indian Depredations Act of March 3, 1891, 26 St. at L. 851, § 2, 2 Fed. St. Ann. 91, Comp. St. 758, Pierce's Fed. Code, § 7845; The French Spoliations Act of January 20, 1885, 23 St. at L. 283, § 6, 2 Fed. St. Ann. 88, Pierce's Fed. Code, § 7863.

⁹ Act of July 2, 1918, c. 117, § 2, 40 St. at L., Comp. St. § 7211a.

¹⁰ The Acts authorizing claims for

loss of horses and equipments during the Civil War approved June 22, 1874; ch. 395, § 2, 18 St. at L. 193, Comp. St. 6391; Jan. 9, 1883, ch. 15, § 1, 22 St. at L. 401, Comp. St. §§ 6393, 6394. August 13, 1888, ch. 868, § 2, 25 St. at L. 437, Comp. St. § 6395. For collecting, drilling, or organizing volunteers for the Civil War, U. R. S., § 3489, Comp. St. § 6402. For loss and destruction of property belonging to officers and enlisted men in the Civil War, Act of March 3, 1885, ch. 335, 23 St.

tion by the carrier is begun. In either case the cause of action in respect of a shipment of property shall, for the purpose of this section, be deemed to accrue upon delivery or tender of delivery thereof by the carrier, and not after. A petition for the enforcement of an order for the payment of money shall be filed in the District Court or State court within one year from the date of the order, and not after."¹

This limitation applies to actions to recover damages for a discrimination against a shipper.² Such acts are not subject to the statute regulating the time for suits to enforce penalties.³

This statute need not be pleaded by the defendant.⁴

The State statute applies to an action by a carrier to recover unpaid freight on interstate shipments,⁵ which when there is a bill of lading must be presumed to be based on such bill⁶ and to an action by a carrier to recover the amount of an under charge upon such a shipment.⁷

§ 180h. Statute of limitations against causes of action arising while carriers were under Federal control.

By the Act of February 28, 1920: "Actions at law, suits in equity and proceedings in admiralty, based on causes of action arising out of the possession, use, or operation by the President of the Railroad or system of transportation of any carrier (under the provisions of the Federal Control Act, or of the Act of August 29, 1916) of such character as prior to the Federal control could have been brought against such car-

at L. 350, Comp. St. 6403, Act of March 4, 1915, ch. 143, § 1, 38 St. at L. 1077, Comp. St. § 6403a."

§ 180g. ¹ Act of Feb. 4, 1887, c. 104, § 16, 24 St. at L. 384, 1901, as amended by Acts of June 29, 1906, c. 3591, § 5, 34 St. at L. 590, June 18, 1910, ch. 309, 36 St. at L. 554, Feb. 28, 1920, §§ 423, 429; *Morrisdale Coal Co. v. Penna. R. R. Co.*, 230 U. S. 304; *Meeker & Co. v. Lehigh Valley R. R. Co.*, 236 U. S. 412, affirming *Lehigh Valley R. R. Co. v. Meeker*, C. C. A., 211 Fed. 785; *A. J. Phillips Co. v. Grand Trunk Western Ry. Co.*, 236 U. S. 662, s. c., C. C. A., 195 Fed. 12.

² U. S. ex rel. *Louisville Cement Co. v. Interstate Commerce Commis-*

sion Co., 246 U. S. 638. See *supra*, §§ 33a, 151.

³ *Meeker v. Lehigh Valley R. R. Co.*, 236 U. S. 412, overruling *Carter v. New Orleans*, C. C. A., 143 Fed. 99.

⁴ U. S. ex rel. *Louisville Cement Co. v. Interstate Commerce Commission*, 246 U. S. 638; *Missouri Pac. R. R. Co. v. C. Ferguson Sawmill Co.*, C. C. A., 237 Fed. 483.

⁵ *Chicago & N. W. Ry. Co. v. Ziebarth*, C. C. A., 245 Fed. 334; *N. Y. Cent. R. Co. v. Mutual Orange Distributors*, 251 Fed. 230.

⁶ *Ibid.*

⁷ *Chicago & N. W. Ry. Co. v. Ziebarth*, C. C. A., 245 Fed. 334.

rier, may, after the termination of Federal control, be brought against an agent designated by the President for such purpose, which agent shall be designated by the President within thirty days after the passage of this Act. Such actions, suits, or proceedings may, within the periods of limitation now prescribed by State or Federal statutes but not later than two years from the date of the passage of this Act, be brought in any court which but for Federal control would have had jurisdiction of the cause of action had it arisen against such carrier."¹

§ 180i. Statute of limitations to suits to enforce orders of the United States Shipping Board.

The Act of Sept. 7, 1916, which created the United States Shipping Board, provides that "No petition or suit for the enforcement of an order for the payment of money shall be maintained unless filed within one year from the date of the order."^{1a}

§ 180j. The Employers' Liability Act which applies to common carriers by railroads, interstate or foreign commerce provides: "No action shall be maintained under this act unless commenced within two years from the day the cause of action accrued."¹

§ 180k. Statute of limitations to suits under Internal Revenue Laws. "No suit shall be maintained in any court for the recovery of any internal tax alleged to have been erroneously or illegally assessed or collected, or any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, until appeal shall have been duly made to the Commissioner of Internal Revenue, according to the provisions of law in that revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof, and a decision of the commissioner has been had therein: *Provided*, That if such decision is delayed more than six months from the date of such appeal, then the said suit may be brought without first having a decision of the commissioner at any time within the period limited in the next section."¹

§ 180h. ¹ Act of Feb. 28, 1920, § 206.

§ 180i. ^{1a} Act of Sept. 7, 1916, Ch. 451, § 3, 39 St. at L. 737, Comp. St. § 8146o.

§ 180j. ¹ Act of April 22, 1908, Ch. 149, § 6, 35 St. at L. 66, amended April 5, 1910, Ch. 143, § 1, 36 St. at L. 291.

§ 180k. ¹ U. S. R. S., § 3226,

"No suit or proceeding for the recovery of any internal tax alleged to have been erroneously or illegally assessed or collected, or of any penalty alleged to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected shall be maintained in any court, unless the same is brought within two years next after the cause of action accrued: *Provided*, That actions for such claims which accrued prior to June sixth, eighteen hundred and seventy-two, may be brought within one year from said date; and that where any such claim was pending before the commissioner as provided in the preceding section, an action which was already barred by any statute on the said date shall be revived by this section."²

This statute applies to taxes upon inheritance,³ excise taxes⁴ income taxes under the Act of 1913,⁵ and to other taxes which are not imposed upon imports.⁶ Such a suit is brought when the summons is issued although it is served after the period has expired.⁷ When Congress has directed a refund of taxes previously in the Court of Claims will govern.⁸ It does not apply to defense of illegality or irregularity in the assessment set up in a suit by the government to collect the tax,⁹ but if the claims were presented to the commissioner before the enactment they need not be again presented.¹⁰ The statute does not require an appeal to the commissioner before an action against the collector for trespass in collecting the tax.¹¹

When an appeal is taken from the assessment, there is no need of a second appeal, after the payment,¹² but if a second

amended Act of Feb. 27, 1877, Ch. 69, § 1, 19 St. at L. 248, Comp. St. § 5949.

² U. S. R. S., § 3227, Comp. St. § 5950.

³ Rand v. U. S., 249 U. S. 503.

⁴ Public Service El. Co. v. Herold, 227 Fed. 491.

⁵ Dodge v. Osborn, 240 U. S. 118, 36 Sup. Ct. 275.

⁶ N. Y. Mail & Newspaper Transp. Co. v. Anderson, 234 Fed. 590.

⁷ Mill Creek & Minehill Nav. & R. Co. v. U. S., 246 Fed. 1013.

⁸ Sage v. U. S., 250 U. S. 33.

⁹ Clinkenbard v. U. S., 21 Wallace 68, § 7, 22 L. ed. 477.

¹⁰ Ibid.

¹¹ Erskine v. Hohback, 14 Wall. 613; 20 Fed. 745. But see Coblenz v. Able, Fed. Cas. 2926.

¹² San Francisco Savings & Loans Society v. Cary, Fed. Cas. 12, 317; Schwarzhild & Sulzberger Co. v. Rucher, 143 Fed. 656; Weaver v. Ewers, C. C. A., 195 Fed. 247, affirming 182 Fed. 713. *Contra*, Hastings v. Herold, 184 Fed. 759, 240 U. S. 118.

assessment is made the statute runs from the decision for such new assessment unless a second appeal is taken.¹³ Delivery of an appeal to the collector for transmission to the Commissioner as required by the regulations of the Treasury Department is the due making of a presentation of the appeal.¹⁴ A written application to the Commissioner for the refund of money spent in buying revenue stamps is not equivalent to taking such an appeal.¹⁵

The decision which starts the running of the time is a decision on the merits. A dismissal of an appeal for the irregularity of the papers does not start the running of the time, if a second appeal is duly taken.¹⁶ When the decision is delayed, the taxpayer has the option to sue at once or to await the decision.¹⁷ It has been held that he may then await more than two years and six months after taking his appeal if the decision is delayed during such time;¹⁸ but there are decisions to the contrary.¹⁹

This Act is not merely a Statute of Limitations but it prescribes a condition precedent, which is not waived by the defendant's failure to plead it.²⁰ Where an appeal on file in the Treasury Department was "endorsed, examined, and rejected Sept. 8, 1868, by J. Dilled," and it did not appear which office he held or that his ruling had not been accepted by the commissioner; it was held by the Court of Claims that there was no proof of any decision.²¹

§ 1801. Statute of limitations to suits to recover usury.
 "The taking, receiving, reserving, or charging a rate of interest greater than is allowed by the preceding section, when knowingly done, shall be deemed a forfeiture of the entire interest

¹³ *Cheatham v. U. S.*, 92 U. S. 85, 35 L. ed. 561, Comp. St., § 5949.

¹⁴ *U. S. v. Real Estate Savings Bank*, 104 U. S. 728, 734, 26 L. ed. 908.

¹⁵ *Chesebrough v. U. S.*, 192 U. S. 253, 48 L. ed. 432, 24 Sup. Ct. 262, Comp. St. § 5949.

¹⁶ *James v. Hicks*, 110 U. S. 272, 4 Sup. Ct. 6, 28 L. ed. 144, Comp. St. § 5949.

¹⁷ *James v. Hicks*, 110 U. S. 272, 4 Sup. Ct. 6, 28 L. ed. 144, affirming

Hicks v. James' Adm'r, 48 Fed. 542; *Merck v. Treat*, C. C. A., 174 Fed. 388.

¹⁸ *Merck v. Treat*, C. C. A., 174 Fed. 388.

¹⁹ *Christie Str. Commission Co. v. U. S.*, 126 Fed. 991, s. c., 129 Fed. 506, affirming D. C. C. A., 136 Fed. 656; *Schwarzchild & Sulzberger Co. v. Rucher*, 143 Fed. 656.

²⁰ *Dubarry v. Dunn*, 162 Fed. 961.

²¹ *Lauer v. U. S.*, 5 Ct. Cl. 447. See *Hubbard v. Kelly*, 8 W. Va. 46.

which the note, bill, or other evidence of debt carries with it, or which has been agreed to be paid thereon. In case the greater rate on interest has been paid, the person by whom it has been paid, or his legal representatives, may recover back in an action in the nature of an action of debt, twice the amount of the interest thus paid from the association taking or receiving the same; provided such action is commenced within two years from the time the usurious transaction occurred. The suits, actions and proceedings against any association under this title may be had in any circuit, district or territorial court of the United States held within the district in which such association may be established, or in any State, county, or municipal court in the county or city in which said association is located having jurisdiction in similar cases."¹ The time begins to run from the date of the payment of the usurious interest and not from the date of payment of the debt,² nor from the date when a renewal note is given which includes the usurious interest as principal,³ nor, it has been held, from the time of discounting a note, and deducting the usurious interest from the payment by the discounters.⁴ A part payment by the debtor in absence of special circumstances will be presumed to be made on account of interest and to start the statute running.⁵

Usurious interest paid more than two years before an action to collect the debt was brought cannot be credited upon the principal.⁶

§ 180m. Statute of limitations to suits for penalties or forfeitures. The Revised Statutes provides:

"No suit or prosecution for any penalty or forfeiture, pe-

§ 180l. 1 U. S. R. S., § 5198, amended Act of Feb. 18, 1875, ch. 80, § 1, 18 St. at L. 320, Comp. St. § 9759.

² McCarthy v. First National Bank, 223 U. S. 493, 32 Sup. Ct. 240, 56 L. ed. 523. But see Duncan v. First Nat. Bank, 26 Pittsb. Leg. J. 129, Fed. Cas. 4135, Comp. St. § 9795.

³ Bank of Daingerfield v. Ragland, 181 U. S. 45, Sup. Ct. 536, 45 L. ed. 738, Comp. St. § 9759.

⁴ Citizen's National Bank v. For-

man's assignee, 111 Ky. 206, 63 S. W. 454, 56 L. R. A. 673. *Contra*, Bobo v. People's Nat. Bank, 92 Tenn. 444, 21 S. W. 888, Comp. St. § 9759.

⁵ Louisville Trust Co. v. Kentucky Nat. Bank, 102 Fed. 442, Comp. St. § 9759.

⁶ Bank of Madison v. Davis, Fed. Cas. 10,038, Comp. St. § 9759. *Petersborough Nat. Bank v. Childs*, 133 Mass. 249, Sup. Ct. 130, Mass. 599, Comp. St. § 9759.

cuniary or otherwise, accruing under the laws of the United States, shall be maintained, except in cases where it is otherwise specially provided, unless the same is commenced within five years from the time when the penalty or forfeiture accrued."¹ It has been held that this applies to suits to recover penalties for importing contract laborers.²

"No suit or proceeding for the recovery of any internal tax alleged to have been erroneously or illegally assessed or collected, or of any penalty alleged to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, shall be maintained in any court, unless the same is brought within two years next after the cause of action accrued: *Provided*, That actions for such claims which accrued prior to June six, eighteen hundred and seventy-two, may be brought within one year from said date; and that where any such claim was pending before the Commissioner, as provided in the preceding section, an action therein may be brought within one year after such decision and not after. But no right of action which was already barred by any statute on the said date shall be revived by this section."³

Whether an action is for a penalty or forfeiture depends upon the character of the liability sought to be enforced. If brought to recover compensation for a loss sustained by the plaintiff it is not; but if the sum claimed has no relation to such a loss but is arbitrarily exacted for some act or omission of defendant, the action is penal.⁴

With the exception of the copyright law, the limitations as to suits for penalties accruing under the laws of the United States relate to punitive penalties for infractions of public law and not to liabilities imposed to redress a private injury even when the wrongful act is punishable as a crime.⁵

This limitation does not apply to an action for damages to an individual which is authorized by the act to regulate commerce.⁶

§ 180m. 1 U. S. R. S., § 1047, Comp. St. 1901, p. 727.

² U. S. v. Dwight Mfg. Co., 213 Fed. 522.

³ U. S. R. S., § 3227, Comp. St., § 5950; see *supra*, §§ 96e-96g.

⁴ Meeker v. Lehigh Valley R. R. Co., 236 U. S. 412.

⁵ U. S. R. S., §§ 5508, 5509; O'Sullivan v. Felix, 233 U. S. 318.

⁶ Meeker v. Lehigh Valley R. R. Co., 236 U. S. 412, overruling Carter v. New Orleans, C. C. A., 143 Fed. 99.

These statutes do not apply to indictments for crimes punishable by imprisonment;⁷ nor to suits to cover the penal sums named in bonds.⁸ They do not apply to penalties or forfeitures imposed by the Custom Laws.⁹ These are governed by the statutes subsequently quoted.¹⁰ Nor to actions to recover interest upon internal revenue taxes.¹¹ Nor to recover damages under the Antitrust Laws.¹² These are governed by the State statutes.¹³ Nor to an action for a conspiracy to defraud the United States.¹⁴ Nor to suits to recover from bank officers damages for breach of their official duty.¹⁵ Nor to suits under the Civil Rights Laws for assaults committed to prevent the plaintiff from voting.¹⁶ It has been doubted, whether it applies to any suits which are not brought by the United States.¹⁷

The statute applies to actions *in personam* and *in rem*,¹⁸ to suits for the penalty of importing contract labor.¹⁹ Fraudulent concealment of the cause of action does not extend the time.²⁰

The statutory provision imposing a penalty for the presentation of false claims against the government of the United States, or on a department or officer, thereof with knowledge that the claim is false or fictitious provides that "every such suit shall be commenced within six years from the commission of the act, and not afterward."²¹

⁷ U. S. v. Brown, Fed. Cas. 14,665, Comp. St. § 1712.

⁸ Raymond v. U. S., Fed. Cas. 11,596, Comp. St. § 1712.

⁹ U. S. v. Witterman, C. C. A., 152 Fed. 377, Comp. St. § 1712.

¹⁰ Ibid. See Lansberg, Fed. Cas. 8,041, Comp. St. § 1712.

¹¹ U. S. v. Guest, C. C. A., 143 Fed. 456, 457, Sup. Ct., C. C. A., 150 Fed. 21.

¹² Chattanooga Foundry & Pipe Works v. Atlanta, 203 U. S. 390, 27 Sup. Ct. 65, 51 L. ed. 241, affirming C. C. A., 127 Fed. 23, 28, 64 L. R. A. 721, which also affirmed 101 Fed. 900, 904, Comp. St. § 1712.

¹³ Ibid, Comp. St. § 1712.

¹⁴ U. S. v. Owen, 32 Fed. 534, Comp. St. § 1712.

¹⁵ Stearns v. Lawrence, C. C. A., 83 Fed. 738, 741. Certiorari, 170

U. S. 705, 18 Sup. Ct. 947, 42 L. ed. 1217; National Bank of Commerce v. Wade, 84 Fed. 15, Comp. St. § 1712.

¹⁶ O'Sullivan v. Felix, 233 U. S. 318, 34 Sup. Ct. 596, 58 L. ed. 980, Comp. St. § 1712.

¹⁷ Atlanta v. Chattanooga Foundry & Pipe Co., 101 Fed. 900, 904, affirmed on another point, C. C. A., Ct. 65, 51 L. ed. 241, Comp. St. 807, 810, Comp. St. § 1712.

¹⁸ Hatch v. The Boston, 3 Fed. 807, 810, Comp. St., § 1712.

¹⁹ U. S. v. Bannister, 70 Fed. 44, 45; U. S. v. Drought M. F. G. Co., 210 Fed. 779. See Comp. St. § 1712.

²⁰ U. S. v. Maillard, Fed. Cas. 15,709, Comp. St. § 1712.

²¹ Rev. St., § 3494, Comp. St. § 6415.

An early statute provides: "That no suit or action to recover any pecuniary penalty or forfeiture of property accruing under the customs revenue laws of the United States shall be instituted unless such suit or action shall be commenced within three years after the time when such penalty or forfeiture shall have accrued: provided, that the time of the absence from the United States of the person subject to such penalty or forfeiture, or of any concealment or absence of the property, shall not be reckoned within this period of limitation."²³ It was held: that this statute was in force in 1907 and that it applied to a suit brought under the Customs Administrative Act of June 10, 1890,²⁴ for the forfeiture of property,²⁵ and to an action by the United States upon a bond given by an importing agent for failure to comply with the Customs Laws.²⁶ When the importer of a violin kept it in his drawing room and used it there at concerts, it was held that there was no concealment which extended the time.²⁶

The Revised Statutes provide: "No action shall be maintained in any case of forfeiture or penalty under the copyright laws, unless the same is commenced within two years after the cause of action has arisen."²⁷ Whether this section is still in force has not been decided.²⁸

The Act for the Protection of Merchant Seamen provides: "All penalties and forfeitures imposed by this Title, for the recovery whereof no specific mode is hereinbefore provided, may be recovered, with the costs, in any circuit court of the United States, or at the suit of any district attorney of the United States or at the suit of any person by information to any district attorney in any port of the United States where or near to where the offense is committed or the offender is found; and if a conviction is had, and the sum imposed as a penalty by the court is not paid either immediately after the conviction or within such

²³ Act of June 22, 1874, ch. 391, 18 St. at L. 190, Comp. St. § 1713, p. 727.

²⁴ 26 St. at L. 135.

²⁵ U. S. v. Whittemann, C. C. A., 152 Fed. 377.

²⁶ U. S. v. Joles, 251 Fed. 417.

²⁶ U. S. v. One Stradivarius Kiewetter Violin, C. C. A., 197 Fed. 157, affirming 188 Fed. 542.

²⁷ U. S. R. S., § 4968, 2 Fed. St. Ann. 271, Pierce Fed. Code, § 8861.

²⁸ See *supra*, § 180b.

period as the court at the time of the conviction appoints, it shall be lawful for the court to commit the offender to prison, there to be imprisoned for the term hereinbefore provided in case of such offense, the commitment to be terminable upon payment of the amount and costs; and all penalties and forfeitures mentioned in this Title for which no special application is provided, shall, when recovered, be paid and applied in manner following: So much as the court shall determine, and the residue shall be paid to the court and be remitted from time to time, by order of the judge, to the Treasury of the United States, and appropriated as provided for in section forty-five hundred and forty-five: *Provided* always, That it shall be lawful for the court before which any proceeding shall be instituted for the recovery of any pecuniary penalty imposed by this act, to mitigate or reduce such penalty as to such court shall appear just and reasonable; but no such penalty shall be reduced to less than one-third of its original amount: *Provided also*; That all proceedings so as to be instituted shall be commenced within two years next after the commission of the offense, if the same shall have been committed at or beyond the Cape of Good Hope or Cape Horn, or within two months after the return of the offender and the complaining party to the United States; and there shall be no appeal from any decision of any of the circuit courts, unless the amount sued for exceeds the sum of five hundred dollars.”²⁹

§ 180n. Statute of limitations to criminal prosecutions. “No person shall be prosecuted, tried, or punished for treason or other capital offense, willful murder excepted, unless the indictment is found within three years next after such treason or capital offense is done or committed.”¹

“No person shall be prosecuted, tried, or punished for any crime arising under the revenue laws, or the slave-trade laws of the United States, unless the indictment is found or the information is instituted within five years next after the committing of such crime.”² “No person shall be prosecuted, tried, or punished for any offense, not capital except as provided in section

²⁹ U. S. R. S., § 4610, Comp. St. § 8390.

² U. S. R. S., § 1046, Comp. St. § 1710.

¹ U. S. R. S., § 1043, Pierce's Fed. Code, § 7760, 2 Fed. St. Ann. 358.

one thousand and forty-six, unless the indictment is found, or the information is instituted within three years next after such offense shall have been committed. But this act shall not have effect to authorize the prosecution, trial or punishment for any offense, barred by the provisions of existing laws.³

The act inflicting punishment for the seduction of a female passenger on an American vessel provides that "when a person is convicted of a violation of the section last preceding, the court may, in its discretion, direct that the amount of the fine, when paid, be paid for the use of the female seduced, or child if she have any; but no conviction shall be had on the testimony of the female seduced, without other evidence, nor unless the indictment is found within one year after the arrival of the vessel on which the offense was committed at the port of destination."⁴

"No person shall be prosecuted, tried or punished for any of the various offenses arising under the internal revenue laws of the United States unless the indictment is found or the information instituted within three years next after the commission of the offense, in all cases where the penalty prescribed may be imprisonment in the penitentiary, and within two years in all other cases: *Provided*, That the time during which the person committing the offense is absent from the district wherein the same is committed shall not be taken as any part of the time limited by law for the commencement of such proceedings; *Provided further*, That the provisions of this act shall not apply to offenses committed prior to its passage: And *provided further*, That where a complaint shall be instituted before a Commissioner of the United States within the period above limited, the time shall be extended until the discharge of the Grand Jury at its next session within the district: And *provided further*, That this act shall not apply to offenses committed by officers of the United States."⁵

Prior to this Act of July 5, 1884, the limitation of time for the indictment for crimes under the Internal Revenue Laws was prescribed by the section of the revised statutes previously quoted.

³ U. S. R. S., § 1044, Pierce's Fed. Code, § 7761, 2 Fed. St. Ann. 358.

⁴ Criminal Code, § 281, 35 St. at L. 1144, Comp. St. § 10454.

⁵ Act of July 5, 1884, ch. 225, § 1, 23 St. at L. 122, Comp. St. § 1711..

The Act of 1884 repeals by implication so much thereof, as applies to offenses against the Internal Revenue Laws.⁶

These statutes do not apply to actions to collect penalties for importing contract labor.⁷ The statute does not begin to run against prosecutions for a conspiracy to defraud the United States so long as any acts in pursuance with the conspiracy are done.⁸

A conspiracy to defraud the government against duty on imports is not a crime arising under the Revenue Laws⁹ but is barred by the expiration of three years, under the general statute previously quoted.¹⁰ This statute applies to the crimes of the commission of frauds against the Government;¹¹ embezzlement by officers and employees of the United States;¹² counterfeiting,¹³ bigamy,¹⁴ embezzlement in the Post Office,¹⁵ the violation of the White Slave Law,¹⁶ conspiracies in violation of the Sherman Act,¹⁷ conspiracies to acquire public lands by fraud,¹⁸ to defraud the government on duties for imports,¹⁹ to use the mails for fraud,²⁰ to commit against the United States a violation of the criminal law, and an act, criminal under the bankrupt law.²¹ Formerly to criminal contempts.²² In criminal contempts by violation of injunctions, the statute runs against each specific act

⁶ Act of July 5, 1884, ch. 225, § 1, 23 St. at L. 122, Comp. St., § 1711.

⁷ U. S. v. Dwight Mfg. Co., 213 Fed. 522.

⁸ Houston v. U. S., 217 Fed. 852; Meyer v. U. S., C. C. A., 220 Fed. 800.

⁹ U. S. v. Rabinowich, 238 U. S. 78, affirming 222 Fed. 846.

¹⁰ U. S. v. Hirsch, 100 U. S. 33, 25 L. ed. 539, Comp. St. § 1710.

¹¹ Green v. U. S., C. C. A., 154 Fed. 401. Certiorari, 207 U. S. 596, 28 Sup. Ct. 261, 52 L. ed. 357, Comp. St. § 1710; U. S. v. Cook, 17 Wall. 168, 182, 21 L. ed. 538; U. S. v. Irvine, 98 U. S., 450, 25 L. ed. 193, Comp. St. § 1710.

¹² U. S. v. Norton, 91 U. S., 566, 23 L. ed. 454, Comp. St. § 1710.

¹³ See U. S. v. Shorey, 9 Int. Rev. Rec., 202 Fed. Cas. 16, 281.

¹⁴ Murphy v. Ramsey, 114 U. S. 15 Sup. Ct. 527. See 29 L. ed. 47, Comp. St. § 1710.

¹⁵ U. S. v. Shorey, Fed. Cas. 16, 281. See Comp. St. § 1710.

¹⁶ U. S. v. Lair, C. C. A., 195 Fed. 47, Comp. St. § 1710.

¹⁷ U. S. v. Kissel, 218 U. S. 601, 31 Sup. Ct. 124, 54 L. ed. 1168, Comp. St. § 1710.

¹⁸ Hide v. U. S., 225 U. S. 347, 32 Sup. Ct. 793, 56 L. ed. 1114, Comp. St. § 1710.

¹⁹ U. S. v. Hirsch, 100 U. S. 33, 25 L. ed. 539, Comp. St. § 1710.

²⁰ Brown v. Elliott, 225 U. S. 392, 32 Sup. Ct. 812, 56 L. ed. 1136, Comp. St. § 1710.

²¹ U. S. v. Rabinowitz, 238 U. S. 78, 59 L. ed. 1211, Comp. St. § 1710.

²² Gompers v. U. S., 233 U. S. 604, 34 Sup. Ct. 693, 58 L. ed. 1115.

of contempt from the date of its commission.²⁸ In case of a conspiracy, against the last overt act committed for the purpose of completing its object.²⁹ The statute does not apply to a prosecution against one whose last overt act in further aim of the conspiracy was committed more than three years previously, when he has acquiesced in subsequent overt acts by his fellow conspirators.³⁰

The filing of an informal information is not the equivalent of an indictment and does not toll the statute.³¹ When a *nolle prosequi* is entered after an indictment duly found, a second indictment after the period has expired, is barred.³²

"Nothing in the preceding sections shall extend to any person fleeing from justice."³³ A man who flees to another district within the United States flees from justice.³⁴ Flight to his usual residence in another district may constitute such fleeing.³⁵ Time occupied in resistance to extradition from a foreign country or to removal from another district is occupied in fleeing from justice.³⁶ A casual return to the district after the flight does not make the time begin to run.³⁷ It has been said that the exception applies to any person who leaves the district after he has committed an offense there, whether or not he does so to avoid punishment.³⁸ An attempt to avoid the justice of the United States is not necessary, if the criminal has fled to avoid the justice of a State which has criminal jurisdiction over the same

²⁸ *Gompers v. U. S.*, 237 U. S. 604, 34 Sup. Ct. 693, 58 L. ed. 1115, Comp. St. § 1710.

²⁹ *U. S. v. Kissel*, 218 U. S. 601, 31 Sup. Ct. 124, 54 L. ed. 1168; *Hide v. U. S.*, 225 U. S. 347, 32 Sup. Ct. 793, 56 L. ed. 1114; *Brown v. Elliott*, 225 U. S. 392, 32 Sup. Ct. 812, 56 L. ed. 1136, Comp. St. § 1710.

³⁰ *Hyde v. U. S.* 225 U. S. 347, 32 Sup. Ct. 793, 56 L. ed. 1114, Comp. St. § 1710.

³¹ *U. S. v. Slacum*, Fed. Cas. 16,311, Comp. St. § 1710.

³² *U. S. v. Ballard*, Fed. Cas. 14,507, Comp. St. § 1710.

³³ *R. S.*, § 1045, Comp. St. § 1710.

³⁴ *Grier v. U. S.*, C. C. A., 154 Fed. 401, 411, affirming 146 Fed. 803. *Certiorari*, 207 U. S. 596, 28 Sup. Ct. 261, 52 L. ed. 357, Comp. St. § 1710.

³⁵ *U. S. v. White*, Fed. Cas. 16,675, 16,676, 16,677, Comp. St. § 1710.

³⁶ *U. S. v. Green*, 146 Fed. 883, 889, affirming another point C. C. A., 154 Fed. 401, Comp. St. § 1710.

³⁷ *Bruce*, 132 Fed. 390; *Bruce v. Bryan*, C. C. A., 136 Fed. 1022, Comp. St. § 1710.

³⁸ *Bruce*, 132 Fed. 390; *Bruce v. Bryon*, C. C. A., 136 Fed. 1022, Comp. St. § 1710.

act.³⁴ It has been said that concealment within the district is within the exception,³⁵ and that so is departure from the district where the offense is committed to the offenders usual residence in another district.³⁶ Involuntary absence by imprisonment is not within the exception.³⁷ Nor when the offense is committed by a sailor on a ship during its absence on a voyage then begun.³⁸ Nor by concealment of the commission of the offense.³⁹

The proper way to defend by the Statute of Limitations to a criminal prosecution is by a special plea in abatement before the trial.⁴⁰ It seems that it cannot be raised by demurrer when the statute contains no exception or *proviso*, unless the indictment shows on its face that the defendant has not fled from justice.⁴¹ It has been held that the pleas of the general issue and the Statute of Limitations are not permissible because of duplicity and such a special plea was stricken out.⁴² It has been said that the defense may be raised by the general issue upon the trial.⁴³

The copyright law of 1909 provides: "That no criminal proceeding shall be maintained under the provisions of this Act unless the same is commenced within three years after the cause of action arose."⁴⁴

The Naturalization Law provides that "no person shall be

³⁴ *Strepp v. U. S.*, 160 U. S. 128, 16 Sup. Ct. 244, § 4, L. ed. 365, Comp. St. § 1710.

³⁵ *U. S. v. O'Brien*, Fed. Cas. 15,908, Comp. St. § 1710.

³⁶ *U. S. v. White*, Fed. Cas. 16,175, 16,676, 16,677, Comp. St. § 1710.

³⁷ *U. S. v. Hewecker*, 79 Fed. 59, 60, Comp. St. § 1710.

³⁸ *U. S. v. Brown*, Fed. Cas. 14,665, Comp. St. § 1710.

³⁹ *U. S. v. White*, Fed. Cas. 16,675, Comp. St. § 1710.

⁴⁰ *U. S. v. Bruce*, 143 Fed. 703, 704; *U. S. v. J. L. Hopkins & Co.*, 228 Fed. 173; *U. S. v. Cook*, 17 Wall. 168, 178, 21 L. ed. 538; *Johnston v. U. S.*, Fed. case 7,418, Comp. St. § 1710.

⁴¹ *U. S. v. Cook*, 17 Wall. 168, 178, 21 L. ed. 538; *U. S. v. Green*, C. C. A., 154 Fed. 401, 411, affirming 146 Fed. 803, certiorari, 207 U. S. 596, 28 Sup. Ct. 261, 52 L. ed. 357; *U. S. v. Andem*, 158 Fed. 996, 999. See *U. S. v. Walker*, Fed. Cas. 16,649; *U. S. v. White*, Fed. Cas. 16,678, Comp. St., p. 1710.

⁴² *U. S. v. Shorey*, Fed. Cas. 16,280.

⁴³ *U. S. v. Bruce*, 143 Fed. 703, 704; *U. S. v. J. L. Hopkins & Co.*, 228 Fed. 173.

⁴⁴ Act of March 4, 1909, c. 320, § 39, 35 St. at L. 1084, Comp. St. § 9560, see *supra*, § 180b.

prosecuted, tried, or punished for any crime arising under the provisions of this Act unless the indictment is found or the information is filed within five years next after the commission of such crimes.”⁴⁵

The Bankruptcy Law provides: “A person shall be punished, by imprisonment for a period not to exceed five years upon conviction of the offense of having knowingly and fraudulently appropriated to his own use, embezzled, spent, or unlawfully transferred any property or secreted, or destroyed any document belonging to a bankrupt estate which came into his charge as trustee.

(b) A person shall be punished, by imprisonment for a period not to exceed two years, upon conviction of the offense of having knowingly and fraudulently (1) concealed while a bankrupt, or after his discharge, from his trustee any property belonging to his estate in bankruptcy; or (2) made a false oath or account in, or in relation to, any proceeding in bankruptcy; (3) presented under oath any false claim for proof against the estate of a bankrupt, or used any such claim in composition personally or by agent, proxy, or attorney; or (4) received any material amount of property from a bankrupt after the filing of the petition with intent to defeat this Act; or (5) extorted or attempted to extort any money or property from any person as a consideration for acting or forbearing to act in bankruptcy proceedings.

(c) A person shall be punished by fine, nor to exceed five hundred dollars, and forfeit his office, and the same shall thereupon become vacant upon conviction of the offense of having knowingly (1) acted as a referee in a case in which he is directly or indirectly interested; or (2) purchased, while a referee, directly or indirectly, any property of the estate in bankruptcy of which he is referee; or (3) refused, while a referee or trustee, to permit a reasonable opportunity for the inspection of the accounts relating to the affairs of, and the papers and records of, estates in his charge by parties in interest when directed by the court so to do.

(d) A person shall not be prosecuted for any offense arising under this Act unless the indictment is found or the informa-

⁴⁵ Act of June 29, 1906, c. 3592,
§ 24, 34 St. at L. 603, Comp. St.
§ 4380.

tion is filed in court within one year after the commission of the offense.⁴⁶

"A person shall not be prosecuted for any offense arising under the Bankruptcy Act unless the indictment is found or the information is filed in court within one year after the commission of the offense."⁴⁷ A prosecution for conspiracy to commit an offense forbidden by the bankruptcy law is not barred by the expiration of a year.⁴⁸ Where all the acts of concealment were committed more than twelve months before the indictment and during this period the bankrupt did nothing except to remain silent, it was held that the prosecution was barred.⁴⁹

"No proceeding for contempt shall be instituted against any person unless begun within one year from the date of the act complained of; nor shall any such proceeding be a bar to any criminal prosecution for the same act or acts; but nothing herein contained shall affect any proceedings in contempt pending at the time of the passage of this Act."⁵⁰

§ 180o. Limitations in the act to prevent trading with the enemy. The act against trading with the enemy provides: "The running of any statute of limitations shall be suspended with reference to the rights or remedies on any contract or obligation entered into prior to the beginning of the war between parties neither of whom is an enemy or ally of enemy, and containing any promise to pay or liability for payment which is evidenced by drafts or other commercial paper drawn against or secured by funds or other property situated in an enemy or ally of enemy country, and no suit shall be maintained on any such contract or obligation in any court within the United States until after the end of the war, or until the said funds or property shall be released for the payment or satisfaction of such contract or obligation: *Provided, however,* That nothing herein contained shall be construed to prevent the suspension of the running of the statute of limitations in all other cases where such

⁴⁶ Act of July 1, 1898, c. 541, § 29, 30 St. at L. 554, Comp. St. § 9613.

⁴⁷ Act of July 1, 1898, c. 541, § 29, 30 St. at L. 554, Comp. St. § 9613.

⁴⁸ U. S. v. Rabinowitz, 238 U. S. 78, 59 L. ed. 1211.

⁴⁹ Warren v. U. S., C. C. A., 199 Fed. 753, Comp. St. § 9613.

⁵⁰ Act of Oct. 15, 1914, ch. 323, § 25.

suspension would occur under existing law.”¹ “Nothing in this Act contained shall render valid or legal, or be construed to recognize as valid or legal, any act or transaction constituting trade with, to, from, for or on account of, or on behalf of, or for the benefit of an enemy performed or engaged in since the beginning of the war and prior to the passage of this Act, or any such act or transaction hereafter performed or engaged in except as authorized hereunder, which would otherwise have been or be void, illegal, or invalid at law.”²

“Nothing in this Act shall be deemed to authorize the prosecution of any suit or action at law or in equity in any court within the United States by an enemy or ally of enemy prior to the end of the war, except as provided in section ten hereof: *Provided, however,* That an enemy or ally of enemy licensed to do business under this Act may prosecute and maintain any such suit or action so far as the same arises solely out of the business transacted within the United States under such license and so long as such license remains in full force and effect: *And provided further,* That an enemy or ally of enemy may defend by counsel any suit in equity or action at law which may be brought against him.

“Receipt of notice from the President to the effect that he has reasonable ground to believe that any person is an enemy or ally of enemy shall be prima facie defense to any one receiving the same, in any suit or action at law or in equity brought or maintained, or to any right or set-off or recoupment asserted by, such person and based on failure to complete or perform since the beginning of the war any contract or other obligation. In any prosecution under section sixteen hereof, proof of receipt of notice from the President to the effect that he has reasonable cause to believe that any person is an enemy or ally of enemy shall be prima facie evidence that the person receiving such notice has reasonable cause to believe such other person to be an enemy or ally of enemy within the meaning of section three hereof.”³

§ 180o. ¹ Act of Oct. 6, 1917, ch. 106, § 8, Sub. Div. (b), 40 St. at L. 419, Comp. St., § 3115½dd, Sub. Div. (c).

² Ibid., § 8, Sub. Div. (b), Comp. St. 3115½d.

³ Ibid., § 7, Comp. St., 3115½d.

“That any person, not an enemy, or ally of enemy, claiming any interest, right, or title in any money or other property which may have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian hereunder, and held by him or by the Treasurer of the United States, or to whom any debt may be owing from an enemy, or ally of enemy, whose property or any part thereof shall have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian hereunder, and held by him or by the Treasurer of the United States, may file with the said Custodian a notice of his claim under oath and in such form and containing such particulars as the said Custodian shall require; and the President, if application is made therefor by the claimant, may, with the assent of the owner of said property and of all persons claiming any right, title, or interest therein, order the payment, conveyance, transfer, assignment or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States or of the interest therein to which the President shall determine said claimant is entitled: *Provided*, That no such order by the President shall bar any person from the prosecution of any suit at law or in equity against the claimant to establish any right, title or interest which he may have in such money or other property. If the President shall not so order within sixty days after the filing of such application, or if the claimant shall have filed the notice as above required and shall have made no application to the President, said claimant may, at any time before the expiration of six months after the end of the war, institute a suit in equity in the district court of the United States for the district in which such claimant resides, or, if a corporation, where it has its principal place of business (to which suit the Alien Property Custodian or the Treasurer of the United States, as the case may be, shall be made a party defendant), to establish the interest, right, title, or debt so claimed, and if suit shall be so instituted then the money or other property of the enemy, or ally of enemy, against whom such interest, right, or title is asserted, or debt claimed, shall be retained in the custody of the Alien Property Custodian, or in the Treasury of the United States, as provided in this Act, and until any final judgment or decree which shall be entered in favor of the claimant shall be fully satisfied by payment or con-

veyance, transfer, assignment, or delivery by the defendant or by the Alien Property Custodian or Treasurer of the United States on order of the court, or until final judgment or decree shall be entered against the claimant, or suit otherwise terminated.

"Except as herein provided, the money or other property conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian shall not be liable to lien, attachment, garnishment, trustee process, or execution, or subject to any order or decree of any court. This section shall not apply, however, to money paid to the Alien Property Custodian under section ten hereof."⁴

"(f) The owner of any patent, trademark, print, label, or copyright under which a license is granted hereunder may, after the end of the war and until the expiration of one year thereafter, file a bill in equity against the licensee in the district court of the United States for the district in which the said licensee resides, or, if a corporation, in which it has its principal place of business (to which suit the Treasurer of the United States shall be made a party), for recovery from the said licensee for all use and enjoyment of the said patented invention, trademark, print, label, or copyrighted matter: *Provided, however,* That whenever suit is brought, as above, notice shall be filed with the Alien Property Custodian within thirty days after date of entry of suit: *Provided further,* That the licensee may make any and all defenses which would be available were no license granted. The court on due proceedings had may adjudge and decree to the said owner payment of a reasonable royalty. The amount of said judgment and decree, when final, shall be paid on order of the court to the owner of the patent from the fund deposited by the licensee, so far as such deposit will satisfy said judgment and decree; and the said payment shall be in full or partial satisfaction of said judgment and decree, as the facts may appear; and if, after payment of all such judgments and decrees, there shall remain any balance of said deposit, such balance shall be repaid to the licensee on order of the Alien Property Custodian. If no suit is brought within one year after the end of the war, or no notice is filed as above required, then the licensee shall not be liable to

⁴Ibid, § 7, Comp. St. 3115e.

make any further deposits, and all funds deposited by him shall be repaid to him on order of the Alien Property Custodian. Upon entry of suit and notice filed as above required, or upon repayment of funds as above provided, the liability of the licensee to make further reports to the President shall cease.

"If suit is brought as above provided, the court may, at any time, terminate the license, and may, in such event, issue an injunction to restrain the licensee from infringement thereafter, or the court, in case the licensee, prior to suit, shall have made investment of capital based on possession of the license, may continue the license for such period and upon such terms and with such royalties as it shall find to be just and reasonable.

"(g) Any enemy, or ally of enemy, may institute and prosecute suits in equity against any person other than a licensee under this Act to enjoin infringement of letters patent, trademark, print, label, and copyrights in the United States owned or controlled by said enemy or ally of enemy, in the same manner and to the extent that he would be entitled so to do if the United States was not at war: *Provided*, That no final judgment or decree shall be entered in favor of such enemy or ally of enemy by any court except after thirty days' notice to the Alien Property Custodian, such notice shall be in writing and shall be served in the same manner as civil process of Federal courts."*

§ 180p. Statutes of limitations in admiralty. There is no statutory time in which an ordinary suit of admiralty must be begun. The Revised Statutes provide, "A suit for the recovery of remuneration for rendering assistance or salvage services shall not be maintainable if brought later than two years from the date when such assistance or salvage was rendered, unless the court in which the suit is brought shall be satisfied that during such period there had not been any reasonable opportunity of arresting the assisted or salvaged vessel within the jurisdiction of the court or within the territorial waters of the country in which the libellant resides or has his principal place of business."¹

Courts of admiralty are not bound by the State Statutes of Limitation,² except in so far as the limitation is by statute made

* *Ibid.*, § 10 Sub. Div. (b), Comp. St. § 3115½ *see*. 268, § 4, 37 St. at L. 242, Comp. St. § 7993.

§ 180p. 1 Act of Aug. 1, 1912, c.

² *The Key City*, 14 Wall. 653, 659;

a condition of the right sought to be enforced.³ Laches is a valid defense with a suit in admiralty and depends upon in every case within the peculiar circumstances."⁴

§ 181. State statutes of limitations. When there is no Act of Congress upon the subject the courts of the United States in actions at common law are bound by the State statutes of limitations.¹ The effect of a State statute of limitations upon actions at common law, to enforce rights created by Federal statutes, was for a long time the subject of conflicting adjudications.² It is now settled that the State statute applies where the Federal laws are silent upon the subject.³ Before the passage of the act of Congress upon the subject, it was held that actions at common law for the infringement of a patent were barred by the period of limitations prescribed by the statutes of the State where the Federal court was held.⁴ It has been further held: that the State statutes of limitations apply to actions to enforce the liability of stockholders of national banks,⁵ when however, the statute does not begin to run until the Comptroller of the Currency orders an assessment.⁶ That, in the absence of

Pacific Coast S. S. Co. v. Bankcroft-Whitney Co., C. C. A., 94 Fed. 180.

³ Pacific Coast S. S. Co. v. Bankcroft-Whitney Co., C. C. A., 94 Fed. 180. See *infra*, § 181; The Key City, 14 Wall 653, 659; Southard v. Brady, 36 Fed. 560.

⁴ Bartleson v. Feidler, 249 Fed. 299.

¹ § 181. ¹ Act of October 6, 1917, ch. 106, § 8, 40 St. at L., Comp. St. § 3115½d, sub. div. o, 38 St. at L. 734, Comp. St. § 8835e; U. S. R. S., § 721; Bell v. Morrison, 1 Pet. 351, 7 L. ed. 174; Tioga R. Co. v. Blossburg & C. R. Co., 20 Wall. 137, 22 L. ed. 381; Bauserman v. Blunt, 147 U. S. 647, 37 L. ed. 316; Security Tr. Co. v. Black River Nat. Bank, 187 U. S. 211, 47 L. ed. 147; D'Wolf v. Rabaud, 1 Pet. 476, 7 L. ed. 227; Clark v. Smith, 13 Pet. 195, 10 L. ed. 123; Fitch v. Creighton, 24 How. 159, 16 L. ed. 596; Brine v. Insurance Co., 96 U. S. 627,

24 L. ed. 858; Mills v. Scott, 99 U. S. 25, 25 L. ed. 294; Van Norden v. Morton, 99 U. S. 378, 25 L. ed. 453; Cummings v. National Bank, 101 U. S. 153, 157, 25 L. ed. 903, 904; Holland v. Challen, 110 U. S. 15, 28 L. ed. 52; Reynolds v. Crawfordsville First Nat. Bank, 112 U. S. 405, 28 L. ed. 733; Bucher v. Cheshire R. Co., 125 U. S. 555, 31 L. ed. 795; Benedict v. New York, 235 Fed. 258, *aff'd* C. C. A., 247 Fed. 758. But see Watson v. Tarpley, 18 How. 517, 15 L. ed. 509.

² See the Second Edition of this Treatise, p. 12.

³ O'Sullivan v. Felix, 233 U. S. 318, 322, 34 Sup. Ct. 596, 58 L. ed. 980.

⁴ Campbell v. Haverhill, 155 U. S. 610, 39 L. ed. 280.

⁵ McClaine v. Rankin, 197 U. S. 54, 49 L. ed. 702.

⁶ Rankin v. Barton, 199 U. S. 228, 50 L. ed. 163. The statute against

any discrimination against the authorities of the United States, they apply to suits against Federal officers, founded upon their official acts⁷ to actions upon judgments of courts in the United States⁸ and to suits founded upon the Civil Rights Laws.⁹

The general rule is that the statute of limitations begins to run from the date of the injury and that lack of knowledge on the part of the plaintiff or silence or concealment by the wrongdoer does not create an exception.¹⁰ This rule has been applied to an action for criminal conversation.¹¹ In equity at least¹² and in some cases at law¹³ the statute does not run against a cause of action for fraud until plaintiff's discovery of the fraud where the defendant has been guilty of concealment or the fraud is one that conceals itself and there has been no lack of diligence on the part of plaintiff.¹⁴

It has been held: that the acts which constituted fraudulent concealment may be coincident with or even precedent to the accrual of the cause of action.¹⁵ That silence by the defendant concerning his receipt of money belonging to the plaintiff constitutes such a concealment,¹⁶ but that a refusal to permit the inspection of books, which show the liability is not.¹⁷ It has been held that this rule applies to an action for a con-

an assessment against stockholders under a State statute does not run until the entry of the decree levying the assessment. *Irvine v. Putnam*, 190 Fed. 321. *Re Phoenix Hardware Co.*, C. C. A., 249 Fed. 410.

⁷ *McCluny v. Silliman*, 3 Pet. 270, 277, 7 L. ed. 676, 678; *Andreae v. Redfield*, 98 U. S. 225, 25 L. ed. 158; *Barney v. Oelricks*, 138 U. S. 529, 34 L. ed. 1037. See also *Beatty's Adm'r v. Burne's Adm'rs*, 8 Cranch, 98, 107, 108, 3 L. ed. 500, 503, 504; *Campbell v. Haverhill*, 155 U. S. 610, 620, 39 L. ed. 280, 283.

⁸ *Metcalf v. Watertown*, 153 U. S. 671, 38 L. ed. 861.

⁹ *O'Sullivan v. Felix*, 233 U. S. 318, 322, 34 Sup. Ct. 596, 58 L. ed. 980.

¹⁰ *Harper v. Harper*, C. C. A., 252 Fed. 39.

¹¹ *Ibid.*

¹² *Johnston v. Chicago, M. & St. P. Ry. Co.*, 224 Fed. 197. See *supra*, § 180c.

¹³ *Bailey v. Glover*, 21 Wall. 342, 22 L. ed. 636; *Peeples v. Georgia Iron & Coal Co.*, C. C. A., 248 Fed. 886. (In bankruptcy.) *Am. Tobacco Co.*, C. C. A., 204 Fed. 58, 62.

¹⁴ *U. S. v. Puget Sound Tr. Lt. & Power Co.*, 215 Fed. 436, see 180(c), *supra*; *infra*, § 182.

¹⁵ *Caldwell v. Ulah*, Ind. App., 103 N. E. 879.

¹⁶ *Holland v. Shannon Tex. Civ. App.*, 84 S. W. 854.

¹⁷ *Fidelity & Casualty Co. v. Jasper Furniture Co., Ind.*, Oct. 1917, 117 N. E. 258.

spiracy to injure plaintiff in its business by interstate commerce;¹⁸ and that the limitation for the time to begin the action is regulated by a State statute concerning acts for injuries to personal property to the person or rights of another.¹⁹

The statute does not begin to run against the distributee of an estate to recover a debt of his ancestor until the distribution although the debt was incurred long before.²⁰ Nor against a suit by a remainderman to recover property from the grantee of the entire estate by the life tenant until the death of the latter;²¹ nor against a trustee until a repudiation of the trust or such misconduct as amounts to a repudiation.²²

Where a corporation wrote to the claimant of a dividend upon its preferred stock which had been paid to the stockholders: "The Executive Committee took up the question of payment to you of the dividend on the preferred stock, and decided that, owing to the present money conditions it would be unwise from the company's standpoint to make any payment at this time," it was held that this started the running of the statute.²³ The Statute of Limitations to suits upon sealed instruments applies to a bond or other contract reciting that it is under seal and so intended although no seals were formally affixed;²⁴ and to actions upon coupons originally attached to sealed instruments.²⁵

Ordinarily the law of the forum governs the application of the statute of limitations although the causes of action arose in another jurisdiction.²⁶ But where the cause of action was created by the statute of another sovereignty a limitation of the time for its enforcement therein contained is usually considered to be a condition of the cause of action, not a limitation of the remedy and will consequently be followed.²⁷ Where the State law pro-

¹⁸ *American Tobacco Co. v. People's Tobacco Co.*, C. C. A., 204 Fed. 58.

¹⁹ *Harvey v. Booth Fisheries Co. of Delaware*, 228 Fed. 782.

²⁰ *Humphreys v. Walsh*, C. C. A., 248 Fed. 414.

²¹ *Steele v. Highland Park Mfg. Co.*, C. C. A., 212 Fed. 972.

²² *Benedict v. City of New York*, 235 Fed. 258; *Bumpass v. McGhee*, C. C. A., 247 Fed. 306.

²³ *Stokes v. Williams*, C. C. A., 249 Fed. 114.

²⁴ *Cook v. Automatic Fire Protection Co.*, 228 Fed. 192.

²⁵ *Smythe v. New Providence Township*, 253 Fed. 824.

²⁶ *Eggen v. Canadian Northern Ry. Co.*, C. C. A., 255 Fed. 937.

²⁷ *Phillips v. Grand Trunk Ry. Co.*, 236 U. S. 662.

vided that the Statute of Limitations of the State where the cause of action arose should govern, an action for a personal injury by a passenger who bought his ticket in one State and was injured in another was barred by the law of the State where the injury occurred.²⁸

In the absence of an express provision to the contrary the widow or next of kin may sue because of the death of the husband or ancestor from a personal injury although had he lived his action would have been barred by the statute.²⁹

A State Statute of Limitations cannot bind the United States when the Government sues in a sovereign capacity to assert a public interest or to enforce a public right,³⁰ even it has been said if specially named therein.³¹ Such is a suit to collect dividends on shares of stock owned by the Government.^{31a}

It was held that the State Statute of Limitations barred a claim by the United States for the value of timber on Government land destroyed by fire,³² and that a suit by the United States for the benefit of an individual land owner may be barred by laches.³³ A State Statute of Limitations cannot bar the United States; but the United States may take advantage of a State Statute of Limitations,³⁴ even when it does not name them;³⁵ and so may officers of the United States in possession of property claimed by the government.³⁶

The rule that a State is not affected by laches or a statute of limitation cannot aid a creditor of a State when suing one of its debtors.³⁷ An individual seeking to enforce by subrogation the

²⁸ *Baltimore & O. R. Co. v. Reed*, C. C. A., 223 Fed. 689.

²⁹ *Western Un. Tel. Co. v. Preston*, C. C. A., 254 Fed. 229, affirming 250 Fed. 480.

³⁰ *Gibson v. Chouteau*, 13 Wall. 92, 20 L. ed. 534; *U. S. v. Thompson*, 98 U. S. 486, 25 L. ed. 194. See *infra*, § 182; *Chesapeake & Del. Canal Co. v. U. S.*, 250 U. S. 123, reversing C. C. A., 240 Fed. 903; overruling s. c., C. C. A., 223 Fed. 926; *U. S. v. Pitan*, 224 Fed. 604; *Bistline v. U. S.*, C. C. A., 229 Fed. 546; *U. S. v. Fletcher*, 231 Fed. 326.

³¹ *U. S. v. Thompson*, 98 U. S. 486, 490, 25 L. ed. 194, 195.

^{31a} *Ches. & Del. Canal Co. v. U. S.*, 250 U. S. 123.

³² *Denver & R. G. R. Co. v. U. S.*, 241 Fed. 614.

³³ *U. S. v. Fletcher*, 231 Fed. 326. See *supra*, § 180c.

³⁴ *Stanley v. Schwalby*, 147 U. S. 508, 517, 37 L. ed. 259, 263.

³⁵ *Stanley v. Schwalby*, 147 U. S. 508, 517, 37 L. ed. 259, 263; *U. S. v. Minor*, C. C. A., 235 Fed. 101.

³⁶ *Stanley v. Schwalby*, 147 U. S. 508, 518, 37 L. ed. 259, 263.

³⁷ *Cressy v. Meyer*, 138 U. S. 525, 34 L. ed. 1018.

rights of a State may be estopped by laches of the State which would not have affected the State itself.³⁸ Municipal corporations and counties may be estopped by laches.³⁹ Laches or the statute of limitations may be pleaded to a bill to remove a cloud on title filed by one out of possession.⁴⁰

The filing of a bill in equity stops the running of the statute of limitations, although the subpoenas are not issued until subsequent to its expiration.⁴¹

An amendment to the plaintiff's pleading which introduces a new or different course of action and marks a new or different demand, is the equivalent of a fresh suit upon a new cause of action, and may be barred by the Statutes of Limitation although the original suit was duly brought.⁴² An amendment which sets up no new cause of action and makes no new demand, but simply varies or expands the allegations in support of the cause of action previously pleaded relates back to the beginning of the action and when the suit was begun within the statutory period of limitation, it is not barred, by the expiration of that time previous to the amendment.⁴³ The filing of a cross bill without the issue of process has the same effect.⁴⁴

A provision in a State Statute of Limitations that it shall not apply to a cause of action against a person out of the State until he comes into the State applies to a suit against the administratrix to establish the statutory liability of her intestate as a stockholder in an insolvent corporation and to charge the estate with the liability thus established.⁴⁵ But not, it has been held, to an equitable cause of action to subject to the payment of the debt assets in the hands of a distributee.⁴⁶ Where the State court held

³⁸ Ibid.

³⁹ *Boone County v. Burlington M. R. R. Co.*, 139 U. S. 684, 35 L. ed. 319.

⁴⁰ *Sage v. Winona & St. P. R. Co.*, 58 Fed. 297.

⁴¹ *Armstrong Cork Co. v. Merchants' Refrigerating Co.*, C. C. A., 184 Fed. 199; *Keystone Coal & Coke Co. v. Fekete*, C. C. A., 232 Fed. 72; *Linn & Lane Timber Co. v. U. S.*, 236 U. S. 574, where the subpoenas had been issued but not served.

⁴² *U. S. v. Daleour*, 203 U. S. 408, 423, 5 L. ed. 248, *infra*, § 210b.

⁴³ *Illinois Surety Co. v. Peeler*, 240 U. S. 214; *Seaboard Air Line v. Renn*, 241 U. S. 293, *infra*.

⁴⁴ *Continental & C. T. & S. Bank v. North Platte Val. Irr. Co.*, 219 Fed. 438.

⁴⁵ *Schwartz v. Loftus*, 216 Fed. 320.

⁴⁶ *Humphreys v. Walsh*, C. C. A., 248 Fed. 414.

that such a statute excepted from its operation a foreign corporation which maintained an agent authorized to serve process within the State, it was followed by the Federal court.⁴⁷

Where the State statute authorizes, after a dismissal or non-suit a renewal of the litigation for the same cause of action within a limited time it will be followed by the Federal court.⁴⁸ A second suit for death caused by negligence is considered to be for the same cause of action although different acts of negligence are alleged.⁴⁹

Federal courts of equity are not bound by State Statutes of Limitations,⁵⁰ except in cases where their jurisdiction is concurrent with the jurisdiction at common law;⁵¹ but they will usually follow them,⁵² unless injustice otherwise would be done.⁵³ espe-

⁴⁷ *Quinette v. Pullman Co.*, C. C. A., 233 Fed. 980.

⁴⁸ *Hicks v. Fordham*, C. C. A., 246 Fed. 236. See *Lee v. Levison*, C. C. A., 247 Fed. 478.

⁴⁹ *McClintic-Marshall Const. Co. v. Forgy*, C. C. A., 246 Fed. 193, 199.

⁵⁰ *Wagner v. Baird*, 7 How. 234, 258, 12 L. ed. 681, 691; *Godden v. Kimmell*, 99 U. S. 201, 25 L. ed. 431; *Wilson v. Koontz*, 7 Cranch, 202, 3 L. ed. 315; *Kirby v. L. S. & M. S. R. Co.*, 120 U. S. 130, 137, 30 L. ed. 569, 572; *Richards v. Maryland Ins. Co.*, 8 Cranch, 84, 3 L. ed. 496; *Hanger v. Abbott*, 6 Wall, 532, 18 L. ed. 939; *Etting v. Marx's Ex'r*, 4 Fed. 673; *Stevens v. Sharp*, 6 Sawy. 993; *Continental Nat. Bank v. Heilman*, 81 Fed. 36; *Redd v. Brun*, C. C. A., 157 Fed. 190; *Jackson v. Horton*, 3 Caines (N. Y.) 19; *Ide v. Trolicht, D. & R. Carpet Co.*, C. C. A., 115 Fed. 137; *Stevens v. Grand Cent. Min. Co.*, C. C. A., 133 Fed. 28.

⁵¹ *Wagner v. Baird*, 7 How. 234, 258, 12 L. ed. 681, 691; *Godden v. Kimmell*, 99 U. S. 201, 25 L. ed. 431; *Meath v. Phillips Co.*, 108 U. S. 553, 27 L. ed. 819. *Contra*,

Rodgers v. Thomas, C. C. A., 193 Fed. 952, 957; *Riner, J.*: "We think it is the general rule that courts of equity in cases of concurrent jurisdiction usually consider themselves bound by the statute of limitations which govern courts of law in like cases, and this rather in obedience to the statute of limitations than by analogy, while in many other cases they act upon the analogy of the statute of limitations at law."

⁵² *Wagner v. Baird*, 7 How. 234, 258, 12 L. ed. 681, 691; *Broderick's Will*, 21 Wall. 503, 22 L. ed. 599; *Godden v. Kimmell*, 99 U. S. 201, 25 L. ed. 431; *Meath v. Phillips County*, 108 U. S. 553; *Kirby v. L. S. & M. S. R. Co.*, 120 U. S. 130, 30 L. ed. 569; *Pratt v. Northam*, 5 Mason, 95, 112, per Story, J.; *Norris v. Haggin*, 136 U. S. 386, 34 L. ed. 424; *O'Brien v. Wheelock*, 184 U. S. 450, 482, 493, 46 L. ed. 636, 651, 655; *Smith v. Smith*, C. C. A., 224 Fed. 1.

⁵³ *Higgins Oil & Fuel Co. v. Snow*, C. C. A., 113 Fed. 433; *Patterson v. Safe Deposit & Trust Co.*, 148 Fed. 787; *Redd v. Brun*, C. C. A., 157 Fed. 190; *Fogg v. St. Louis, H.*

cially in foreclosure suits⁵⁴ and suits against executors and administrators,⁵⁵ unless there is an Act of Congress upon the subject. It has been said that a Federal court of equity will never follow a State statute of limitation when thereby manifest wrong and injustice would be wrought,⁵⁶ nor usually in case of a fraud that has been concealed.⁵⁷

The Federal courts will usually give such statutes the same construction that is placed upon them by the courts of the respective States where they were enacted;⁵⁸ but a court of admiralty refused to follow a decision of a State court which did not permit a foreign corporation, subject to service of process within the State, to plead the statute.⁵⁹

It has been said that the Statute of Limitations is available only as a defense and never to support a cause of action,⁶⁰ con-

& K. R. Co., 17 Fed. 871, 873; Cheatham v. Evans, C. C. A., 160 Fed. 802; Wilson v. Plutus Min. Co., C. C. A., 174 Fed. 319; Armstrong Cork Co. v. Merchants' Refrigerating Co., C. C. A., 184 Fed. 199; Newbery v. Wilkinson, 190 Fed. 62; Rodgers v. Thomas, C. C. A., 193 Fed. 952; Updike v. Mace, 194 Fed. 1001; Davis v. Smokeless Fuel Co., C. C. A., 196 Fed. 753; Layton Pure Food Co. v. Church & Dwight Co., C. C. A., 32 L.R.A. (N.S.) 274, 182 Fed. 35; L. Broderick's Will, 21 Wall. 503, 22 L. ed. 599; Pulliam v. Pulliam, 10 Fed. 53; Fogg v. St. Louis, H. & K. R. Co., 17 Fed. 871, 873; Story's Eq. Jur., § 1521. Cf. Scott v. Armstrong, 146 U. S. 499, 36 L. ed. 1059; Security Tr. Co. v. Black River Nat. Bank, 187 U. S. 211, 237, 47 L. ed. 147, 158.

⁵⁴ Cleveland Ins. Co. v. Reed, 1 Biss. 180; Reeves v. Vinacke, 1 McCrary, 213, 217, per Nelson and Dillon, JJ.

⁵⁵ Pulliam v. Pulliam, 10 Fed. 53; Broderick's Will, 21 Wall. 503, 22 L. ed. 599; Newbery v. Wilkinson,

190 Fed. 62; Goodno v. Hotchkiss, 237 Fed. 687.

⁵⁶ Fogg v. St. Louis, H. & K. R. Co., 17 Fed. 871, 873; Story's Eq. Jur., § 1521. Cf. Scott v. Armstrong, 146 U. S. 499, 36 L. ed. 1059; Security Tr. Co. v. Black River Nat. Bank, 187 U. S. 211, 237, 47 L. ed. 147, 158.

⁵⁷ McIntire v. Pryor, 173 U. S. 38, 43 L. ed. 606; Saxlehner v. Eisner & M. Co., 179 U. S. 19, 45 L. ed. 60; Newberry v. Wilkinson, C. C. A., 199 Fed. 673; Citizens' Sav. & Tr. Co. v. Illinois Cent. R. Co., C. C. A., 182 Fed. 607.

⁵⁸ Cheatham v. Evans, C. C. A., 160 Fed. 802; Armstrong Cork Co. v. Merchants' Refrigerating Co., C. C. A., 184 Fed. 199; Fordham v. Hicks, 224 Fed. 870; Quinette v. Pullman Co., 229 Fed. 333; City of Memphis, T. v. Board of Directors, 231 Fed. 217; Salyer v. Consolidation Coal Co., C. C. A., 246 Fed. 794.

⁵⁹ Davis v. Smokeless Fuel Co., C. C. A., 196 Fed. 753.

⁶⁰ Talbot v. Hill, D. C., C. C. A., 261 Fed. 244.

sequently, the court dismissed a suit to cancel the lien of a deed of trust, when the exercise of the power of sale was barred by the statute.⁶¹

§ 181a. Suspension of statute of limitations. The statute against Trading with the Enemy provides for a suspension of the Statutes of Limitations to the extent and in the manner described in a preceding section.¹

The Antitrust Law provides "Whenever any suit or proceeding in equity or criminal prosecution is instituted by the United States to prevent, restrain or punish violations of any of the antitrust laws, the running of the statute of limitations in respect of each and every private right of action arising under said laws and based in whole or in part on any matter complained of in said suit or proceeding shall be suspended during the pendency thereof."²

§ 182. Equitable laches. Moreover, the lapse of time for a shorter period than the statute of limitations, and in cases to which that statute does not apply, will often be held such laches as to bar the complainant¹ but very rarely, unless other circumstances than the mere lapse of time make it inequitable to permit the complainant to sue.²

⁶¹ Ibid.

§ 181a. ¹ *Supra*, § 180o.

² Act of Oct. 15, 1914, 38 St. at L. 731, ch. 323, § 5.

§ 182. ¹ *Brown v. County of Buena Vista*, 95 U. S. 157, 161, 24 L. ed. 422, 423. In the following cases amongst others, the doctrine of laches was applied: *Town of Essex v. New England Tele. Co. of Mass.*, 239 U. S. 313; *Waller v. Texas & Pac. Ry. Co.*, 239 U. S. 398; *Northrup v. Browne*, C. C. A., 204 Fed. 224; *Cubbins v. Mississippi River Commission*, 204 Fed. 299; *Carpenter v. M. J. & M. & M., Consolidated*, C. C. A., 212 Fed. 868; *Pooler v. Hyne*, C. C. A., 213 Fed. 154, 155; *Stiles v. Judson*, 214 Fed. 811; *Christy v. Atchison, T. & S. F. Ry. Co.*, 214 Fed. 1016; *Alexander v. Fidelity Trust Co.*, 215 Fed. 791;

Childs v. Missouri, K. & T. Ry. Co., 221 Fed. 219; *Es International Mineral Co.*, 222 Fed. 415; *Mathieson v. Craven*, 228 Fed. 345; *Fidelity Trust Co. v. Alexander*, 243 Fed. 162; *Dunsecomb v. Chicago, B. & Q. B. Co.*, C. C. A., 246 Fed. 394; *Guenther v. Dennis-Simmons Lumber Co.*, 246 Fed. 521; *Naylor v. Foreman-Blades Lumber Co.*, 230 Fed. 658; *U. S. v. New Orleans Pac. Ry. Co.*, C. C. A., 235 Fed. 841; *Alwood v. Lewis*, C. C. A., 254 Fed. 810; *Benedict v. City of New York*, C. C. A., 247 Fed. 758; *Church v. Swetland*, C. C. A., 248 Fed. 289; *Humphreys v. Walsh*, C. C. A., 248 Fed. 414; *Stewart v. Florida, G. & W. Ry. Co.*, C. C. A., 255 Fed. 573.

² *Stewart v. Holland*, 179 Fed. 969; *Central R. Co. of New Jersey v. Jersey City*, 199 Fed. 237; *New*

It has been said: that when the suit is delayed until after expiration of the statutory time, the burden of proof is upon the plaintiff to show such extraordinary circumstance as exclude laches.³ If previously brought, upon the defendant to show that such extraordinary circumstances exist as to create laches.⁴ Laches by his assignor is binding upon the complainant.⁵

Ignorance of the defendant's wrong doing is a sufficient excuse for laches;⁶ unless the complainant was guilty of inexcusable negligence, or,⁷ if there has been no prolonged absence from the jurisdiction or disability, when the facts are notorious such as the operation of a railroad by a well known corporation.⁸ When at the time of the discovery of a fraud the evidence thereof was slight, delay until more substantial evidence is found should not be considered to be laches.⁹

It is not laches for a complainant to delay asserting his rights until the determination in another suit, brought by himself or another in a similar position, of a doubtful question of law materially affecting their validity,¹⁰ nor is delay because of

berry v. Wilkinson, C. C. A., 199 Fed. 673; Schwartz v. Loftus, 216 Fed. 320; Parker v. Parker, C. C. A., 224 Fed. 186; Elder v. Western Mining Co., C. C. A., 237 Fed. 966; Kentucky Block Cannel Coal Co. v. Sewell, C. C. A., 249 Fed. 840; Sharum v. Whitehead Coal Mining Co., C. C. A., 223 Fed. 282.

³ McNeil v. McNeil, C. C. A., 170 Fed. 289.

⁴ Godden v. Kimmel, 99 U. S. 201, 25 L. ed. 431; National Bank v. Carpenter, 101 U. S. 567, 25 L. ed. 815; Wilson v. Plutus Min. Co., C. C. A., 174 Fed. 317; Wisner v. Barnett, 4 Wash. 631. But see Sullivan v. P. & K. R. Co., 94 U. S. 806, 811, 24 L. ed. 324, 326; Doe v. Hyde, 114 U. S. 247, 29 L. ed. 242; Philippi v. Philippi, 115 U. S. 151, 29 L. ed. 336.

⁵ New York Grape Sugar Co. v. Buffalo Grape Sugar Co., 24 Fed. 604; Woodmanse & Hewitt Manu-

facturing Co. v. Williams, C. C. A., 68 Fed. 489; Tompkins v. St. Regis Paper Co., C. C. A., 236 Fed. 221, 224.

⁶ Tompkins v. St. Regis Paper Co., C. C. A., 236 Fed. 221, 224; Elder v. Western Min. Co., C. C. A., 237 Fed. 966.

⁷ Waller v. Texas & Pac. Ry. Co., 245 Fed. 398; Jewell v. Trilby Mines Co., C. C. A., 229 Fed. 98.

⁸ Waller v. Texas Pac. Ry. Co., 245 U. S. 398.

⁹ Tevander v. Ruysdeal, C. C. A., 253 Fed. 918.

¹⁰ Buxton v. James, 5 De Gex & Sm. 80, 84; Rumford Chem. Works v. Vice, 14 Blatchf. 179, 180; Green v. Barney, 19 Fed. 420; Hurd v. James Goold Co., 197 Fed. 756; Central R. Co. of New Jersey v. Jersey City, 190 Fed. 237; Jackson Co. v. Gardiner Inv. Co., C. C. A., 200 Fed. 113; Stearns-Roger Mfg. Co. v. Brown, 114 Fed. 939, 945; Tomp-

the inability of the owner to bear the expense of the litigation,¹¹ nor, in Porto Rico, a delay warranted by the previous jurisprudence and caused by lack of knowledge of the principles of chancery.¹²

The United States are not bound by laches,¹³ unless equities have arisen through the lapse of time;¹⁴ or where a suit is brought in the name of the United States to enforce the rights of a private person.¹⁵ It has been said that the presumption of payment from lapse of time may bar the United States.¹⁶

In a stockholder's suit set aside a sale a delay of nine days less than a year was held to be sufficient laches to bar the right of recovery, when in the meanwhile, bonds secured by the purchased property had been issued by the vendee.¹⁷ The lapse of time since a decree was entered is no bar to proceedings to punish the violation thereof as a contempt.¹⁸ Laches in admiralty is subsequently considered.¹⁹

Laches in prosecuting a suit after it is brought may also be taken into consideration.²⁰

kins v. St. Regis Paper Co., C. C. A., 236 Fed. 221; *People v. Cooper*, 22 Hun (29 N. Y. S. C. R.), 515, 517. See *Illinois G. T. Ry. Co. v. Wade*, 140 U. S. 65, 35 L. ed. 342.

¹¹ *Davis v. A. H. Reid Creamery & Dairy Supply Co.*, 187 Fed. 157. *Contra*, dicta in *Hayward v. Nat. Bank*, 96 U. S. 611, 618, 24 L. ed. 855; *Leggett v. Standard Oil Co.*, 149 U. S. 287, 294, 13 Sup. Ct. 902, 37 L. ed. 737. But see *Elder v. West. Min. Co.*, 237 Fed. 966.

¹² *Noble v. Gallerdo Y. Leary*, 223 U. S. 65, 66 L. ed. 353.

¹³ *Gibson v. Choteau*, 13 Wall. 92, 20 L. ed. 534; *U. S. v. Thompson*, 98 U. S. 486, 25 L. ed. 194. See *supra*, § 181.

¹⁴ *U. S. v. Stinson*, 197 U. S. 200, 49 L. ed. 724.

¹⁵ *U. S. v. Chicago, M. & St. P. Ry. Co.*, C. C. A., 116 Fed. 969; *U. S. v. Fletcher*, 231 Fed. 326; *U. S. v. New Orleans Pac. Ry. Co.*,

235 Fed. 841. Cf. *U. S. v. Beebe*, 127 U. S. 338, 32 L. ed. 121.

¹⁶ *Chesapeake & Del. Canal Co. v. U. S.*, C. C. A., 223 Fed. 926, reversed 250 U. S. 123.

¹⁷ *Bradford v. Betton Motor Co.*, 105 Fed. 63, aff'd C. C. A., 155 Fed. 711. See *Davis v. A. H. Reid Creamery & Dairy Supply Co.*, 187 Fed. 157, aff'd 197 Fed. 80; *Marks v. Merrill Paper Co.*, C. C. A., 203 Fed. 16; *Kelly v. Dolan*, C. C. A., 233 Fed. 635 (12 yrs.), *Collens v. Penn Wyoming Copper Co.*, 203 Fed. 726 (a delay of 2½ yrs.); *Weningeh v. Success Min. Co.*, C. C. A., 227 Fed. 548; *Munger v. Perlman Rim Corp.*, C. C. A., 244 Fed. 799; *Tompkins v. St. Regis Paper Co.*, C. C. A., 236 Fed. 221, 224.

¹⁸ *Tash v. Western Kentucky Coal Co.*, C. C. A., 252 Fed. 44.

¹⁹ *Infra*, § 576.

²⁰ *Underfeed Stoker Co. v. Am. Stoker Co.*, 169 Fed. 891; *Northrup*

The defense of laches need not be pleaded.²¹ Nor the presumption of payment after twenty years.²²

§ 183. Pleading statutes of limitations. It is the safer practice for the defendant to plead the statute of limitations in every case where he relies upon it; ¹ although, when laches appear upon the face of a bill, in equity, it may be dismissed upon a motion before answer,² and although, if not pleaded, it may be raised at the hearing before the testimony is taken.³ Where the bill shows that a reissued patent was void because of delay in the patent office,⁴ that defense need not be pleaded.⁵ In most cases, it has been held that Federal statutes of limitations need not be pleaded.⁶

When a suit is brought after the statutory time, the burden is

v. Browne, C. C. A., 204 Fed. 224; Drees v. Waldron, C. C. A., 212 Fed. 93; Kellogg Switchboard & Supply Co. v. Dean Electric Co., 231 Fed. 194; U. S. v. Fletcher, 231 Fed. 326.

²¹ Whitaker v. Whitaker Iron Co., C. C. A., 249 Fed. 531.

²² Chesapeake & Del. Canal Co. v. U. S., C. C. A., 223 Fed. 926, reversed on another point, 250 U. S. 123.

¹ Fichtel v. Barthel, 173 Fed. 489, a patent case; Robinson v. Mutual Reserve Life Ins. Co., 175 Fed. 629; Robinson v. Mutual Reserve Life Ins. Co., 175 Fed. 629. The limitation upon the time to bring actions to claim filiation in the Civil Code of Porto Rico of 1889, art. 137, and of § 199 of the Porto Rico Act of March 1, 1902, must be pleaded. Burnet v. Desmornes Y Alvarez, 226 U. S. 145, 57 L. ed. —. A defendant in a foreclosure suit, who claimed an interest in the property, but who was not alleged to be in possession nor to owe the amount of the debt, was not allowed by a demurrer to avail himself of the statute of limitations. Blair v. Silver Peak Mines, 84 Fed. 737.

² Godden v. Kimmell, 99 U. S. 201, 25 L. ed. 431; National Bank v. Carpenter, 101 U. S. 567, 25 L. ed. 815; Wisner v. Barnet, 4 Wash. 631; Robinson v. Mutual Reserve Life Ins. Co., 175 Fed. 629; Alexander v. Fidelity Trust Co., 214 Fed. 495. See Edison EL Light Co. v. Equitable Life Assur. Soc. of U. S., 55 Fed. 478; Sullivan v. P. & K. R. Co., 94 U. S. 806, 811, 24 L. ed. 324; Doe v. Hyde, 114 U. S. 247, 29 L. ed. 142; Phillippi v. Phillippe, 115 U. S. 151, 29 L. ed. 336.

³ As to the former practice, see Waller v. Texas & P. Ry. Co., C. C. A., 229 Fed. 87; *Re* International Mineral Co., 222 Fed. 415; Fidelity & Casualty Co. v. Jasper Furniture Co., Ind., Oct. 1917, 117 N. E. 258.

⁴ Nat. Cash Register Co. v. Union Comp. Mach. Co., 143 Fed. 342. See *supra*, § 181a.

⁵ Wollensak v. Reiher, 115 U. S. 96, 101, 29 L. ed. 350, 351; Lockhart v. Leeds, 195 U. S. 427, 49 L. ed. 263; Thurmond v. Ches. & O. Ry. Co., C. C. A., 140 Fed. 697.

⁶ *Supra*, §§ 180c, e, g, k, n.

on the complainant to show in his bill and by his proof that it would be inequitable to apply the statute to his case.⁷ That the delay has been prejudicial to the defendant need not be affirmatively shown, but may be presumed, and it was so presumed when a bill was filed eighteen months after the complainant admitted to have discovered the existence of a decree of divorce which he claimed to be fraudulent and the defendant had married since the decree.⁸

In an action of common law the Statute of Limitations must be pleaded and if not pleaded is waived.⁹ When, however, a statute creating a new cause of action contains a limitation of the right to sue this is frequently construed as a condition of the relief and in such case need not be pleaded.¹⁰

The defense of the Statute of Limitations is in substantially the same form as a similar plea in an action at law, but no special form is essential.¹¹ The same strictness of pleading the statute is not required at equity as at law; and it was held to

⁷ *Godden v. Kimmel*, 99 U. S. 201, 25 L. ed. 431; *National Bank v. Carpenter*, 101 U. S. 567, 25 L. ed. 815; *Wilson v. Plutus Min. Co.*, C. C. A., 174 Fed. 317; *Wisner v. Barnett*, 4 Wash. 631. But see *Sullivan v. P. & K. R. Co.* 94 U. S. 806, 811, 24 L. ed. 324, 326; *Doe v. Hyde*, 114 U. S. 247, 29 L. ed. 242; *Phillippi v. Phillippe*, 115 U. S. 115 U. S. 151, 29 L. ed. 336.

⁸ *McNeil v. McNeil*, C. C. A., 170 Fed. 289. In *Newberry v. Wilkinson*, C. C. A., 199 Fed. 673, a bill was dismissed for laches when filed against the sureties of a guardian between three and four years after the complainant became of age, and he had had notice sufficiently to put him upon inquiry two years before his infancy terminated, but made no search of the records until three months before the suit was brought.

⁹ *Shields v. Shimm*, 124 U. S. 351, 8 Sup. Ct. 510, 31 L. ed. 445; *Gormley v. Bunion*, 138 U. S. 623, 11 Sup.

Ct. 453, 34 L. ed. 1086; *Hallett v. New England Roller Grape Co.*, C. C. A., 119 Fed. 873.

¹⁰ *Phillips v. Grand Trunk Co.*, 236 U. S. 662; *The Harrisburg*, 119 U. S. 199, 1 Sup. Ct. 140, but see *Sharrow v. Inland Lines Ltd.*, 214 N. Y. 101; *Carlin v. Peerless Gas Light Co.*, 283 Ill. 142, 119 N. E. 66; *Goldstein v. Chicago City Ry. Co.*, 286 Ill. 297, 121 N. E. 726; *Bretthauer v. Jacobson*, 79 N. J. Law 223, 75 Atl. 560; *McRae v. N. Y., N. H. & H. R. R. Co.*, 199 Mass. 418, 85 N. E. 425; *Harwood v. Chicago, Rock Island & Pacific Co.*, 101 Kan. 215, 171 Pac. 354; *De Martino v. Siemon*, 90 Conn. 527, 97 Atl. 765; *Hartary v. Chicago Ry. Co. Illinois*, 124 N. E. 849.

¹¹ *Harpending v. Reformed Prot. Ch.*, 16 Pet. 455, 101 Fed. 1029; *West Portland H. Ass'n v. Lowndale*, 17 Fed. 205; *Story's Eq. Pl.*, § 752.

be a sufficient averment of the Statute of Limitations, as well as of laches, when the answer alleged that if there had been any claim against the defendant's interstate in his lifetime, by reason of the transactions alleged in the bill, which was denied, said claim was barred by the lapse of time and the neglect of plaintiff to have a settlement of the same in the lifetime of the decedent; and that the defendant, therefore, believes that any such claim is barred, as plaintiff allowed the claim to sleep only after the death of the deceased.¹² When the answer pleaded a limitation of six years, whereas the three years' statute applied; it was held to be sufficient.¹³ If the bill charge fraud or other matters, which, if true, would prevent the statute from depriving the complainant of relief, the plea must deny them.¹⁴

§ 184. Defense of statute of frauds. The State Statute of Frauds will be followed by the Federal courts.¹ Under the old practice, if the bill showed that the complainant's case is repugnant to the Statute of Frauds, it was demurrable.² This, however, is rarely the case, and the statute was usually referred to by plea or answer.³ The rule is thus stated by Lord Chancellor Cranworth: "It was argued that the Statute of Frauds was not open to the defendant, by reason of his not having insisted upon the statute as a defense; but this is a mistake. Where a defendant admits the agreement, if he intends to rely on the fact of its not being in writing and signed, and so being invalid by reason of the statute, he must say so; otherwise he is taken to mean that the admitted agreement was a written agreement good under the statute, or else that on some other ground it is binding on him; but where he denies or does not admit the agreement the burden of proof is altogether upon the plaintiff, who must then prove a valid agreement capable of being enforced."⁴ It has been held that the statute is waived unless

¹² *Huntington Nat. Bank v. Huntington Distilling Co.*, 152 Fed. 240.

¹³ *Ramsden v. Gately*, 142 Fed. 912.

¹⁴ *Stearns v. Page*, 1 Story, 204; *Himrod v. Ft. Pitt Mining & Milling Co.*, C. C. A., 202 Fed. 724.

§ 184. ¹ *Randall v. Howard*, 2 Black, 585, 589, 17 L. ed. 269, 271.

² *Randall v. Howard*, 2 Black.

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585, 589, 17 L. ed. 269, 271. But see *Chapman v. School Dist.* 1 Dedy, 108.

³ For an illustration of the plea, see *Jackson v. Oglander*, 2 H. & M. 465.

⁴ *Ridgway v. Wharton*, 3 De G., M. & G. 677, 689. But see *Heys v. Astley*, 9 Law Times (N. S.), 356.

pleaded.⁵ The facts which show that the statute applies must be stated specifically.⁶ Otherwise the defense is bad.⁷

§ 185. Defenses of matter in pais. Defenses founded upon matters in pais state some other reason, why the plaintiff should not have relief,¹ for example a release, or an account stated, or an equitable estoppel,² an election,³ or a purchase without notice for a valuable consideration.⁴

§ 185a. Equitable estoppel in pais. An estoppel in pais is often called an equitable estoppel but it is a defense recognized at common law.¹ An equitable estoppel or an estoppel in pais arises whenever a man by his acts, representations, admissions, or silence when he ought to speak intentionally or through culpable negligence induces another to believe certain facts and such other relies and acts thereupon so as to be prejudiced if the existence of the facts is denied.²

The most frequent examples of estoppel in pais in the Federal courts arise in patent cases.³ A patentee who has assigned his patent,⁴ or a licensee whose license has not been repudiated,⁵ cannot contest its validity in a suit for its infringement. An assignor of a patent cannot sue his assignee for the infringement of an older and broader patent covering the same invention subsequently acquired by him when the assignee has acted within the limitation of the patent assigned.⁶ The same rule applies: to the licensee of the assignor.⁷ To the employer of

⁵ *Jennings v. Augir*, 215 Fed. 658; *Contra*, *Thomas J. Baird Inv. Co. v. Harris*, C. C. A., 209 Fed. 291 (holding that in an action at law a general denial coupled with an admission of an execution of the contract, did not waive the defense of the statute of frauds).

⁶ *Bailey v. Wright*, 2 Bond, 181; *McCloskey v. Barr*, 38 Fed. 165, 169.

⁷ *Ibid*.

§ 185. 1 Story's Eq. Pl., §§ 795-815.

² *Infra*, § 185a.

³ *Infra*, § 185b.

⁴ *Infra*, § 185c.

§ 185a. 1 *Weber v. Hetzell*, C. C. A., 230 Fed. 965.

² *Ferry v. Troy Laundry Co.*, 238 Fed. 867.

³ See *infra*, § 188.

⁴ *Underwood Typewriter Co. v. Manning*, 221 Fed. 652; *Mergenthaler Linotype Co. v. Int. T. Mach. Co.*, 229 Fed. 168; *Leader Plow Co. v. Bridgewater Plow Co.*, C. C. A., 237 Fed. 376.

⁵ *Martin v. New Trinidad Lake Asphalt Co.*, 255 Fed. 93.

⁶ *United Printing Mach. Co. v. Cross Paper Feeder Co.*, 220 Fed. 322.

⁷ *Leader Plow Co. v. Bridgewater Plow Co.*, 237 Fed. 376.

the assignor who has instructed the latter to design a competing device which will avoid infringement.⁸ To anyone who with knowledge of the assignment cooperates with the assignor in the infringement.⁹ To a corporation organized after the assignment of which the assignor becomes the president;¹⁰ or organized by the procurement of the assignor¹¹ or which has succeeded to the business and assets of a co-partnership which had agreed to cease infringement.¹² But not to the manufacturer of an infringing machine upon the order of such a corporation except as to that particular machine.¹³ The estoppel does not prevent the assignor or licensee from proving the state of the prior art so as to limit the scope of the patent;¹⁴ nor from denying the infringement.¹⁵ It has been held that the assignor cannot escape the estoppel by alleging that he was induced by unfair representations to part with the patent;¹⁶ but in a later case defendant was permitted to deny complainant's title to the patent and in a counter-claim allege equitable ownership in itself and pray for a decree quieting its title.¹⁷ A complainant is not estopped to attack a patent introduced by defendant as part of the prior art which was originally pleaded in the bill but afterwards abandoned.¹⁸ A plaintiff who has ratified a license by

⁸ *Mergenthaler Linotype Co. v. Int. T. Mach. Co.*, 229 Fed. 168.

⁹ *Schiebel Toy & Novelty Co. v. Clark, C. C. A.*, 217 Fed. 760; *Dalton Add. Mach. Co. v. Moon-Hopkins Billing Mach. Co.*, 223 Fed. 51; *Martin Gauge Co. v. Pollock*, 251 Fed. 295, 298. But see *Roessing-Ernst Co. v. Coal & Coke By-Product Co., C. C. A.*, 208 Fed. 990.

¹⁰ *Roessing-Ernst & Co. v. Coal & Coke By-Products Co., C. C. A.*, 208 Fed. 990.

¹¹ *Martin Gauge Co. v. Pollock*, 251 Fed. 295.

¹² *Dudlo Mfg. Co., v. Varley Duplex Magnet Co., C. C. A.*, 253 Fed. 745.

¹³ *Roessing-Ernst Co. v. Coal & Coke By-Products Co., C. C. A.*, 208 Fed. 990.

¹⁴ *Babcock & Wilcox Co. v. Toledo Boiler Works Co., C. C. A.*, 170 Fed. 81; *Standard Plunger Elevator Co. v. Stokes, C. C. A.*, 212 Fed. 941; *Schiebel Toy & Novelty Co. v. Clark*, 217 Fed. 760; *Mergenthaler Linotype Co. v. Int. Typesetting Co.*, 229 Fed. 168, 172; *H. D. Smith & Co. v. Southington Mfg. Co., C. C. A.*, 247 Fed. 342.

¹⁵ *H. D. Smith & Co. v. Southington Mfg. Co., C. C. A.*, 247 Fed. 342.

¹⁶ *Vacuum Eng. Co. v. Dunn, C. C. A.*, 209 Fed. 219.

¹⁷ *Cleveland Eng. Co. v. Galion D. M. Truck Co.*, 243 Fed. 405.

¹⁸ *Mergenthaler Linotype Co. v. Int. Typesetting Co.*, 229 Fed. 168, 173.

collecting royalties and demanding accountings thereunder is estopped from repudiating the same upon the ground that it was executed without her authority.¹⁹

Where complainant for more than twelve years had not advertised its trade-mark, nor employed salesmen, nor made any attempt, to sell the goods so marked outside of a single State, the court held that it was estopped from suing for infringement a corporation which in ignorance of the plaintiff's rights had spent several thousand dollars in advertising in another State goods similarly marked.²⁰

It was held: that the successor to the rights of the lessee in a lease of a coal mine which had successfully resisted a suit by the lessor for a forfeiture of the lease and had operated the mine for two years, was estopped from asking a cancellation of the lease or a modification of its terms upon the ground that the lessor had misrepresented the quantity of coal.²¹ That a failure by the lessee in such a lease to discover coal seams beneath those which it had operated did not estop it from working such seams which were included in the general terms of the lease although they were subsequently discovered by successors of the lessor on adjacent property.²² Where a mortgage recognizes the priority of another mortgage previously executed, the mortgagee is estopped from denying the priority of such mortgages and bonds thereby secured.²³

Creditors or others who have knowledge that their trustee or other representative is acting in collusion with the other side in a pending suit, are estopped if without excuse they remain silent until after the decree.²⁴ Beneficiaries of a trust who have avoided the charge of laches by the contention that the trust was not repudiated by the trustee in his lifetime, cannot, upon the accounting of the latter's executor, enforce charges for

¹⁹ *Vose v. Roebuck Weather Strip & Wire Screen Co.*, 216 Fed. 523.

²⁰ *Theodore Rectanus Co. v. United Drug Co.*, C. C. A., 226 Fed. 548.

²¹ *Browning v. Boswell*, C. C. A., 215 Fed. 826.

²² *Standard Pocahontas Coal Co.*

v. New Pocahontas Coal Co., C. C. A., 252 Fed. 535.

²³ *Mississippi Valley Tr. Co. v. Washington Northern R. Co.*, 212 Fed. 376.

²⁴ *Re Dashiell*, C. C. A., 246 Fed. 366.

which there would be no liability unless the trustee had converted the trust funds to his own use.²⁵

Where executors had no authority to bind the estate by the contract upon which suit was brought, a stipulation that judgment upon any verdict therein should be entered against them as executors did not bind them or the estate or estop them from denying the estate's liability.²⁶

The doctrine of equitable estoppel does not effect the United States because land to which the Government asserts a title has been occupied and improved with the Government's knowledge.²⁷ The payment by a municipal corporation of interest upon its bonds, warrants or other written obligations does not estop it from proving that they were issued fraudulently without consideration and *ultra vires*.²⁸

In equity an estoppel in pais need not be pleaded since it is in effect a rule of evidence.²⁹ At common law in the absence of a State statute upon the subject it is available as a defense under the general issue.³⁰ If the State statute or practice requires an equitable estoppel to be pleaded, the Federal court sitting within the State must observe the rule in actions at law.³¹

§ 185b. Defense of election of remedies. The defense of the election of remedies is not a favorite of courts of equity.¹ It has, however, been long observed and is well settled.² Where two inconsistent remedies, proceeding upon irreconcilable claims of rights, are open to a suitor, the choice of one bars the other.³ A mistake in the assertion of an alleged right is not an election, because an election can consist only in a choice between two inconsistent remedies existing and not fancied.⁴ "Election is simply what its name imports; a choice shown by an overt act, between two inconsistent rights, either of which may be asserted

²⁵ *Alexander v. Fidelity Tr. Co.*,
238 Fed. 938.

²⁶ *Griggs v. Nadean*, 221 Fed. 381.

²⁷ *Utah Power & Light Co. v. U. S.*,
C. C. A., 230 Fed. 328.

²⁸ *Hornblower v. City of Pierre*,
C. C. A., 241 Fed. 450.

²⁹ *Shelton v. Southern Ry. Co.*, 255
Fed. 182.

³⁰ *Ibid.*

³¹ *Ibid.*

§ 185b. ¹ *Friederichsen v. Renard*,
247 U. S. 207, 211.

² *Ibid.*

³ *Ratchford v. Cayuga Co. Cold Storage & W. Co.*, 217 N. Y. 565.

⁴ *Greenhall v. Carnegie Trust Co.*,
180 Fed. 812.

at the will of the chooser alone.”⁵ That a party through mistake of law has attempted to exercise a right, to which he is not entitled, does not prevent his afterwards exercising another right, which he had and still would have unless barred by the previous attempt.⁶ Where the relief sought is substantially the same, although prayed upon different theories, there is no election by prosecuting either of them unsuccessfully.⁷

In case of a conditional sale an unsuccessful attempt to enforce a lien upon property⁸ or an action and judgment for the purchase price which has not been collected in full,⁹ does not prevent a recovery in specie. On the other hand, the recaption of the property is an election which prevents the recovery of the unpaid installments.¹⁰ The filing of a mechanic's lien is a concession, that the articles sold have ceased to be personal property and have become a part of the real estate, so that they cannot be replevied.¹¹

It was held: that the entry of judgment in a foreclosure suit, to which the tenant in possession is a defendant, is an election to terminate his lease which prevents the recovery of future rent when he upon the entry of judgment vacated the premises; although the mortgagee subsequently, against the tenant's opposition, obtained an order vacating the judgment and discontinuing the foreclosure suit.¹² That the entry and part collection of a judgment for damages for breach of covenants, of which the sole consideration was certain promissory notes, is an election which prevents a defense to an action upon such notes for want or failure of consideration.¹³ A suit to annul a contract

⁵ Mr. Justice Holmes in *William W. Bierce Ltd. v. Hutchins*, 205 U. S. 340, 346.

⁶ *Ibid.*

⁷ *So. Pac. Ry. Co. v. Bogert*, 250 U. S. 483.

⁸ *William W. Bierce, Ltd. v. Hutchins*, 205 U. S. 340.

⁹ *Ratchford v. Cayuga Co. Cold Storage & W. Co.*, 217 N. Y. 565. But see *Whitney v. Abbott*, 191 Mass. 59, 63; *Shipley Const. & Supply Co. v. Mager*, 165 App. Div. (N. Y.) 866. Where after default the vendor elected to declare future pay-

ments due and recovered judgment for them which was held to be an election.

¹⁰ *Kelley-Springfield Road Roller Co. v. Schlimme*, 220 Pa. 413; *Minneapolis Harvester Works v. Hally*, 27 Minn. 495; *McBryan v. Universal Elevator Co.*, 130 Mich. 111.

¹¹ *Kirk v. Crystal*, 118 App. Div. (N. Y.) 32; *aff'd* 193 N. Y. 622.

¹² 461 Eighth Ave. Co., Inc. v. Childs Co., 181 App. Div. (N. Y.) 742.

¹³ *Karasik v. People's Trust Co., C. C. A.*, 252 Fed. 337. See also

for fraud, which has not been reduced to judgment, does not prevent an action for damages for the deceit.¹⁴ The cancellation of a proof of claim upon a bankrupt's motion on the ground, that the claim was not provable because not dischargeable by the bankruptcy proceedings, prevents him from subsequently contending that the judgment was void.¹⁵ The exclusion in an action at common law upon a written contract of evidence, that the paper was not intended to be binding, when the ruling was upon the plaintiff's objection, estops him from maintaining in a subsequent suit in equity, to enjoin the former action, that the evidence was admissible at law only.¹⁶

The filing of a bill to set aside a transfer of assets by a corporation and for an account to the trustee of a stockholder who was alleged to be the owner of all the assets since he was in fact the corporation, is not an election, which prevents an amended bill praying that the assets and securities be returned to the corporation.¹⁷

§ 185c. Purchase for a valuable consideration. The defense of purchase without notice for a valuable consideration must be pleaded by the defendant or it is waived.¹ An allegation in the bill that the defendants bought with knowledge of the fraud charge is surplusage and need not be proved.² The defendant should state the date, parties and a summary of the contents of the deed of purchase.³ He should deny notice positively and should state the amount of the consideration.⁴ It is insufficient to plead that the defendant paid a "good and valuable consideration, to-wit, a certain sum of money."⁵ Notice to an individual

J. L. Owens Co. v. Officer, C. C. A., 244 Fed. 47, 48, 53.

¹⁴ Friederichsen v. Renard, 247 U. S. 207; Bistline v. U. S., C. C. A., 229 Fed. 546.

¹⁵ Davis v. Wakelee, 156 U. S. 680, 685, 689, 691, 15 Sup. Ct. 555, 39 L. ed. 578.

¹⁶ Michaels v. Olmstead, 157 U. S. 198, 201, 15 Sup. Ct. 580, 39 L. ed. 671.

¹⁷ Greenhall v. Carnegie Trust Co., 180 Fed. 812.

§ 185c. ¹ Boone v. Chiles, 10 Peters 177, 211, 212; Wright-Blodgett Co. v. U. S., 236 U. S. 397, 403; Wood v. Mann, 1 Sumner 506.

² U. S. v. Brannon, C. C. A., 217 Fed. 849.

³ Boone v. Chiles, 10 Peters 177, 211; Wright-Blodgett Co. v. U. S., 236 U. S. 397, 403.

⁴ Wood v. Mann, 1 Sumn. 506.

⁵ Secombe v. Campbell, 18 Blatchf.

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is notice to a corporation subsequently formed by him, of which he retained the control.⁶

In the absence of a statute requiring the record of a lis pendens, it seems that a purchaser without notice, pending a suit is confined to asserting his rights in the pending cause.⁷

§ 186. Defense of matter of record or res adjudicata. In general. A plea founded upon matter of record sets up the judgment or decree of a court of record upon the same matter and between the same parties, or those in privity with them, in a cause of which it had jurisdiction.¹

Pleas of matter of record are in some of the books distinguished from pleas of matter as of record. This distinction was due to the fact that, in England, the Court of Chancery in its equitable jurisdiction, the Court of Admiralty and ecclesiastical courts were deemed courts not of record, although their decrees had the same effect as the judgments of the courts of record.²

Where there is neither valid service of process, nor voluntary appearance, a judgment *in personam* is not an estoppel;³ but a State statute providing that a special appearance for the sole purpose of questioning the jurisdiction is equivalent to a general appearance, will make a judgment thereupon binding when attacked collaterally.⁴ So it has been held, will a rule of law, established by the courts of a State, that an appeal from an order denying a motion to set aside the service of a summons is equivalent to a general appearance.⁵

⁶ Rickey Land & Cattle Co. v. Miller, 218 U. S. 258, 263, 54 L. ed. 1032, 1038. See Linn & Lane Timber Co. v. U. S., C. C. A., 196 Fed. 593.

⁷ Rickey Land & Cattle Co. v. Miller, 218 U. S. 258, 263, 54 L. ed. 1032, 1038; citing Whiteside v. Haselton, 110 U. S. 296, 301, 28 L. ed. 152, 154. See Atlas Ry. Supply Co. v. Lake & River Ry. Co., 134 Fed. 503; Barstow v. Becket, 110 Fed. 826. See *infra*, § 477.

§ 186. ¹ Ulpian, liber 42, tit. 20 et leg. 1: "*Res judicata dicitur, quae finem controversiarum pronuntiatione iudicii accipit: quod*

vel condemnatione vel absolute contigit." T. B. Harms, Francis Day & Hunter v. Stern, C. C. A., 229 Fed. 42.

² Story's Eq. Pl., § 778.

³ Simon v. Southern Ry. Co., C. C. A., 195 Fed. 56; *supra*, § 164; Grannis v. Ordean, 234 U. S. 385; N. Y. Life Ins. Co. v. Dunlevy, 241 U. S. 518; T. B. Harms, Francis Day & Hunter v. Stern, 229 Fed. 42.

⁴ York v. Texas, 137 U. S. 15, 34 L. ed. 604. See *supra*, § 169.

⁵ Chinn v. Foster-Milburn Co., 195 Fed. 158, 162.

It has even been held that in the case of a foreign corporation, where the validity of the service has been contested and decided against the defendant, such decision is binding collaterally.⁶

Where property has been attached, a summons left at the last stopping place of a resident who has left the jurisdiction is sufficient notice to him.⁷ A statute, authorizing a personal judgment upon service by publication against a former resident who had left the State for good was held to be unconstitutional.⁸

A judgment which is void as against one party, not merely voidable by him, is void as against the other.⁹

The judgment of the same court, or of another court of the United States,¹⁰ or of a court of one of the Union,¹¹ with jurisdiction of the subject-matter and of the parties, in which the defendant was duly served or voluntarily appeared, is, with the exceptions hereinafter noted, and in the absence of fraud, conclusive between the parties and their privies as to all matter pleaded and which might have been tried in the case. No judgment or decree rendered after a proceeding not *in rem*, in which the defendant therein was not served with process within the jurisdiction;¹² or in which the unsuccessful party was denied a hearing;¹³ or some such other gross injustice was perpetrated as to render the so-called judicial proceeding not due process of law,—is of any effect.

§ 186a. Res adjudicata by judgments of alien courts. The same rule applies to the judgment of a court of an Indian nation

⁶ Chinn v. Foster-Milburn Co., 195 Fed. 158, 163. But see Harkness v. Hyde, 98 U. S. 476, 25 L. ed. 237; *supra*, § 164.

⁷ Herbert v. Bicknell, 233 U. S. 70, 34 Sup. Ct. 562, 50 L. ed. 854.

⁸ McDonald v. Mabey, 243 U. S. 91.

⁹ McDonald v. Mabey, 243 U. S. 91.

¹⁰ Johnson Co. v. Wharton, 152 U. S. 252; 38 L. ed. 429.

¹¹ Clay v. Deskins, C. C. A., 63 Fed. 330; Hennessy v. Tacoma Smelting & Refining Co., C. C. A., 129 Fed. 240.

¹² Pennoyer v. Neff, 95 U. S. 714, 24 L. ed. 565; Life Ins. Co. v. Bangs, 103 U. S. 780, 26 L. ed. 608; St. Clair v. Cox, 106 U. S. 350, 27 L. ed. 222; Klenk v. Byrne, 143 Fed. 1008. See Clark v. Roller, 199 U. S. 541, 50 L. ed. 300.

¹³ Bischoff v. Wethered, 9 Wall. 812, 19 L. ed. 829; Windsor v. McVeigh, 93 U. S. 274, 23 L. ed. 914; Bradstreet v. Neptune Ins. Co., 3 Sum. 601. See Hilton v. Guyot, 159 U. S. 113; 204, 205, 40 L. ed. 95, 122, 123.

in the Indian Territory¹ and to the judgment of an alien court in a country, such as England and Canada, the laws of which give like effect to a judgment of a court in the United States.²

A foreign judgment, under which a person has been compelled to pay money is said to be so far conclusive that the justice of the payment cannot be impeached in another country, and that the defendant cannot be compelled to pay it again.³ So, it has been held, are foreign judgments discharging obligations between citizens or residents of the foreign country and therein contracted.⁴ But it was held by a majority of the Supreme Court: that, otherwise, the judgment *in personam* of a court in a foreign country where a similar judgment of a court of this country would be considered as only *prima facie* evidence of the facts therein adjudicated, when one of the parties is an American citizen and the other a citizen of that foreign country; is only *prima facie* evidence and not conclusive.⁵

A foreign judgment determining the status of persons subject to the jurisdiction, such as a decree confirming a marriage or granting a divorce, is followed unless contrary to the policy of the law of this country.⁶

§ 186b. Res adjudicata by judgment in matrimonial actions.

A decree of divorce, obtained upon service by publication, must be respected when it was made by a court of the State of the matrimonial domicile.¹ The State in which the parties were married and where they resided after their marriage and the

§ 186a. ¹ Standley v. Roberts, 59 Fed. 836.

² Ritchie v. McMullen, 159 U. S. 235, 40 L. ed. 133; Giae v. Westervelt, 116 Fed. 1017.

³ Hilton v. Guyot, 159 U. S. 113, 168, 40 L. ed. 95, 110, per Gray, J., citing Gold v. Canaham, 2 Swanst. 325; s. c., 1 Cases in Ch. 316; Tarleton v. Tarleton, 4 M. & S. 20; Konitzky v. Meyer, 49 N. Y. 571.

⁴ Burrows v. Jamereaux or Jami-neau, Mosely, 1; s. c., 2 Stra. 733; s. c., 2 Eq. Cas. Abr. 525, pl. 7; s. c., 12 Vin. Abr. 87, pl. 9; s. c., Sel. Cas. in Ch. 69; s. c., 1 Dick. 45; May v. Breed, 7 Cush. (Mass.)

15, 54 Am. Dec. 700; Hilton v. Guyot, 159 U. S. 113, 168, 40 L. ed. 95, 110.

⁵ Hilton v. Guyot, 159 U. S. 113, 40 L. ed. 95; Kilham v. Wilson, C. C. A., 112 Fed. 565; Eastern Bldg. & L. Ass'n v. Welling, 116 Fed. 100. But see Cruz v. O'Boyle, 197 Fed. 824.

⁶ Cheely v. Clayton, 110 U. S. 701, 28 L. ed. 298; Hilton v. Guyot, 159 U. S. 113, 167, 40 L. ed. 95, 109.

§ 186b. ¹ Atherton v. Atherton, 181 U. S. 155, 45 L. ed. 794; Thompson v. Thompson, 226 U. S. 551, 57 L. ed. —.

party who brings the suit still resided when the suit was brought is the matrimonial domicile.² Notice, by personal service or by publication, must be given to the defendant.³ The judgment is valid although the order for service by publication was granted upon an affidavit that the defendant was a non-resident, made upon information and belief, when she was in fact a resident of the State; provided that the law of the State permits orders to be granted upon affidavits so made.⁴ Irregularities in such affidavit, in the manner of stating material facts, do not invalidate the judgment, provided that the facts are actually stated therein, although the judgment might be voidable because of those defects by a suit brought for that purpose.⁵ Otherwise, when no personal service within the jurisdiction is made upon a defendant who is a nonresident, the decree of divorce is invalid unless he appears,⁶ or when he instigated the suit.⁷ Even in a case of an appearance by defendant when neither party had an actual domicile in the State where the decree was entered, the State of their domicile may refuse to recognize the validity of the divorce when adjudicating the right of inheritance by children of a second marriage.⁸ But a wife who has appeared and accepted alimony under such a decree is estopped from denying its validity.⁹ Although the New York statute¹⁰ permits service upon the co-respondent in a divorce case or his appearance gratis therein with the right to defend in either case, together with costs if he succeeds in defeating the charges of adultery; the judgment of divorce is not *res adjudicata* against him except as to a charge against which he has appeared and defended.¹¹

A decree for alimony where there is no personal service is binding upon the property seized in the State, including the

² Ibid.

³ Thompson v. Thompson, 226 U. S. 551, 57 L. ed. —.

⁴ Thompson v. Thompson, 226 U. S. 551, 57 L. ed. —.

⁵ Ibid.

⁶ Haddock v. Haddock, 201 U. S. 562, 50 L. ed. 867, 5 Ann. Cas. 1.

⁷ Kaufman v. Kaufman, 177 App. Div. (N. Y.) 162.

⁸ Andrews v. Andrews, 188 U. S. 14.

⁹ Langewald v. Langewald, Mass. Jan., 1920, 125 N. E. 566.

¹⁰ Code of Civil Procedure, § 1757, N. Y. L. 1911, ch. 311.

¹¹ Raymond v. Williston, 213 Fed. 525; Hendrick v. Biggar, 209 N. Y. 440, 103 N. E. 763; Billings v. Billings, 73 App. Div. (N. Y.) 69.

husband's bank account tied up by an injunction.¹³ Where after personal service, there was a decree giving the wife a stated sum in full of alimony and all other demands set forth in her cross-bill, it was held that the wife could not subsequently sue in another State to obtain further alimony from land there situated.¹³

An entry on the docket of a divorce suit which appeared to be the act of the court and not of the clerk, containing findings of the jurisdictional facts adjudging that the marriage be dissolved and that the plaintiff was entitled to alimony from the defendant; "that he be ordered to pay" plaintiff the monthly sums therein specified; was held to be a judgment for the amount of alimony therein stated and not a direction that judgment therefor be subsequently entered.¹⁴

When a decree had been duly entered against a defendant, who had been served, and was afterwards set aside, it was held: that a second decree against him without notice was *res adjudicata* unless set aside by the court which entered it for irregularity.¹⁵

Alimony payable in the future by a foreign judgment of divorce is *res adjudicata* in another State,¹⁶ unless the court which made it reserves the right of modification at any future time.

§ 186c. Res adjudicata by decision of Court of Probate. A decree of a State court of probate or surrogate's court, irrespective of the residence of the parties, is binding upon property within its jurisdiction.¹ An application for probate or administration is not binding upon the court of another State except

¹³ Pennington v. Fourth National Bank of Cincinnati, Ohio, 243 U. S. 269.

¹³ Bates v. Bodie, 245 U. S. 520; Pennington v. Fourth Natl. Bank, 243 U. S. 269.

¹⁴ Smith v. Smith, C. C. A., 247 Fed. 461.

¹⁵ Kalehua v. Clark, C. C. A., 250 Fed. 612.

¹⁶ Cotter v. Cotter, C. C. A., 225 Fed. 471.

§ 186c. ¹ Macgruder v. Drury, 235 U. S. 106; Northrup v. Browne, C. C. A., 204 Fed. 224. A decree

of distribution amongst the heirs of a decedent, made by a Probate Court of Alaska, was held not to be a conclusive adjudication that a partnership did not exist between decedent and another, to whom the property belonged, as against a creditor of the alleged partner who sought to recover the property from the distributees, since the Probate Court had no jurisdiction to bring in the proper parties and adjudicate that question. Bartleson v. Feidler, 149 Fed. 299. See Martinez v. Mendez, C. C. A., 256 Fed. 596.

in so far as it affects property within the jurisdiction of the court.⁴

If a testator was domiciled within its jurisdiction, its decree admitting his will to probate is ordinarily followed in other jurisdictions so far as the personal property thereby bequeathed is concerned.⁵ It has been held, however, that the State has power to direct that a will bequeathing personalty within its jurisdiction must be there proved and that then its courts may refuse to follow the decision upon the point of a court of the State where the testator was domiciled.⁶ The decree of such a court settling an account of an executor, administrator or guardian cannot, it has been said, be collaterally attacked although there has been no service upon the parties interested and they have not appeared,⁷ but it may be set aside in a direct proceeding for fraud.⁸ The domicile of the decedent is always open to dispute when the effect of the decree of a court of another affecting his estate is determined, either upon an application for probate⁹ or in a proceeding to collect an inheritance tax.¹⁰

A decree of distribution is no bar to a suit for an accounting of a trust charged upon the decedent or the enforcement of an equitable lien upon his assets.¹¹ The decree of a court of probate approving the final account of the administratrix and adjudging the estate to be insolvent upon a petition by a judgment creditor for a discovery of assets was held not to bar the latter's suit against the administratrix to set aside a fraudulent conveyance made to her by the decedent.¹²

§ 186d. Res adjudicata in Federal courts by judgments of State courts. A decree or judgment of a State court between the same parties in a suit duly commenced before that in a Federal court is *res adjudicata* in the latter,¹ although the

⁴ *Baker v. Baker, Eccels & Co.*, 242 U. S. 394; *Higgins v. Eaton*, 202 Fed. 75.

⁵ *Higgins v. Eaton*, C. C. A., 202 Fed. 75.

⁶ *Higgins v. Eaton*, 202 Fed. 75.

⁷ *Macgruder v. Drury*, 235 U. S. 106, 117, *Jenison v. Hapgood*, 7 Pickering, Mass. 1, 7.

⁸ *Smith v. Smith*, 210 Fed. 947.

⁹ *Tilt v. Kelsey*, 207 U. S. 43, 52

L. ed. 95; *Burbank v. Ernst, Tutrix of Burbank, a minor*, 232 U. S. 162.

¹⁰ *Tilt v. Kelsey*, 207 U. S. 43, 52 L. ed. 95; *Overby v. Gordon*, 177 U. S. 214.

¹¹ *Alexander v. Fidelity Tr. Co.*, 238 Fed. 938, *supra*, § 54.

¹² *English v. Brown*, 219 Fed. 248.

§ 186d. ¹ *Clay v. Deakins*, C. C. A., 63 Fed. 330; *Hennessey v. Tacoma Smelting & Refining Co.*, C. C.

question was one of general commercial law and jurisprudence and the case was decided upon a demurrer.³

It seems that it can not be attacked because it is against the policy of the forum,³ unless it was a judgment for a penalty.⁴ Where a motion by a mortgagor in a State court to set aside a foreclosure sale was denied it was held: that the decision could not be reviewed collaterally by the Federal courts, although it was contended that a question under the Federal Constitution was involved.⁵ An order, judgment or decree of a State court in a suit instituted subsequent to the beginning of that in a court of the United States is not *res adjudicata*.⁶ Where a suit was first instituted the decree therein is conclusive although not entered until after the pendency of that in which it is pleaded or offered in evidence.⁷

The judgment of a State court has no greater weight as *res adjudicata*, than would be given to the same by a State tribunal.⁸

§ 186e. Reciprocal effect as adjudications of judgments of courts of law and of equity. A judgment at common law is a bar to a bill in equity, based upon the facts there pleaded or offered in evidence; unless a matter is pleaded in equity, of which the former court could not have taken cognizance.¹ A judgment for nominal damages, in an action at law for a breach

A., 129 Fed. 240; *Susquehanna Coal Co. v. Mayor, etc., of South Amburg*, 184 Fed. 941; *Chinn v. Foster-Milburn Co.*, 195 Fed. 158; *Converse v. Stewart*, C. C. A., 197 Fed. 152.

² *Fuller v. Hamilton County*, 53 Fed. 411; *De Bekker v. Frederick A. Stokes Co.*, 248 Fed. 838.

³ *Beal v. Carpenter*, C. C. A., 235 Fed. 273.

⁴ *Wisconsin v. Pelican Ins. Co.*, 127 U. S. 265, 27 L. ed. 656; *Huntington v. Attrill*, 146 U. S. 657, 667, 13 Sup. Ct. 224, 227, 36 L. ed. 1123; *Interstate Savings & Trust Co. v. Wyatt*, 1 Colorado App., April, 1915, 147 Pac. 444.

⁵ *Queens Land & Title Co. v. Kings County Trust Co.*, 255 Fed. 222.

⁶ *Blydenstein v. N. Y. S. & Tr. Co.*, 59 Fed. 12; *Sharon v. Terry*,

1 L.R.A. 572, 36 Fed. 337, *supra*. §§ 52, 57. *Contra*, *Case v. Mountain Timber Co.*, 210 Fed. 565. See *Insurance Co. v. Harris*, 97 U. S. 331, 24 L. ed. 959.

⁷ *David Bradley Mfg. Co. v. Eagle Mfg. Co.*, C. C. A., 57 Fed. 980; s. c., 58 Fed. 721.

⁸ *Union & Planters' Bank v. Memphis*, 189 U. S. 71, 47 L. ed. 712; *Covington v. First Nat. Bank*, 198 U. S. 100, 49 L. ed. 963; *Glencoe Granite Co. v. City Tr., S. D. & S. Co.*, C. C. A., 118 Fed. 386; *John D. Park & Sons Co. v. Bruen*, 139 Fed. 698; *Harrison v. Remington Paper Co.*, C. C. A., 3 L.R.A.(N.S.) 954, 140 Fed. 385, 5 Ann. Cas. 314.

§ 186e. 1 *Commercial Union Assur. Co., L'd v. N. J. Rubber Co.*, 64 N. J. Eq. 338, 51 Atl. 451;

of contract, was held to be not a bar to a suit for specific performance.² A final decree on the merits in equity is a bar to further litigation between the same parties in a court of law as to the same subject-matter.³ A dismissal in equity because the case is not within equitable jurisdiction is not a bar to any action or defense at law;⁴ but a judgment or decree sustaining a demurrer upon the merits to a bill or complaint must be followed at law.⁵

§ 186f. Res adjudicata by extra-territorial proceedings. In the absence of statutory authority, a decree of a State court of equity is void which declares to be invalid a conveyance of land beyond its jurisdiction, but does not direct a reconveyance; and such a decree does not bind a court within the jurisdiction of which such land is situated.¹ So, it has been held, is a decree foreclosing a mortgage upon and selling property beyond the territorial jurisdiction, unless it compels the mortgagor or the trustee of the mortgage to execute a conveyance to the purchaser.²

§ 186g. Effect as res adjudicata of judgments in rem. A domestic or foreign judgment *in rem* adjudicating the title to land or to a ship or to other movable property within the custody of the court, is in the absence of extraordinary circumstances,¹ conclusive, and will not be re-examined;² unless there was such a failure of notice or disregard of the rules of justice as to make the proceedings not due process of law.³

Slaughter v. La Compagnie Francaise, 113 Fed. 21.

² *Sperry & Hutchinson Co. v. Blue*, State Tax Com'r, 202 Fed. 82; *Chicago & A. Ry. Co. v. Pressed Steel Car Co.*, C. C. A., 243 Fed. 883.

³ *Fuller v. Hamilton County*, 53 Fed. 411; *Old Dominion Copper Min. & Smelt. Co. v. Lewisohn*, C. C. A., 202 Fed. 178.

⁴ *Murray v. City of Pocatello*, 226 U. S. 318, 57 L. ed.; *Cramer v. Moore*, 36 Ohio St. 471.

⁵ *Fuller v. Hamilton County*, 53 Fed. 411.

§ 186f. ¹ *Carpenter v. Strange*, 141 U. S. 87, 35 L. ed. 640. But see Eq. Rule 8.

² *Lynde v. Columbus, C. & K.*

Ry. Co., 57 Fed. 993; *Farmers' L. & Tr. Co. v. Postal Tel. Co.*, 55 Conn. 334, 3 Am. St. Rep. 53, s. c., 11 Atl. 184; *Mercantile Tr. Co. v. Kanawha & O. Ry. Co.*, 39 Fed. 337. But see *Muller v. Dows*, 94 U. S. 444, 24 L. ed. 207, *supra*, § 64, *infra*, § 399.

§ 186g. ¹ See *Windsor v. McVeigh*, 93 U. S., 274, 23 L. ed. 914.

² *The James G. Swan*, 106 Fed. 94; *Williams v. Armroyd*, 7 Cranch, 423, 432, 3 L. ed. 392, 392; *Hudson v. Guestier*, 4 Cranch, 293, 2 L. ed. 625; *Hilton v. Guyot*, 159 U. S. 113, 167, 40 L. ed. 95, 109.

³ *Windsor v. McVeigh*, 93 U. S. 274, 23 L. ed. 914.

§ 186h. Effect of adjudication of mental incompetency. An adjudication of mental incompetency is in the nature of a proceeding *in rem*. It is conclusive and can not be collaterally attacked in any proceeding affecting property in the jurisdiction, and if the alleged incompetent was domiciled within the State, it seems, nowhere, so far as his right to freedom from restraint is concerned. The proper remedy is an application to the court which committed him to set its decree aside.¹

§ 186i. Effect of adjudication as to custody of a child. It has been held that the decree of a foreign court awarding the custody of a child is not conclusive, but is a fact or circumstance bearing upon the discretion to be exercised, without dictating or controlling it.¹

§ 186j. Effect of adjudications in bankruptcy proceedings. An adjudication in bankruptcy is, so far as regards the administration of the property, good against all the world.¹

An adjudication of involuntary bankruptcy upon a petition charging that a conveyance was an act of bankruptcy does not estop the grantee in a suit to set aside the conveyance from denying his knowledge that a preference was intended and any fraud on his part.²

An adjudication of the bankruptcy of a partnership is not *res adjudicata* as to the existence of the partnership against parties who are not heard even if they appeared therein.³

The dismissal of a petition of involuntary bankruptcy, which charges that the respondents are partners with a man who had been previously adjudicated a bankrupt, when no issues were tried, was held not to be a binding adjudication upon the question of such partnership.⁴

§ 186h. ¹Challoner v. Sherman, C. C. A., 215 Fed. 867. But see Gasquet v. Fenner, 235 Fed. 997.

§ 186i. ¹People ex rel. Allen v. Allen, 105 N. Y. 628; Morrell v. Morrell, 83 Conn. 479, 77 Atl. 1; Woodworth v. Spring, 4 Allen (Mass.) 321; Hanrahan v. Sears, 72 N. H. 71, in all of which the decree was followed; *Ex parte* Stewart, 137 N. Y. 202, in which the decree was not followed.

§ 186j. ¹Manson v. Williams, 213 U. S. 453, 53 L. ed. 869. See *infra*, §§ 636-639. Ward v. Central Trust Co. of Ill., 261 Fed. 344.

²Gratiot County State Bank v. Johnson, Trustee, 249 U. S. 246, 39 Sup. Ct. 263, 63 L. ed. 587; Ward v. Central Trust Co. of Ill., 261 Fed. 344.

³Ibid.

⁴Re Bean, C. C. A., 230 Fed. 405.

A decree confirming a composition which relieves a special partner from further liability and dismisses a petition to have him declared a general partner does not estop those who have not appeared nor proved a claim in the bankruptcy proceedings nor assented to the composition, from suing him as a general partner, upon proof of fraud, discovered after the decree; although they have paid on a claim made against them for the estate in bankruptcy, and defended an action upon another claim.⁵

A discharge by a State court of a receiver appointed under a chattel mortgage, the ground of discharge being that the bankrupt was solvent, is not *res adjudicata*, or binding, upon the trustee in bankruptcy, or creditors not parties to the suit, which will prevent an action to recover from the chattel mortgagees a preference received upon an execution sale a few days after the receiver was discharged.⁶

An order or judgment of a Referee in Bankruptcy disallowing a claim upon the ground that the claimant has received a preference is *res adjudicata* in a subsequent suit by the trustee to recover the preference.⁷ An order or judgment of a Referee in Bankruptcy denying the right to recover from the trustee the amount of a check deposited by a stranger in proceedings for a composition, is *res adjudicata* in a subsequent suit against the trustee to recover such deposit.⁸ An order or judgment by the Referee dismissing a claim for reclamation because the vendor by accepting a guarantee of payment had waived its right to reclaim the property was held not to preclude a claim by the guarantor to retake the property because it had been subrogated to the rights of the seller.⁹ A judgment allowing a claim for reclamation does not estop a party from enforcing a lien upon the property claimed.¹⁰

A decree in a suit by a Receiver in Bankruptcy against certain creditors which set aside a trust deed intended as a general assignment was held to bind the trustee who had publicly par-

⁵ Pell v. McCabe, 250 U. S. 573.

⁸ Coen v. James, 164 App. Div. (N. Y.) 419.

⁶ Golden Hill Distilling Co. v. Logue, C. C. A., 243 Fed. 342.

⁹ Re Abondara, 246 Fed. 469.

⁷ Ullman, Stern & Krausse v. Copard, C. C. A., 246 Fed. 124.

¹⁰ Re Jamison Bros. & Co., C. C. A., 227 Fed. 30, 35.

ticipated in the defense.¹¹ It was further held that creditors who had not accepted the trust deed had no standing to attack the decree.¹² Creditors who had accepted the deed were bound by the adjudication against the trustee.¹³

§ 186k. *Res adjudicata* by order in special proceeding. The effect of a final order in a special proceeding is governed by the same rules that apply to a final judgment.¹ Thus an order granting a writ of mandamus or prohibition against a public officer binds his successor in office.² Questions decided upon the issue of a mandamus to compel the payment of judgments were held to be *res adjudicatae* upon an application to enforce a later judgment, so far as concerned the balances of the former judgments therein included, but not as to the other claims.³ It was held: that, upon an application for a mandamus to compel the levy of funds to pay a judgment, a statute of limitations which had not been pleaded in the action resulting in the judgment, could not be set up as a defense.⁴

An order denying an application for an intervention is no bar to an original bill filed by the petitioners,⁵ but it has been said that it is *res adjudicata* against a bill in equity to enjoin the proceedings and to permit the intervention.⁶

A decree of deportation, rendered by a United States Commissioner, was held to be an adjudication *in rem*, binding in a criminal prosecution against a stranger to the proceeding.⁷

An order denying an application for naturalization is an adjudication that the defendant is not qualified for citizenship which bars a second application until he can prove that since the

¹¹ Dashiell, C. C. A., 246 Fed. 366. See *infra*, § 186y.

¹² Ibid.

¹³ Ibid.

§ 186k. ¹ Police Jury of Jefferson County v. U. S. ex rel. Fisk, 60 Fed. 249; Ransom v. Pierre, C. C. A., 101 Fed. 665.

² Bank of Kentucky v. Stone, C. C. A., 88 Fed. 383, 395, 398.

³ Police Jury of Jefferson County v. U. S. ex rel. Fisk, 60 Fed. 249. See *infra*, §§ 186t, 457, 459.

⁴ Bunch v. U. S., C. C. A., 252 Fed. 673.

⁵ Credits Commutation Co. v. U. S., 177 U. S. 311, 44 L. ed. 782; Securities Tr. Co. v. Bank of Bernice, C. C. A., 239 Fed. 665. See Manhattan Tr. Co. v. Sioux City & N. R. Co., 102 Fed. 710, *infra*, § 259.

⁶ McDonald v. Seligman, 81 Fed. 753.

⁷ U. S. v. Hills, 124 Fed. 831. See *ex parte* Wong Wing, 220 Fed. 353.

decision he has been qualified for at least five years.⁸ A decision by a State court upon such an application which overruled an objection made on behalf of the government was held not to be an "illegality" for which it might be annulled.⁹

A decision by the Supreme Court of Michigan upon the review of an order of the State Railroad Commission fixing rates is judicial and not legislative or executive in its nature and is *res adjudicata* in another suit.¹⁰

Where landowners had been unsuccessful in proceedings in the State courts to prevent the forfeiture of their land for unpaid taxes, these judgments against them were *res adjudicatae* against a bill in the Federal court to set aside the tax sales and proceedings as a cloud upon their title.¹¹

A final order in a proceeding administrative and not judicial in its nature is not *res adjudicata*.¹² Such are the decisions of the New Jersey State Boards of Taxation and of Equalization of taxes¹³ and a final order in a summary proceeding under the Act of June 22, 1874¹⁴ for relief against the forfeiture of a boat or merchandise which has been seized.¹⁵ So orders quashing a writ or denying an application addressed to the discretion of a court is usually not *res adjudicata*.¹⁶

The quashing of a writ of certiorari to review an order is not *res adjudicata* in a suit for relief against the order as illegal.¹⁷ The denial of a writ of prohibition is not an adjudication that the court sought to be prohibited has jurisdiction of the proceeding which it was sought to stop.¹⁸

§ 186 l. Effect as *res adjudicata* by interlocutory decrees and orders. In general a decree or order which is interlocutory

⁸ *Re Guliano*, 156 Fed. 420; *Re Centi*, 217 Fed. 833. See *supra*, § 5 note.

⁹ *U. S. v. Ness*, 217 Fed. 169. Cf. *supra*, § 151b.

¹⁰ *Detroit & Mackinac Ry. v. Mich. R. R. Comm.*, 235 U. S. 402. But see *Prentiss v. Atlantic Coast Line*, 211 U. S. 226, 227.

¹¹ *Snyder v. Upper Elk Coal Co.*, C. C. A., 228 Fed. 21. See *Carpenter v. N. J. & N. & M. Consol.*, C. C. A., 212 Fed. 868.

¹² *Mayor and Aldermen of Jersey*

City v. Central R. Co. of Jersey, 212 Fed. 76.

¹³ *Ibid.*

¹⁴ Ch. 391, 18 St. at L. 189.

¹⁵ *U. S. v. Nineteen Bales and Sixteen Bundles of Rugs*, C. C. A., 247 Fed. 380.

¹⁶ *Brooklyn Heights R. Co. v. Straus*, 245 Fed. 132.

¹⁷ *Ibid.*

¹⁸ *Consolidated Rubber Tire Co. v. Ferguson*, C. C. A., 183 Fed. 756. See § 456, *infra*.

such as a decree for an injunction,¹ or a decree for an injunction and an accounting because of the infringement of a patent,² is not a bar, for, until the final decree in the cause, it is subject to revision by the court which entered it.³ When no formal judgment has been entered upon a verdict of findings, there is no adjudication.⁴

In certain cases orders which finally determine the rights of parties, such as an order of interpleader,⁵ are conclusive in subsequent litigation. It has been held: that a judgment appointing a receiver, with power to sue in any court of any State or of the United States, estops a party duly served with process therein from subsequently disputing the right of such receiver to sue in any of such other courts.⁶ That a motion in a State court to set aside a foreclosure sale, although a question under the Federal Constitution was raised, cannot be reviewed

§ 1861. 1 *Santowsky v. McKey*, C. C. A., 249 Fed. 51.

2 *Australian Knitting Co. v. Gormly*, 138 Fed. 92; *Whittemore Bros. & Co. v. World Polish Mfg. Co.*, 159 Fed. 480.

3 *David Bradley Mfg. Co. v. Eagle Mfg. Co.*, 58 Fed. 721; *Reinecke Coal Min. Co. v. Wood*, 112 Fed. 477; *Dady v. Georgia & A. Ry.*, 112 Fed. 838; *infra*, § 443.

4 *Oklahoma City v. McMaster*, 196 U. S. 529, 49 L. ed. 587. It has been held: that the following entries in the docket, although indefinite, sufficiently indicated that the action proceeded to final judgment: After the title of the case and notations of adjournments: "Trial commenced January 18, 1887, and concluded January 27, 1887, and decided in favor of the defendant. Costs assessed against plaintiff, \$1,389.15. Rents and money, \$1,340. Total amount, \$2,729.15. Appeal to the Supreme Court granted." In the Supreme Court: "Court met pursuant to adjournment. The bench all present.

The evidence in the case was then concluded, and, after some arguments by counsel on both sides, the case was submitted to the court for their decision. The court, after some deliberation, decided that the will is good, and hereby confirms the decision of the lower court." *Holford v. James*, 136 Fed. 533. An entry in the record of an Ohio Court: stating findings, adjudging that the marriage contract theretofore existing between the parties be dissolved and both parties released from its obligations; and "that the plaintiff is entitled to alimony * * * and that he be ordered to pay," specifying the amount "and the costs of this proceeding taxed at \$—," was held to be a final judgment. *Smith v. Smith*, C. C. A., 247 Fed. 461.

5 *Insurance Co. v. Harris*, 97 U. S. 331, 24 L. ed. 959; *supra*, § 157. But see *N. Y. Life Ins. Co. v. Dunlevy*, 241 U. S. 518, § 158.

6 *Burr v. Smith*, 113 Fed. 858; *supra*, §§ 35-37, 93.

by a District Court of the United States.⁷ That an order fixing an attorney's fees, upon a motion for his substitution, is not an adjudication which will support an action at law, brought in another Federal district;⁸ that a decree for alimony and costs will not support an action in another State in respect to future payments for which it provides, but as to which it remains subject to modification at any time, in the discretion of the court that rendered it;⁹ that a decree was not final, which confirmed and adopted a commissioners' report in partition, recommending a conveyance of part of the land, a sale of the rest, and a distribution of the proceeds, as thereafter ordered upon the confirmation of the sale.¹⁰ Where several suits ancillary to each other were brought in different districts, it was said that the validity of a decree in one district could not be questioned by the same parties in the ancillary suit in another district.¹¹

Some authorities hold that pending an appeal, the judgment is not final nor conclusive;¹² but the rule does not apply to an application to the Supreme Court for *certiorari*,¹³ nor probably to a writ of error which is not a continuation of the original proceeding.¹⁴ In determining the effect of an appeal from the judgment of a State court, the State practice will be examined.¹⁵

§ 186m. Res adjudicata by dismissals and non-suits. A discontinuance,¹ a non-suit,² or dismissal for want of jurisdic-

⁷ *Queens Land & Title Co. v. King's County Trust Co.*, 255 Fed. 222.

⁸ *Du Bois v. Seymour*, C. C. A., 152 Fed. 600; reversing 145 Fed. 1003.

⁹ *Israel v. Israel*, C. C. A., 9 L.R.A.(N.S.) 1168, 8 Ann. Cas. 697, 148 Fed. 576; *Valiquet v. Valiquet*, 177 Fed. 994. See *Cotter v. Cotter*, C. C. A., 225 Fed. 471.

¹⁰ *Clark v. Roller*, 199 U. S. 541, 50 L. ed. 300.

¹¹ *Compton v. Jesup*, 68 Fed. 263, 282, per Taft, J. But see s. c., 167 U. S. 1, 42 L. ed. 55.

¹² *Blue Goose Mining Co. v. Northern Light Mining Co.*, C. C. A., 245 Fed. 727.

¹³ *Keown v. Keown*, 257 Fed. 851. See *Minerals Separation v. Butte & Superior Copper Co.*, 227 Fed. 401; *Finley v. Halliburton*, C. C. A., 251 Fed. 860.

¹⁴ *General Electric Co. v. American Brass & Copper Co.*, 208 Fed. 24; see *infra*, § 687.

¹⁵ *Calaf Y Fugurul v. Calaf Y Rivera*, 232 U. S. 371; *Blue Goose Min. Co. v. Northern Light Co.*, C. C. A., 245 Fed. 727.

§ 186m. ¹ *Carlisle v. Smith*, 224 Fed. 231; *Hanson v. Hanson*, C. C. A., 234 Fed. 853.

² *Homer v. Brown*, 16 How. 354, 14 L. ed. 970; *Woodward v. Davidson*, 150 Fed. 840; *Muir v. Morris*, 257 Fed. 150; *Bixler v. Pennsyl-*

tion,³ or for want of proof,⁴ or otherwise, if not upon the merits, is not conclusive in a subsequent action upon the same facts,⁵ and the rulings in such a case, even if made by the appellate tribunal are not binding in a second suit, brought in another jurisdiction.⁶

A direction of a verdict is a conclusive adjudication upon the issues between the parties.⁷ The decision of a State court as to the effect of a judgment of a certain character in its courts should, unless a contract is involved, be followed by the courts of other jurisdictions.⁸

A decree of a court of equity will not be a bar if it resulted in the dismissal of a bill without prejudice;⁹ or for want of prosecution,¹⁰ or for multifariousness,¹¹ or for a slip in practice,¹² such as a dismissal upon a verified answer when an oath

vania R. Co., 201 Fed. 553; Quereau v. Lehigh Valley R. Co., 251 Fed. 986.

³ Wayne County Securities Co. v. Hughitt, 228 Fed. 816; Bistline v. United States, C. C. A., 229 Fed. 546. For an admiralty case, see the *Wilhelmina*, C. C. A., 232 Fed. 430.

⁴ Bingham v. Wilkins, Fed. Cas. 1416; Ploxin v. Brooklyn Heights R. R. Co., C. C. A., 2d Ct., N. Y. L. J., Jan'y 29, 1920, — Fed. —; Homer v. Brown, 16 How. 354, 14 L. ed. 970; Woodward v. Davidson, 150 Fed. 840; Muir v. Morris, 257 Fed. 150; Bixler v. Pennsylvania R. Co., 201 Fed. 553; Quereau v. Lehigh Valley R. Co., 251 Fed. 986.

⁵ Gardner v. Mich. Cent. R. Co., 150 U. S. 349, 37 L. ed. 1107. But see Williford v. Kansas City, M. & B. R. Co., 154 Fed. 514.

⁶ Gardner v. Mich. Cent. R. Co., 150 U. S. 349, 37 L. ed. 1107; Gilbert v. Am. Surety Co., C. C. A., 122 Fed. 499; Harrison v. Remington Paper Co., C. C. A., L.R.A.(N.S.) 954, 140 Fed. 385, 5 Ann. Cas. 314; Illinois Cent. R. R. Co. v. Benz, 108 Tenn., 670, 58 L.R.A. 690, 91 Am. St. Rep. 763.

⁷ U. S. Farm Land Co. v. Jame-son, C. C. A., 246 Fed. 592.

⁸ Cline v. Southern Ry Co., 231 Fed. 238; Muir v. Morris, 257 Fed. 150.

⁹ Durant v. Essex Co., 7 Wall. 107, 19 L. ed. 154; House v. Mullen, 22 Wall. 42, 46, 22 L. ed. 838, 839; Northern Pac. Ry. Co. v. St. Paul, M. & M. Ry. Co., 47 Fed. 536; *infra*, § 377.

¹⁰ American D. R. B. Co. v. Sheldon, 17 Blatchf. 208; s. c., 4 Bann. & A. 551; Keller v. Stolzenbach, 20 Fed. 47; Conn v. Penn, 5 Wheat. 424, 427, 5 L. ed. 125; Badger v. Badger, 1 Cliff. 241; Welsbach Light Co. v. Cohn, 181 Fed. 122.

¹¹ Young v. U. S., 176 Fed. 612.

¹² Durant v. Essex Co., 7 Wall. 107, 109, 19 L. ed. 154, 156; House v. Mullen, 22 Wall. 42, 46, 22 L. ed. 838, 839; Walden v. Bodley, 14 Pet. 158, 10 L. ed. 399; Gist v. Davis, 2 Hill. Ch. (S. C.) 335; Grubb v. Clayton, 2 Hayw. (N. C.) 378; Hughes v. U. S., 4 Wall. 232, 18 L. ed. 303. See, however, Starr v. Stark, 1 Saw. 270; Anon., 3 Atk. 809; Story's Eq. Pl., § 790.

by the respondent had not been waived;¹³ or because the court had no power to grant the relief,¹⁴ or by consent before a hearing,¹⁵ even, it has been held, when it provides that each party shall pay his own costs;¹⁶ or by the former English practice, if it had not been signed and enrolled, although it could then be insisted on by answer as a good defense.¹⁷ Nor does a judgment against the plaintiff upon his default have that effect.¹⁸

A decree upon a bill taken as confessed concludes the defendant in another suit,¹⁹ and the failure of a party to offer evidence upon an issue does not make the adjudication less conclusive against him.²⁰ The fact that a writ of error was dismissed by the appellate court without a decision there upon the merits does not make the decision below the less conclusive.²¹ And where a bill was dismissed for want of equity as well as for technical objections to the same, the decree was *res adjudicata* to a subsequent suit in another court where such objections were not recognized.²² A dismissal in equity because the complainant has

¹³ *Speckart v. Schmidt*, 190 Fed. 499.

¹⁴ *Murray v. City of Pocatello*, 226 U. S. 318, 57 L. ed. 239.

¹⁵ *Marshall v. Otto*, 59 Fed. 249.

¹⁶ *Rincon Water & Power Co. v. Anaheim Union Water Co.*, 115 Fed. 543.

¹⁷ *Anon.*, 3 Atk. 809; *Story's Eq. Pl.*, § 790.

¹⁸ *Gabrielson v. Waydell*, 67 Fed. 342.

¹⁹ *Last Chance Min. Co. v. Tyler Min. Co.*, 157 U. S. 683, 39 L. ed. 859; *Reedy v. Western El. Co.*, C. C. A., 83 Fed. 709; *Thompson v. Wooster*, 114 U. S. 104, 111, 112, 29 L. ed. 105, 107, 108; *Ogilvie v. Herne*, 13 Ves. 563. Where, in an action on contract, defendant pleaded a counterclaim, to which plaintiff replied by plea in abatement, alleging another suit pending between the same parties in the federal court on the counterclaim, which plea was clearly invalid, and on the trial defendant failed to ap-

pear, whereupon evidence was introduced by plaintiff to rebut the merits of the counterclaim, but no evidence was given to sustain the plea in abatement; held, that a judgment dismissing the counterclaim would not be presumed to have been based on the plea of abatement, but was on the merits, and therefore was *res adjudicata*. *Groton Bridge & Mfg. Co. v. Clark Pressed Brick Co.*, C. C. A., 126 Fed. 552.

²⁰ *Confectioners' Mach. & Mfg. Co. v. Racine Eng. & Mach. Co.*, 163 Fed. 914; *Delaware, L. & W. R. Co. v. Troxell*, C. C. A., 200 Fed. 44.

²¹ *Johnson v. Herold*, 161 Fed. 593.

²² *Venner v. Chicago City Ry. Co.*, 195 Fed. 788. Where the court had no power to grant relief, the judgment was not *res adjudicata* because, in its opinion, it expressed its views against the complainant upon the merits.

an adequate remedy at law, is not a bar to any action or defense at law.²³ A judgment dismissing an action upon plaintiff's refusal to amend is a judgment upon the merits.²⁴ A decree sustaining a demurrer to a bill is a bar to a subsequent bill between the same parties involving the same subject-matter unless the bill is dismissed without prejudice;²⁵ and a final decree overruling a demurrer operates as an estoppel upon the defendant.²⁶

Where a decree of dismissal does not disclose the ground, in the absence of a State statute upon the subject, the presumption is that the dismissal was upon the merits; but this is not conclusive; and when the decree is pleaded in bar of a subsequent suit, the plaintiff may plead facts showing that it was not.²⁷

§ 186n. Effect as res adjudicata of decisions upon criminal prosecutions. A judgment of acquittal upon,¹ or for dismissal upon the merits of² an indictment is a bar to a suit by the United States to recover a penalty for the same offense,³ or it has been said, to recover duties charged to be owed because of a fraud which had been pleaded in the indictment,⁴ but not, it seems, to a civil suit to recover damages;⁵ or an injunction upon a charge of the same facts.⁶

§ 186o. Direct and collateral attacks upon judgment. A direct attack upon a judgment or decree, may be made by a mo-

²³ *Sperry & Hutchinson Co. v. City of Tacoma*, 199 Fed. 853.

²⁴ *Lindsley v. Union Silver Star Min. Co., C. C. A.*, 115 Fed. 46.

²⁵ *Northern Pac. Ry. Co. v. Slaght*, 205 U. S. 122, 51 L. ed. 738; *Messinger v. New Eng. M. L. I. Co.*, 59 Fed. 416; *Bradford Belting Co. v. Kisinger-Ison Co., C. C. A.*, 113 Fed. 811. *Cf. Lindsley v. Union Silver Star Min. Co., C. C. A.*, 115 Fed. 46; *Ohio River R. Co. v. Fisher, C. C. A.*, 115 Fed. 929; *Sperry & Hutchinson Co. v. City of Tacoma*, 199 Fed. 853.

²⁶ *Fuller v. Hamilton Co.*, 53 Fed. 411.

²⁷ *Stratton v. Essex County Park Commission*, 164 Fed. 901.

§ 186n. ¹ *Coffey v. U. S.*, 116 U. S. 442, 29 L. ed. 686.

² *U. S. v. Salem*, 244 Fed. 296.

³ *Coffey v. U. S.*, 116 U. S. 442, 29 L. ed. 686. *Cf. U. S. v. Oregon C Co.*, 103 Fed. 549. But see *United States v. Dwight Mfg. Co.*, 213 Fed. 522.

⁴ *U. S. v. Salem*, 244 Fed. 296.

⁵ *Stone v. U. S.*, 167 U. S. 178, 42 L. ed. 127. See *Am. Molting Co. v. Kettel, C. C. A.*, 209 Fed. 351. As to the rule concerning judgments of the courts of the Philippines, see *Chantangeo v. Ababoa*, 218 U. S. 476, 54 L. ed. 1116.

⁶ *U. S. v. Donaldson-Schultz Co., C. C. A.*, 148 Fed. 581; reversing, 142 Fed. 300.

tion in the court where it was entered to set the same aside;¹ by writ of error *coram nobis* in the same court,² or by bill of review in the same court; by a writ of error *coram vobis* or appeal³ or by one of the extraordinary writs⁴ in the court of review; by a bill in the nature of a bill of review,⁵ a bill to impeach the decree on account of fraud, accident or mistake,⁶ or a bill to suspend or avoid its operation.⁷ The judgment or decree can not be attacked collaterally unless the court had no jurisdiction over the person of the defendant or of the subject-matter of the suit,⁸ or the defendant was denied a hearing or whenever the proceedings were not due process of law.^{9a} A judgment or decree can be attacked collaterally when the court had no jurisdiction of the subject-matter.⁹

A judgment or decree of a court of the United States cannot be attacked collaterally because the record does not show the necessary difference of citizenship between the parties to the controversy or that a Federal question was involved;¹⁰ not even when a motion for a remand has been erroneously denied.¹¹ In the latter case, the only remedy, if any, is an appeal or writ of error taken in due time.¹² A judgment or decree cannot be attacked collaterally for fraud.¹³

§ 1860. ¹ See *infra*, §§ 443 to 445, 481.

² *Infra*, § 481.

³ *Infra*, ch. XXXVI.

⁴ *Infra*, §§ 456, 457, 460.

⁵ *Infra*, § 450.

⁶ *Pac. R. Co. of Mo. v. Mo. Pac. Ry. Co.*, 111 U. S. 505, 28 L. ed. 498. *Infra*, § 451. See *Carpenter v. M. J. & M. & M. Consol., C. C. A.*, 212 Fed. 868.

⁷ *Infra*, § 452.

⁸ *Peninsular Iron Co. v. Els*, 68 Fed. 24, 35, 36; *Christmas v. Russell*, 5 Wall. 290, 305, 18 L. ed. 475, 479; *Mawell v. Stewart*, 22 Wall. 77, 22 L. ed. 564; *Snyder v. Upper Elk Coal Co., C. C. A.*, 228 Fed. 21.

^{9a} *Windsor v. McVeigh*, 93 U. S. 274, 23 L. ed. 914. *Supra*, § 186.

⁹ *Rose v. Himely*, 4 Cranch 241, 269; *Thompson v. Whitman*, 18 Wal-

lace 457; *Andrews v. Andrews*, 188 U. S. 14; *Fordham v. Hicks*, 240 Fed. 751.

¹⁰ *Kempe's Lessee v. Kennedy*, 5 Cranch 173, 185, 3 L. ed. 70, 73; *Skillern's Ex'rs v. May's Ex'rs*, 6 Cranch 267, 3 L. ed. 220; *Cameron v. McRoberts*, 3 Wheat. 591, 4 L. ed. 467; *Des Moines Nav. Co. v. Iowa H. Co.*, 123 U. S. 552, 557, 559, 31 L. ed. 202, 204, 205; *Dowell v. Applegate*, 152 U. S. 327, 337-341, 38 L. ed. 463, 467, 468. *Pullman's P. C. Co. v. Washburn*, 66 Fed. 790. *Cf. Empire State-Idaho Min. & Developing Co. v. Hanley*, 205 U. S. 225, 51 L. ed. 770.

¹¹ *Knox v. Lewis V. Alwood*, 228 Fed. 753; *Mellon v. St. Louis Union Trust Co., C. C. A.*, 240 Fed. 359.

¹² But see *infra*, § 558.

¹³ *Peninsular Iron Co. v. Els*, 68

Under special circumstances it was held: that an ignorant party who was under duress when sued was not estopped by the judgment against him.¹⁴

Where the defendant has objected in the original court to the jurisdiction over his person and that court has found against him, the judgment of another court that the decree in the first suit is binding upon him is due process of law.¹⁵ That it is the duty of another court to follow the same has been held by a Circuit Court of Appeals.¹⁶

§ 186p. Matters concluded by adjudication. Where the parties and the property in dispute are the same and the plaintiff claims the same right as in the former suit, the prior adjudication is conclusive both as to all questions which were actually decided and as to all which might have been considered.¹ But

Fed. 24, 35, 36; *Christmas v. Russell*, 5 Wall. 290, 305, 18 L. ed. 475, 479; *Mawell v. Stewart*, 22 Wall. 77, 22 L. ed. 564.

¹⁴ *Hicks v. Fordham*, C. C. A., 246 Fed. 236, 239.

¹⁵ *Chicago Life Ins. Co. v. Cherry*, 244 U. S. 25, 29, 37 Sup. Ct. 492, 61 L. ed. 966.

¹⁶ *Phelps v. Mutual Reserve Fund Life Ass'n*, C. C. A., 112 Fed. 453, 61 L.R.A. 717. See *U. S. Oil & Land Co. v. Bell*, C. C. A., 219 Fed. 785; *Queens Land & Title Co. v. Kings County Trust Co.*, 255 Fed. 222.

§ 186p. ¹ *M'Alcer v. Lewis*, 75 Fed. 134; *Nesbit v. Riverside Ind. Dist.*, 144 U. S. 610, 36 L. ed. 562; *Dowell v. Applegate*, 152 U. S. 327, 38 L. ed. 463; *Cromwell v. County of Sac*, 94 U. S. 351, 24 L. ed. 195; *Jaros H. U. W. Co. v. Fleece H. U. W. Co.*, 65 Fed. 424; *Bissell v. Spring Valley Tp.*, 124 U. S. 225, 31 L. ed. 411; *U. S. Tr. Co. v. New Mexico*, 183 U. S. 535, 540, 46 L. ed. 315, 319; *Werlein v. New Orleans*, 177 U. S. 390, 44 L. ed. 817; *Virginia-Carolina Chemical Co. v.*

Kirven, 215 U. S. 252, 54 L. ed. 179; *Re Coffin*, 146 Fed. 181; *Wood v. Browning*, C. C. A., 176 Fed. 273; *Hewitt v. Great Western Beet Sugar Co.*, C. C. A., 230 Fed. 394; *Goodno v. Hotchkiss*, 237 Fed. 687; *Miller v. Belvy Oil Co.*, C. C. A., 248 Fed. 83. See *Treat v. Ellis*, C. C. A., 253 Fed. 484. A judgment at law upon a suit to collect a note is not an estoppel to a suit in equity to rescind for fraud a contract under which a note was given when this issue was not raised in the former action. *Independent Harvester Co. v. Tinsman*, C. C. A., 253 Fed. 935.

Where a decree in a suit upon a note adjudicated, that the plaintiff was a holder in due course, and provided, that the defendants could not make other defenses, they may in a later suit plead the statute of limitations. *Pensacola State Bank v. Thornberry*, C. C. A., 226 Fed. 611.

It was held that a judgment by default in a suit upon a *quantum meruit* for services of a physician was not a bar to an action against him for malpractice. *Fall v. Bennett*, C. C. A., 248 Fed. 491. *Contra:*

where there is a different matter in dispute, the former judgment

Gates v. Preston, 41 N. Y. 113; Black v. Bartlett, 75 N. Y. 150; Bellinger v. Craigie, 31 Barbour (N. Y.) 534.

Where the same matters were pleaded as a ground of complaint in a suit in a State court to enforce the State Anti-Trust Act, it was held that the judgment was *res adjudicata* in a subsequent suit to enforce the Federal Anti-Trust Act. Strans v. Am. Publishers, C. C. A., 201 Fed. 306.

A judgment for the defendant in a suit under a State employers' liability act was held to be an estoppel to a suit charging the employer with a liability at common law for the same acts. Mazzariello v. Doherty, C. C. A., 204 Fed. 245.

It has been held: that, where, in a suit upon coupons, they and the bonds from which they were cut were adjudged to be invalid, the adjudication bound the plaintiff in a subsequent suit upon coupons from the same bonds which fell due later. Bissell v. Spring Valley Tp., 124 U. S. 225, 31 L. ed. 411; Fitch v. Stanton Tp., C. C. A., 190 Fed. 310; Hickman v. Town of Fletcher, C. C. A., 195 Fed. 907. That in a similar action a judgment that the bondholder had not paid the same in good faith, was binding in a suit upon coupons subsequently maturing. Fitch v. Stanton Tp., C. C. A., 190 Fed. 310.

That a decree in a foreclosure suit directing that coupons acquired by a corporation interested be preferred in payment out of the proceeds of the mortgaged property before the principal, did not bar a suit to require the same company to account to the bondholders for the loss sustained by its diversion

or withdrawal of the moneys from the sinking fund. Brown v. Pennsylvania Canal Co., 229 Fed. 444.

That a judgment for the defendants in a suit to set aside the foreclosure of a mortgage was *res adjudicata* against a suit by a privy of the complainant to foreclose a subsequent mortgage. Raphael v. Wasatch & J. V. R. Co., C. C. A., 201 Fed. 854.

That where on the reversal of a foreclosure decree after a sale thereunder, the court below, in its action upon the mandate, although it reversed the decree in part, confirmed the sale; the failure of the mortgagor to appeal from such confirmation rendered it *res adjudicata* so that another suit to set it aside could not be maintained. Grape Creek C. Co., v. Farmers' L. & Tr. Co., C. C. A., 80 Fed. 200.

That where in a suit to foreclose a mortgage, the mortgagee of the second mortgage appeared, defaulted, and a decree was entered declaring he had no interest or lien or claim to the mortgaged premises; the grantee of the owner of the equity paid the first mortgage debt, and had the foreclosure suit dismissed, held that the decree was not a bar to the assertion of the second mortgage in a subsequent suit. Barnes v. Cady, 232 Fed. 318. That a deficiency judgment taken by a trustee in a foreclosure suit does not prevent the bondholders from suing at law upon their bonds. Mackay v. Randolph Macon Coal Co., C. C. A., 178 Fed. 881.

That a judgment dismissing a bill to enforce an alleged mechanics' lien, upon the ground that there was no lien, was a bar to a subsequent suit by the alleged lienor, to redeem

property sold in a foreclosure sale. *Nat. Foundry & Pipe Works v. O'Conta City Water-Supply, C. C. A.*, 113 Fed. 793.

That where a controversy has arisen between the lessor and the lessee of certain cars, as to the right of ownership and possession thereof upon the termination of a sublease, and a suit to which the lessor, lessee and sublessee were parties has been brought to determine their rights, in which it was adjudged that the lessor owned and had the right of possession of the cars, and compensation for storage of them after the end of his lease was awarded to the sublessee; the decree was *res adjudicata* as to the lessee's right to recover damages from the sublessee for the detention of the cars after the end of the sublease. *O'Hara v. Mobile & O. R. Co.*, 75 Fed. 130. But see *Chicago, R. I. & P. Ry. Co. v. St. Joseph Depot Co.*, 92 Fed. 22.

That a decision, that a tax for one year was void because the property taxed was exempt, was conclusive as to the exemption of the property when taxed for another year. *New Orleans v. Citizens' Bank*, 167 U. S. 371, 42 L. ed. 202; *Gunter v. Atlantic Coast Line*, 200 U. S. 273, 291, 50 L. ed. 477, 486; *Goodenow v. Litchfield*, 59 Iowa, 226. But see *Keokuk & W. R. Co. v. Missouri*, 152 U. S. 301, 315, 38 L. ed. 450, 456; *Davenport v. Chicago, R. & P. R. Co.*, 38 Iowa, 633; *Memphis City Bank v. Tennessee*, 161 U. S. 186, 40 L. ed. 664. Cf. *Baldwin v. Maryland*, 179 U. S. 220, 45 L. ed. 160. Otherwise, where it was the settled rule of the State courts that such an adjudication was not an estoppel between the parties, as to taxes for

any other year. *Covington v. First Nat. Bank*, 198 U. S. 100, 49 L. ed. 963. As to stamp taxes, see *Rutan v. Johnson, C. C. A.*, 231 Fed. 369.

Where in a suit attacking the constitutionality or ordinances fixing the charges for gas and imposing an occupation tax, the District court upheld the rates but declared the tax to be void; upon an appeal by the gas company, the ruling as to the tax was not assigned as error nor was reference thereto made in the opinion or mandate of the appellate court directing further proceedings, after which the rate was again sustained and the bill dismissed without further mention of the tax; held: that the earlier adjudication should be considered to be part of the final decree establishing beyond collateral attack that the tax was void; but that the later decree might be modified to reiterate the earlier adjudication. *Lincoln Gas Co. v. Lincoln*, 250 U. S. 256.

That the judgment of a Circuit Court of the United States, in an action for the recovery of excessive duties, brought by importers against a collector, was *res adjudicata* against the importers in subsequent proceedings before the Board of General Appraisers. *U. S. v. J. G. Johnson & Co.*, 145 Fed. 1018; *East Tennessee Tel. Co. v. Board of Councilmen*, 190 Fed. 346. As to internal revenue cases, see *Johnson v. Herold*, 161 Fed. 563; *supra*, § 96g.

For a case where a prior decree was held to conclusively establish the sufficiency of maps filed by a railway company, see *So. Pac. R. Co. v. U. S.*, 168 U. S. 1, 42 L. ed. 355. For a case where a decree declaring stock to be invalid was said

to substantially establish the invalidity of the claim to pay which the stock was issued, see *Townsend v. St. L. & S. C. & Min. Co.*, 159 U. S. 21, 40 L. ed. 61. Where a director was one of the defendants to a stockholder's suit, in which the complainant succeeded, and the decree directed that the costs and expenses of litigation be paid out of the fund that was there recovered; it was held that such decree was conclusive against her right to recover in a subsequent suit against such director the proportion thereof which represented her stockholding interest. *Singer-Bigger v. Young*, C. C. A., 166 Fed. 852.

That a decree of a court of equity dismissing a bill to remove a cloud on title is not so far *res adjudicata* as to prevent the plaintiff from succeeding in a subsequent action of ejectment against the same defendant, although the court of equity in its opinion stated that the title of plaintiff was bad. *Phelps v. Harris*, 101 U. S. 370, 25 L. ed. 855. But see *State v. Buller*, 47 Fed. 415.

That a judgment in favor of defendants for costs in a replevin suit, where one of the defenses was that plaintiff owned only on undivided interest in the property was no bar to a subsequent action by plaintiff against one of these defendants for the conversion of the same property. *Benjamin Schwarz & Sons v. Kennedy*, 142 Fed. 1027. That a judgment adjudicating that certain parties had no property rights in a railroad switch on the land of another, but that they were entitled to car service thereupon during the continuance of a contract between the land owner and the railroad, was

res adjudicata in a subsequent suit between the parties, or their privies, on the question of their property rights in the switch; but did not affect the question as to whether the right to use the switch had been lost by the abrogation of the contract between the land owner and the railroad company. *Bedford-Bowling Green Stone Co. v. Oman*, 134 Fed. 441.

That a decree denying the prayer of a petition of intervention, which sought to establish and enforce a landlord's lien for the rent of terminal facilities, did not preclude the intervenor from filing a second petition asking for the payment of rent, which accrued within six months prior to the receivership, out of the earnings of the road while in the hands of the receivers. *Manhattan Trust Co. v. Sioux City & N. R. Co.*, 102 Fed. 710.

That an order made by a referee on a motion directing a trustee to return to the purchaser of certain casks of whisky sold by the trustee a part of the purchase money on account of a shortage in the quantity, where the amount involved was small, the shortage very large and no defense was made, does not constitute an adjudication of the terms of the contract of sale which will bind the trustee when a much larger claim is filed involving other packages. *In re Drumgoole*, 140 Fed. 208. That a judgment in favor of a defendant in a suit brought against him and others, as partners, is not a bar to a subsequent action on the same contract against him individually, when no statute authorized the affording of such relief in the former action. *Millie*

is only conclusive of the matters which were actually decided.²

There is a distinction between the effect of a judgment as a bar to a second action for the same cause, and its effect as an estoppel in another action between the same parties upon a different cause of action. In the former case, when a judgment of the merits is pleaded, and only then, it is an absolute bar and concludes the parties, not only as to all matters offered and received in the former case, but also as to any other matter which might have been offered for that purpose in the latter. In the latter case the judgment cannot be pleaded but may be offered in evidence. It then operates as estoppel only as to those matters which were directly in issue and either admitted or tried.³ In the former case, the refusal of the former court to permit an amendment stating additional grounds for the relief prayed does not enable the plaintiff to urge these grounds in a second suit for the same relief.⁴ In general, a judgment is a bar to a second attempt to reach the same result by a different *medium concludendi*.⁵

Iron Min. Co. v. McKinney, C. C. A., 172 Fed. 42.

² Last Chance Min. Co. v. Tyler Min. Co., 157 U. S. 683, 39 L. ed. 859; Cromwell v. County of Sac, 94 U. S. 351, 24 L. ed. 195; So. Pac. R. R. Co. v. U. S., 183 U. S. 519, 533, 46 L. ed. 307, 314; Grider v. Groff, 202 Fed. 685; Kemmerer v. St. Louis Blast Furnace Co., C. C. A., 212 Fed. 63; United States v. Naldrett, 214 Fed. 895; Northwestern Port Huron Co. v. Babcock, C. C. A., 223 Fed. 479; Smith v. Smith, C. C. A., 224 Fed. 1; T. B. Harms & Francis, Day & Hunter v. Stern, C. C. A., 229 Fed. 42; Birge-Forbes Co. v. Heye, C. C. A., 248 Fed. 636; Horner v. Hamner, C. C. A., 249 Fed. 137; Officer v. J. L. Owens Co., C. C. A., 252 Fed. 337.

In the following cases, amongst others, the previous judgment was held to be conclusive: *Re Wm. S. Butler & Co.*, C. C. A., 207 Fed. 705;

Byrd v. Hall, 211 Fed. 182; *Swift v. McFarland*, 215 Fed. 452; *Breeden v. Breeden*, C. C. A., 230 Fed. 49; *Masters v. City of Rainier*, 238 Fed. 827; *Watts v. Weston*, 238 Fed. 149; *Sucesores De L. Villamil & Co., S. En C., v. Merced*, C. C. A., 239 Fed. 86; *Crowdson v. Shultz*, 254 Fed. 24; *Srere et al. v. Gottesman et al.*, 254 Fed. 217; *Guzzi v. Delaware & Hudson Co.*, 256 Fed. 719.

³ *Sutton v. Wentworth*, C. C. A., 247 Fed. 493.

⁴ *Nat. Foundry & Pipe Works v. Oconto Water Supply Co.*, 183 U. S. 216, 234; *Bates v. Brodie*, 245 U. S. 524, 526; *Miller v. Belvy Oil Co.*, C. C. A., 248 Fed. 83.

⁵ *U. S. v. Dalcour*, 203 U. S. 408, 423, 51 L. ed. 248, 251. See *U. S. v. California & Oregon Land Co.*, 192 U. S. 355, 48 L. ed. 476.

To find the matters in issue the pleadings must be examined. To ascertain the controverted points upon which the former determination was made, they must be compared with the judgment and each may furnish a definition of the other.⁶ If these then show that the verdict could not have been rendered without deciding the particular matter subsequently questioned, it will be considered as settling that matter in all future actions between the parties and those in privity with them. Where they do not show that the matter was necessarily and directly decided by the court and jury, evidence *aliunde* consistent with the record may be received to prove what was actually done.⁷ To what extent there may be specification and limitation by evidence *aliunde* the Supreme Court has not yet decided.⁸ Even when it appears from the extrinsic evidence that the matter was properly within the issues in the former suit, if it be not shown that the verdict or findings and the judgment necessarily involved the consideration and determination thereof, the question will not be concluded.⁹ If, upon the face of the record, anything is left to conjecture as to what was necessarily involved and decided, there is no estoppel in it when pleaded, and nothing conclusive in it when offered as evidence;¹⁰ but, where, on the face of the record, it appeared that the judgment might have proceeded, upon one of several grounds, evidence was admitted to show *aliunde* upon which of these grounds it did proceed, so as to make it effectual as an estoppel.¹¹

It seems also that the opinion may be considered.¹² It has

⁶ Bates v. Brodie, 245 U. S. 524, 526.

⁷ Packet Co. v. Sickels, 5 Wall. 580, 593, 594; National Foundry & Pipe Works v. Oconto Water-Supply Co., 183 U. S. 216, 46 L. ed. 157; U. S. ex rel. Coffman v. Norfolk & W. Ry. Co., 114 Fed. 682, 686.

⁸ Bates v. Brodie, 245 U. S. 520, 526.

⁹ Packet Co. v. Sickels, 5 Wall. 580, 594; Clark v. Scovill, 198 N. Y. 279, 283; Wood v. Jackson, 8 Wendell, N. Y. 936.

¹⁰ Russell v. Place, 94 U. S. 606, 610, 24 L. ed. 214, 215, McCarty v.

Lehigh Valley R. Co., 160 U. S. 110, 120, 40 L. ed. 358, 362.

¹¹ Benjamin Schwarz & Sons v. Kennedy, 142 Fed. 1027.

¹² National Foundry & Pipe Works v. Oconto Water-Supply Co., 183 U. S. 216, 46 L. ed. 157; Mack v. Levy, 60 Fed. 751; U. S. ex rel. Coffman v. Norfolk & W. Ry. Co., 114 Fed. 682; Millie Iron Min. Co. v. McKinney, C. C. A., 172 Fed. 42; Murphy v. M'Loughlin, C. C. A., 247 Fed. 385; Cline v. Southern Ry. Co., 231 Fed. 238; Blue Goose Min. Co. v. Northern Light Min. Co., C. C. A., 245 Fed. 727.

been said that evidence of remarks by a judge during a trial is not admissible to show the grounds of his decision.¹³ The opinion of the court upon a question not within the issues is not binding in subsequent litigation.¹⁴ The scope of the decision upon an appeal is ascertained and determined by the mandate¹⁵ and, it has been said, by the opinion¹⁶ of the appellate court; and the parties are not concluded as to questions left open by the mandate and opinion, although they were passed upon by the court below.¹⁷

That the first judgment or decree in the matter in dispute was too small to permit its review by an Appellate Court does not prevent it from being a bar to a subsequent suit which can be brought up by appeal or error.¹⁸

A decree for a perpetual injunction is not conclusive upon the right to commit the act enjoined under subsequent legislation¹⁹ or possibly when under changed conditions.²⁰ A decree enjoining the enforcement of a statutory system of rates for transportation of freight and passengers, because it resulted in confiscation, was held not to be *res adjudicata* of a subsequent contention that the statutory rate for passengers, when put into operation with higher freight rates and under changed traffic conditions, was reasonable.²¹

§ 186q. *Res adjudicata* in patent and trade mark cases. A judgment in an action for royalties causes an estoppel against the same defendant in a suit for royalties accruing subsequently, although he pleads a defense different from that set up in the first suit.¹

A decree in a suit to enjoin the infringement of a patent,

¹³ Landon v. Clark, C. C. A., 221 Fed. 841.

¹⁴ Millie Iron Min. Co. v. McKinney, C. C. A., 172 Fed. 42.

¹⁵ National Foundry & Pipe Works v. Oconto Water-Supply Co., 183 U. S. 216, 234, 46 L. ed. 157; Lincoln Gas Co. v. Lincoln, 250 U. S. 256; Farmer v. Atl-coast Line R. Co., 205 Fed. 319, 322.

¹⁶ Ibid.

¹⁷ Russell v. Russell, 129 Fed. 434.

¹⁸ Johnson Co. v. Wharton, 152 U. S. 252, 38 L. ed. 429. As to the effect of an appeal, see Eastern B. & L. Ass'n v. Welling, 103 Fed. 352.

¹⁹ Vicksburg v. Vicksburg Waterworks Co., 206 U. S. 496, 51 L. ed. 1155.

²⁰ Central of Ga. R. Co. v. Railroad Commission of Ala., 209 Fed. 75.

²¹ Ibid.

§ 186q. ¹ Johnson Co. v. Wharton, 152 U. S. 252, 38 L. ed. 429.

which declares that the same is valid, binds upon this question the same defendant in a second suit to enjoin similar infringements, although the only issue raised by the pleadings in the former suit relate to the title.² But where there was no such finding in the first decree, and the only question then litigated had been the defendants' claim of a license, it was not estopped from contesting the validity of the patent in a second suit.³ A decree in a suit for an infringement of a patent does not prevent a subsequent suit for infringement of the same patent by the same defendant through a new device,⁴ although the cause in action therein set forth might have been pleaded by a supplemental bill.⁵ But the burden of proof is upon the complainant to show that the issues are not the same.⁶

Since the owner of a patent cannot split up his cause of action, a judgment for damages in an action at law, although conclusive in his favor on the questions of validity and infringement, is a bar to the right to an accounting in a subsequent suit in equity against the same defendant for other sales made prior to the commencement of the action at law.⁷ A judgment dismissing a suit by the patentee for reclamation of articles subject to the patent, finding that the articles belong to the trustee in bankruptcy of a licensee, compels the dismissal of a subsequent suit to enjoin an alleged infringement of the patent by the sale of the articles by the trustee. A decree for a perpetual injunction, damages and profits in a patent case is an estoppel against a second suit for damages and profits on account of infringements committed during the period covered by the first suit of which no evidence was given nor recovery prayed.⁸ But it does not prevent a second perpetual injunction against the same acts to support a decree for an accounting of profits caused by infringements subsequent to the first suit.⁹

A general verdict of a jury in an action at common law award-

² *Empire S. N. Co. v. American S. L. B. Co.*, C. C. A., 74 Fed. 864.

³ *Lublin v. Stewart H. & M. Co.*, 75 Fed. 294.

⁴ *T. B. Wood's Sons Co. v. Valley Iron Works*, 198 Fed. 869.

⁵ *Sanitary St. Flushing Mach. Co. v. Studebaker Corporation*, 226 Fed. 797.

⁶ *Panoulais v. Nat. Equipment Co.*, 198 Fed. 493. See *supra*, § 186j.

⁷ *L. E. Waterman Co. v. Kline*, C. C. A., 234 Fed. 891.

⁸ *Horton v. N. Y. C. & H. R. R. Co.*, 63 Fed. 89.

⁹ *Ibid.*

ing damages for the infringement of a patent establishes the validity thereof as between the parties, but does not disclose the construction placed upon it by the jury, nor what claims in the suit were held to be valid.¹⁰ It does not, consequently, afford a basis upon which a court of equity in a subsequent suit between the same parties can, without further evidence, determine the question of infringement by a different device.¹¹

A judgment denying reclamation by the patentee of articles held by the trustee in bankruptcy of his licensee is binding against the former in a subsequent suit to enjoin the latter from selling the articles.¹²

A decree enjoining the infringement of a patent, upon a bill alleging that the defendant claimed the right to make the articles infringed under the authority of another patent, which, however, was not pleaded in the defendant's answer, did not estop parties in privity with the defendants from setting up the latter patent as a defense to a subsequent suit upon the same patent of the plaintiffs, where the former decree did not expressly adjudicate the validity of the plaintiffs' patent.¹³ Where the owner of a patent had sued a manufacturer for infringement, in which suit the Circuit Court of Appeals of one circuit had adjudicated in favor of the defendant; and he subsequently, in a suit in another circuit against the seller of a similar article, not made by the former defendant, obtained an adjudication in his favor by the Circuit Court of Appeals; the defendant in the first suit was granted an injunction restraining him from bringing similar suits in any part of the United States against any of that defendant's customers; although that defendant had assumed the defense of the second suit.¹⁴ But such an injunction will not lie against an exclusive licensee in another circuit when he acquired his rights before the first decision was rendered.¹⁵ A decree for a permanent injunction in one circuit, which excepted therefrom a prohibition against the defendant's selling infringing articles

¹⁰ *Cheatham El. S. D. Co. v. Transit Development Co.*, 197 Fed. 563.

¹¹ *Ibid.*

¹² *L. E. Waterman Co. v. Kline*, C. C. A., 234 Fed. 891.

¹³ *Leonard v. Simplex El. Heating Co.*, 145 Fed. 946. See a note to *Westinghouse El. & Mfg. Co. v.*

Stanley Instrument Co., 68 C. C. A., 541.

¹⁴ *Kessler v. Eldred*, 206 U. S. 285, 51 L. ed. 1065. See § 186y, *supra*, § 269a, *infra*.

¹⁵ *Hurd v. James Gould Co.*, 197 Fed. 756.

made in another, where the patent had been held to be invalid, was held to be not an adjudication of the defendant's right to sell such articles in the latter circuit, but merely a reservation of the question until it should arise in a proper case.¹⁶

Where, upon a decree establishing the right to a trademark, it was stipulated that neither the defendant, nor its customers, should be held liable for past infringements, the complainant could not subsequently bring a suit for contributory infringement against one who had previously furnished the former defendant cartoons containing the infringing trademark.¹⁷

A person who has assumed and conducted the defense of a patent case is bound by the decree, although not a party to the same.¹⁸ A corporation which, pending the suit, acquires the subject-matter of the patent in suit, is estopped by the decree therein;¹⁹ and where his assignee was successful, the decree is an estoppel in his favor against the opposite party or his privies.²⁰ Purchasers of articles subsequent to a decree in a patent suit are not privies to the decree, nor protected by the same.²¹

A decree dismissing a bill in equity upon the merits for an infringement of a patent is a bar to a subsequent action at law²² or suit in equity for an infringement of the same patent by the same device,²³ notwithstanding the fact that the complainant, by notice, restricted his proofs and contention to certain specified claims, which are not in issue in the subsequent suit.²⁴ A decree sustaining the validity of a patent awarding a permanent in-

¹⁶ Hurd v. Seim, 189 Fed. 591.

¹⁷ Hillside Chemical Co. v. Munson & Co., 146 Fed. 198. As to the effect of a decree which prescribes the language of a certain statement when enjoining the violation of a trademark, see G. & O. Merriam Co. v. Saalfeld, C. C. A., 190 Fed. 927.

¹⁸ Rumford Chemical Works v. Hygienic Chemical Co., C. C. A., 159 Fed. 436; Confectioners' Mach. & Mfg. Co. v. Racine Eng. & Mach. Co., 163 Fed. 914; Bryant El. Co. v. Marshall, 169 Fed. 426, aff'd, C. C. A., 185 Fed. 499. See *supra*, § 186l.

¹⁹ Confectioners' Mach. & Mfg.

Co. v. Racine Eng. & Mach. Co., 163 Fed. 914.

²⁰ Confectioners' Mach. & Mfg. Co. v. Racine Eng. & Mach. Co., 163 Fed. 914.

²¹ Hurd v. Seim, 189 Fed. 591.

²² Robinson v. Am. Car & Foundry Co., C. C. A., 159 Fed. 131.

²³ Marshall v. Bryant El. Co., C. C. A., 185 Fed. 499; affirming Bryant El. Co. v. Marshall, 169 Fed. 426.

²⁴ Marshall v. Bryant El. Co., C. C. A., 185 Fed. 499; affirming Bryant El. Co. v. Marshall, 169 Fed. 426.

junction against infringement and directing an accounting, is interlocutory, and is not final, and is not conclusive of the validity of the patent in a subsequent suit between the parties,²⁵ although it has been affirmed by the Circuit Court of Appeals.²⁶

§ 186r. Effect of splitting cause of action. In order to avoid multiplicity of suits and the harassment of persons by superfluous litigation, it is a rule of law¹ and of equity² that a plaintiff cannot split his cause of action and bring different suits upon demands which the law considers to be indivisible. When a defendant interposes a counter-claim for a sum in excess of the court's jurisdiction, a judgment allowing so much thereof as is within the jurisdiction leaves the remainder open to recovery in a suit where the liability of the original plaintiff will be *res adjudicata*.³

The rule in equity is not inflexible and under special circumstances two claims under a single contract may be the subject of separate suits.⁴ Thus it has been held that where, in a suit upon the same contract for the exploitation of a mine to recover from individual defendants money spent in its development, and from a corporation, stock and dividends, the State court refused to pass upon the latter demand because it involved the internal management of a foreign corporation; a second suit might be brought in equity for this relief.⁵ Where an action founded on the Federal Anti-Trust Act was based on the same facts that had been pleaded in an action to enforce a State Anti-Trust law, it was held: that facts adjudicated in the latter could not be contradicted in the other.⁶

In the courts of the United States a judgment for the damages caused by a nuisance such as the excessive use of a street by a railroad company does not bar a subsequent action for a con-

²⁵ *Australian Knitting Co. v. Mfg. Co.*, 251 Fed. 696; *Union Cent. Gormly*, 138 Fed. 92; *Whittemore Bros. & Co. v. World Polish Mfg. Co.*, 159 Fed. 480.

²⁶ *Australian Knitting Co. v. Gormly*, 138 Fed. 92.

¹ *Watts v. Weston*, C. C. A., 238 Fed. 149; *Goodno v. Hotchkiss*, 257 Fed. 687; *Srere v. Gottesman*, 254 Fed. 217.

² *Beltz v. Great Western Lead*

³ *Canton-Hughes Pump Co. v. Llera*, C. C. A., 215 Fed. 79.

⁴ *Beltz v. Great Western Lead Mfg. Co.*, 251 Fed. 696.

⁵ *Ibid.*

⁶ *Straus v. Am. Publishers*, C. C. A., 201 Fed. 306.

tinuance of the same nuisance.⁷ But where a street has been permanently occupied by a railroad company without compensation to the owners, all the damage thereby caused must be recovered in a single action.⁸

Where an action for personal injuries did not abate by the plaintiff's death, it was held, that a judgment therein in favor of his administratrix did not prevent subsequent statutory actions to recover damages for his death.⁹ Where by the same acts of negligence, the plaintiff suffers a personal injury and also an injury to his property¹⁰ or to personal property and real estate,¹¹ separate actions for each class of damages may be maintained. Where the defendants, after an action at law against them for infringement of a patent, commit similar infringements, a suit in equity may be maintained for an injunction and damages.¹²

Where different grounds or relief relating to the same property contemporaneously exist, a decree dismissing a bill praying for one is no bar to a subsequent suit praying for the other.¹³

A suit, to compel the transfer of stock and the payment of dividends thereupon declared, was held to be no bar to a suit after the transfer to enforce the right to subscribe for shares of a new issue of stock which existed before the prior suit was brought.¹⁴

If the prayers for relief are inconsistent, a denial of one is no bar to a subsequent suit praying the other;¹⁵ but the grant of relief bars a subsequent suit for inconsistent relief based upon the same facts.¹⁶ Thus, a judgment for damages, for breach of

⁷ *Baltimore & P. R. Co. v. Fifth Baptist Church*, 137 U. S. 568, 34 L. ed. 784.

⁸ *Shepherd v. Baltimore & O. R. Co.*, 130 U. S. 426, 32 L. ed. 970.

⁹ *Puget Sound Traction, Light & Power Co. v. Frescoln*, C. C. A., 245 Fed. 301.

¹⁰ *Boyd v. Atlantic Coast Line R. Co.*, 218 Fed. 653.

¹¹ *Chicago, B. & Q. R. Co. v. Dawson*, C. C. A., 245 Fed. 338.

¹² *Cheatham El. Switching Device*

v. Transit Development Co., C. C. A., 209 Fed. 229, s. c., 203 Fed. 285.

¹³ *Union Cent. Life Ins. Co. v. Drake*, C. C. A., 214 Fed. 537; *Bates v. United Shoe Mach. Co.*, 216 Fed. 140. See *supra*, § 185b.

¹⁴ *Bates v. United Shoe Machinery Co.*, C. C. A., 216 Fed. 140.

¹⁵ *Union Cent. Life Ins. Co. v. Drake*, C. C. A., 214 Fed. 537.

¹⁶ *English v. Brown*, C. C. A., 229 Fed. 34.

a contract to deliver stock, is a bar to a suit to enforce an equitable lien thereupon.¹⁷

When it is doubtful upon the pleadings and judgment whether the second suit involves the splitting of a demand, testimony may be taken upon the subject.¹⁸

§ 186s. Res adjudicata against privies. A judgment or decree is binding upon both parties and those in privity with them.¹ The adjudication may be used for the benefit of the original parties and their privies.² It has no legal effect against persons not parties or privies to the suit³ but under the doctrine of *stare decisis* it may have great weight as a precedent,⁴ especially in patent and trade-mark cases.⁵ It was held that a decree establishing a lost muniment of title was not admissible against strangers to the suit, although it was contended to be an admission against the interest of parties against whom it was made.⁶

Privies are all who have acquired any interest in the property in dispute after the judgment or decree,⁷ or pending the suit,⁸ provided, in the latter case at least, that compliance was made with the necessary statutory requirements.⁹ A grantee of part of a tract of land is not in privity with the grantee of another

¹⁷ *English v. Brown*, C. C. A., 229 Fed. 34.

¹⁸ *Societe Nouvelle D'Armement v. Barnaby*, C. C. A., 246 Fed. 68.

¹ *Moor v. Welsh Copper Co.*, 1 Eq. Cas. Abr. 39; *Werlein v. New Orleans*, 177 U. S. 390, 44 L. ed. 817; *W. A. Gaines & Co. v. Rock Spring Distilling Co.*, 226 Fed. 531.

² *Carroll v. Goldschmidt*, C. C. A., 83 Fed. 508; *Confectioners' Mach. & Mfg. Co. v. Racine Eng. & Mach. Co.*, 163 Fed. 914.

³ *Searchlight Gas Co. v. Presto-O-Lite Co.*, C. C. A., 215 Fed. 693; *McIlhenny Co. v. Gaidry*, C. C. A., 253 Fed. 613; *Bayley & Sons, Inc. v. Blumberg*, C. C. A., 254 Fed. 696.

⁴ *DeBearn v. Safe Deposit & Tr. Co. of Baltimore*, 233 U. S. 24.

⁵ See *infra*, § 277, 279.

⁶ *Virginia & West Virginia Coal*

Co. v. Charles, C. C. A., 251 Fed. 83.

⁷ *Moor v. Welsh Copper Co.*, 1 Eq. Cas. Abr. 39; *Werlein v. New Orleans*, 177 U. S. 390, 44 L. ed. 817.

⁸ *Moor v. Welsh Copper Co.*, 1 Eq. Cas. Abr. 39. *Confectioners' Mach. & Mfg. Co. v. Racine Eng. & Mach. Co.*, 163 Fed. 914. *G. & C. Merriam Co. v. Saalfeld*, C. C. A., 190 Fed. 927, where those who succeeded to the business of a publisher pending a suit against him were held to be bound by the decree subsequently therein entered. But see *Reinecke Coal Min. Co. v. Wood*, 112 Fed. 477; *Stewart v. O'Neal*, 237 Fed. 897, (a remainderman born after the time limited for contest of a will).

⁹ *Jones v. Smith*, 40 Fed. 314; *supra*, §§ 82, 83, *infra*, § 375.

part nor bound by a judgment against the latter.¹⁰ A tenant whose lease was prior to the suit is not in privity with the landlord.¹¹ The principal is not bound by a judgment against his surety.¹² An express¹³ or implied¹⁴ warrantor is bound by the judgment in a suit against his warrantee if he has notice of the suit and an opportunity to defend it.

§ 186t. Res adjudicata against party in different capacities.

A decree does not bind a party in another capacity from that in which he was sued. Thus, a judgment against a trust company, sued individually, is no estoppel against a suit by it as trustee.¹ A decree against the trustee of a mortgage does not affect the same person when claiming as trustee of another mortgage without proof that the bondholders are the same.²

In order that he may be estopped in his representative capacity, it is not essential that a party be so described in the title, if it appears in the body of the bill.³ A party is not estopped by a judgment against him so far as concerns an interest of a stranger to the suit which he has subsequently bought.⁴

§ 186u. Res adjudicata against beneficiaries of a trust. Ordinarily, the beneficiary of a trust is bound by a judgment against his trustee¹ or the latter's predecessor.² Subscribers to

¹⁰ *Kapiolani Estate v. Atcherley*, 238 U. S. 119.

¹¹ See *Iroquois Iron Co. v. Kruse*, C. C. A., 241 Fed. 493; *Doctor Jack Pot Mining Co. v. Marsh*, 262 Fed. 261. The Illinois Dram Shop Act, Ill. R. S. ch. 43, § 10, which makes a judgment in proceedings against the tenant binding upon the landlord, is valid. *Eiger v. Garrity*, 246 U. S. 97.

¹² *U. S. v. California Bridge Co.*, 245 U. S. 337.

¹³ *Wolfe v. Barataria Land Co.*, C. C. A., 255 Fed. 503.

¹⁴ *Strathleven Steamship Co., Limited, v. Baulch*, C. C. A., 244 Fed. 412; *Cuneo Importing Co. v. American Importing & T. Co.*, C. C. A., 247 Fed. 413. See *George A. Fuller Company v. Otis Elevator Company*, 245 U. S. 489. The estoppel can be used by a purchaser of the subject-

matter pending the suit and before adjudication. *Carroll v. Goldschmidt*, C. C. A., 83 Fed. 508, 27 C. C. A. 566; *Confectioners' Mach. & Mfg. Co. v. Racine Eng. & Mach. Co.*, 163 Fed. 914, 919. But see *Ingersoll v. Jewitt*, 16 Blatchf. 378, Fed. Cas. No. 7039.

§ 186t. ¹ *Bancroft v. Wicomico County Com'rs*, 121 Fed. 874.

² *Compton v. Jesup*, C. C. A., 68 Fed. 47. Cf. *Carey v. Roosevelt*, C. C. A., 102 Fed. 569.

³ See *Manigault v. Holmes*, 1 Bailey Eq. (S. C.) 283.

⁴ *Re Clark Realty Co.*, C. C. A., 253 Fed. 938.

§ 186u. ¹ *Kent v. Lake Superior S. C. Co.*, 144 U. S. 75, 36 L. ed. 352; *Rejall v. Greenhood*, 92 Fed. 945. For the exceptions, see *Goff v. Kelly*, 74 Fed. 327; *Handlan v.*

bonds who have repudiated their subscriptions are not parties to a suit by or against the trustee.³ A judgment against a guardian *ad litem* binds his ward.⁴

An ancillary administrator in one State is not in privity with an ancillary administrator in another, and a judgment against the one is not a bar to a suit by the other.⁵ The same rule applies between executors of a will and administrators with the will annexed appointed in another jurisdiction.⁶ A judgment upon the merits against a widow, in an action for the benefit of herself and children, is not a bar to a second suit, brought by her as administratrix, for the same cause of action under the Employers' Liability Act⁷ when the recovery would be for the benefit of the same persons and the defendant is the same.⁸ A judgment against the husband concerning the title to property claimed to be held in community was held to estop him and his wife in a subsequent suit.⁹

§ 186v. Res adjudicata against mortgagees. A mortgagee is bound by judgments against the mortgagor entered before the mortgage or in suits pending when the mortgage was made,¹

Walker, C. C. A., 200 Fed. 566, in bankruptcy. Raphael v. Wasatch & J. V. R. Co., C. C. A., 201 Fed. 854; Linton v. Omaha Wholesale Produce Market House Co., C. C. A., 218 Fed. 331; Schnepfe v. Schnepfe, C. C. A., 230 Fed. 781; In re Franklin Brewing Co., 254 Fed. 910.

² New Orleans v. Citizens Bank, 167 U. S. 371, 389, 42 L. ed. 202; *infra*, § 1864.

³ Beyer v. City of Athens, Tenn., C. C. A., 249 Fed. 849.

⁴ Duncomb v. Chicago, B. & Q. R. Co., C. C. A., 246 Fed. 394; Columbia-Knickerbocker Trust Co. v. Abbot, C. C. A., 247 Fed. 833, 851.

⁵ Brown v. Fletcher's Estate, 210 U. S. 82; Ingersoll v. Coram, 211 U. S. 335, 53 L. ed. 208, reversing C. C. A., 148 Fed. 169, and affirming 132 Fed. 168, 136 Fed. 689.

⁶ Brown v. Fletcher's Estate, 210

U. S. 82, 28 Sup. Ct. 702, 52 L. ed. 966; Wilson v. Hartford Fire Ins. Co., C. C. A., 164 Fed. 817. A Federal court followed a California statute and the construction of the same by the State courts, so far as to hold that a foreclosure decree of a State court against an administrator of the mortgagor was binding upon the latter's heirs, without determining whether, if the foreclosure had been instituted in the Federal court, the heirs would have been necessary parties. Cf. Norton v. House of Mercy, C. C. A., 101 Fed. 382; Hearfield v. Bridges, C. C. A., 75 Fed. 47.

⁷ 35 St. at L. 65, Comp. St. Supp. 1811, p. 1322.

⁸ Troxell v. Delaware, L. & W. R. Co., 227 U. S. 434, reversing 200 Fed. 44.

⁹ Lichty v. Lewis, 63 Fed. 535.

§ 186v. 1 Keokuk & Western R.

but not by judgments in subsequent suits to which he was not a party.² The holders of mortgage bonds, previously issued, are not bound by a judgment against the mortgagor concerning the liability of its property to taxation;³ nor concerning the validity or duration of a franchise covered by the mortgage.⁴ A decree against a trustee binds his successors.⁵

§ 186w. Res adjudicata against corporations, directors and stockholders. A corporation is not estopped by a decree in a suit to which one of its stockholders was a party.¹ Otherwise, however, when the corporation was formed by the same persons, who defended the former suit, for the purpose of escaping from the effect of the adjudication.²

A judgment in a patent suit adjudicating no infringement by a manufacturing corporation was held to be available as *res adjudicata* in its favor by another company which it owned and controlled and acted as its selling agent.³ The officers of a corporation are estopped by a decree against their company, when they assisted it in the acts therein enjoined and exclusively managed and controlled the same.⁴ Where a corporation was sued for the torts of its servants it was held that a judgment in favor of the servants was a bar to an action against it.⁵ A judgment against the corporation estops in his individual capacity an officer who has had control of the defense.⁶ A judg-

Co. v. Missouri, 152 U. S. 301, 314, 38 L. ed. 450, 456.

² Dull v. Blackman, 169 U. S. 243, 42 L. ed. 733; Keokuk & Western R. Co. v. Missouri, 152 U. S. 301, 314, 38 L. ed. 450, 456; Campbell v. Hall, 16 N. Y. 575; Southern B. & Tr. Co. v. Folsom, C. C. A., 75 Fed. 929; Columbia Ave. Sav. Fund, Safe Deposit, Title & Trust Co. v. Dawson, 130 Fed. 152; Black v. Manhattan Trust Co., 213 Fed. 693.

³ Wicomico County Com'rs v. Bancroft, C. C. A., 135 Fed. 977; Loughton v. City of Carthage, Mo., 175 Fed. 145; Old Colony Trust Co. v. Omaha, 230 U. S. 100.

⁴ Illinois Trust & Savings Bank v. Des Moines, 224 Fed. 620.

⁵ Lewis v. Holmes, C. C. A., 224 Fed. 411.

⁶ § 186w. ¹ Am. Coat Pad Co. v. Phoenix Pad Co., C. C. A., 113 Fed. 629, 632. Nor by a decree against a president and director of the same in his individual capacity. Brinkerhoff v. Holland Tr. Co., 159 Fed. 191.

² See McCabe & Steam Constr. Co. v. Wilson, 209 U. S. 275, 52 L. ed. 788.

³ Hart Steel Co. v. Railroad Supply Co., 244 U. S. 294.

⁴ Saxhelner v. Eisner, 140 Fed. 938.

⁵ Williford v. Kansas City, M. & B. R. Co., 154 Fed. 514.

⁶ United States Envelope Co. v.

ment against the corporation which was not obtained by fraud, establishes the company's indebtedness to the plaintiff in a suit to enforce a director's liability.⁷ Stockholders, present or former, who are not parties to statutory proceedings for the dissolution of a corporation, are so far bound by a decree therein making assessments upon the stock, that they cannot dispute the insolvency of the company nor the amount and the necessity of the assessment,⁸ nor whether it was correctly imposed upon former stockholders;⁹ but they may defend upon the ground that their shares were fully paid, or as to any other question peculiarly affecting their individual liability.¹⁰ Former stockholders are also, it has been said, concluded by a judgment finding that there were claims unpaid existing at the time of their transfer.¹¹ Where the stockholders were parties to such a suit or proceeding and were duly served, they are bound by all questions therein determined,¹² and a judgment upon the merits in their favor is a bar to subsequent proceedings in another jurisdiction for the same relief.¹³ Stockholders are not bound by a judgment against their corporation in a suit which was brought after the proceedings to liquidate its assets had begun.¹⁴ It has been held that a judgment establishing the exemption of a bank from taxation of its property and from liability to pay a tax upon its stockholders, is not an estoppel against the enforcement of a tax directly against the latter.¹⁵

Transo Paper Co., C. C. A., 221 Fed. 79.

⁷ Northern Pac. Ry. Co. v. Crowell, 245 Fed. 668.

⁸ Hawkins v. Glenn, 131 U. S. 319, 33 L. ed. 184; s. c., 135 U. S. 533, 34 L. ed. 262; Hamilton v. Levison, 198 Fed. 444; Southworth v. Morgan, 205 N. Y. 293; Rood v. Whorton, 67 Fed. 434. *Re* Newfoundland Syndicate, C. C. A., 201 Fed. 917; Selig v. Hamilton, 234 U. S. 652; Marin, as receiver of the American Biscuit Company of Crookston v. Augedahl, 247 U. S. 142.

⁹ Selig v. Hamilton, 234 U. S. 652,

and the ratable share of the latter class.

¹⁰ Rood v. Whorton, 67 Fed. 434; Mottinger v. Hendricks, 208 Fed. 824.

¹¹ Hamilton v. Selig, 195 Fed. 153. *Aff'd*, 234 U. S. 652.

¹² Irvine v. Blackburn, 198 Fed. 360.

¹³ Converse v. Stewart, 192 Fed. 941.

¹⁴ Schrader v. Manufacturers' Nat. Bank, 133 U. S. 67, 33 L. ed. 564. *Cf.* Ward v. Joslin, C. C. A., 105 Fed. 224.

¹⁵ New Orleans v. Citizens' Bank, 167, U. S. 371, 380, 402, 42 L. ed.

§ 186x. Effect as adjudications of proceedings against public corporations and public officers. A State is not bound by a judgment against one of its officers for the possession of lands, which he claims to hold in its behalf.¹ A homesteader is not bound by a decree against the United States in a suit brought by the Government to cancel a land patent to a railway company.² A judgment against a municipal officer binds his successor in office, the municipality, and the other officers, so far as their official obligations are concerned,³ and also the citizens and taxpayers.⁴ The same effect is given to an order for a mandamus,⁵ or for a writ of prohibition.⁶ A municipal corporation is not necessarily bound by a decree in a suit against another municipality, to which officers of the State were parties.⁷ An injunction in a taxpayer's suit, which restrains a municipal corporation from paying bonds, does not estop a bondholder, who is not a party to the suit.⁸

§ 186y. Res adjudicata against persons not parties nor privies. A person who succeeded to the defendant's rights, previous to the institution of the suit, is not bound by and cannot claim the benefit of the decree therein.¹

Persons not parties nor their privies have been held to be bound by ² and to have the benefit of decrees as estoppels when

¹ 202, 205, 212. See *Union & Planters' Bk. v. Memphis*, 189 U. S. 71, 47 L. ed. 712.

² *Tindal v. Weasley*, 167 U. S. 204, 42 L. ed. 137. See *supra*, § 105.

³ *Brandon v. Ard*, 211 U. S. 11, 53 L. ed. 68.

⁴ *New Orleans v. Citizens' Bank*, 167 U. S. 371, 389, 42 L. ed. 202, 208; *Scotland County v. Hill*, 112 U. S. 183, 28 L. ed. 692. *Harshman v. Knox Co.*, 122 U. S. 306, 30 L. ed. 1152; *State v. Rainey*, 74 Mo. 229; *Harmon v. Auditor*, 123 Ill. 122, 5 Am. St. Rep. 502.

⁵ *McIntosh v. Pittsburg*, 112 Fed. 705, 707.

⁶ *Police Jury v. U. S.*, 60 Fed. 249; *Ransom v. Pierre*, C. C. A.,

101 Fed. 665; *McEvoy v. New York*, 56 App. Div. 222. See *supra*, § 186j; *infra*, §§ 457, 459.

⁷ *Bank of Ky. v. Stone*, C. C. A., 88 Fed. 383, 395, 398. See *infra*, § 450.

⁸ *Bank of Kentucky v. Kentucky*, 207 U. S. 258, 52 L. ed. 197.

⁹ *Clagett v. Duluth Tp.*, C. C. A., 143 Fed. 824.

§ 186y. ¹ *Calculagraph Co. v. Automatic Time Stamp Co.*, 154 Fed. 166.

² *Plumb v. Crane*, 123 U. S. 560, 31 L. ed. 268; *Bank of Ky. v. Stone*, 88 Fed. 383, 396; *Lane v. Welds*, C. C. A., 99 Fed. 286; *Penfield v. C. & A. Potts & Co.*, C. C. A., 126 Fed. 475; *Sacks v. Kupferle*, 127 Fed. 569.

they have controlled the defense;³ when they have defended the suit openly to the knowledge of the adverse party and for the protection of their own interests;⁴ but not unless they have exercised some control over the management of the defense or prosecution as the case may be.⁵

A decree is not *res adjudicata* against a stranger who participated in the defense unless it is so far final as to be *res adjudicata* against the original defendant.⁶

The secret payment of the expenses of the defense,⁷ unless known to the opposite party, in which latter case the judgment binds the payer,⁸ or the public filing of a brief upon appeal,⁹ in the first suit, is insufficient; but a party who intervenes upon an appeal will be estopped by the decree.¹⁰

³ Farish v. State Banking Board, 235 U. S. 498.

⁴ Cramer v. Singer Mfg. Co., 93 Fed. 636; Greenwich Ins. Co., v. N. & M. Friedman Co., C. C. A., 142 Fed. 944; Confectioners' Mach. & Mfg. Co. v. Racine Eng. & Mach. Co., 163 Fed. 914; Bemis Car Box Co. v. J. G. Brill Co., C. C. A., 200 Fed. 749; Gilchrist Co. v. Erie Specialty Co., 215 Fed. 741; Rowe v. Hill, C. C. A., 215 Fed. 518; James Clark Distilling Co. v. Western Maryland Ry. Co., 219 Fed. 333; Cushman v. Warren-Scharf Asphalt Paving Co., C. C. A., 220 Fed. 857; U. S. Envelope Co. v. Transo. Paper Co. (D. Conn.), 221 Fed. 79; Gilchrist Co. v. Erie Specialty Co., C. C. A., 231 Fed. 659; Searchlight Horn Co. v. Am. Graphophone Co., 240 Fed. 745. *Re* Dashiell, C. C. A., 246 Fed. 366; T. L. Smith Co. v. Cement Tile Machinery Co., C. C. A., 249 Fed. 481; Dunscomb v. Chicago B. & Q. R. Co., 246 Fed. 394; Sabine Hardwood Co. v. West Lumber Co., 248 Fed. 123; Deer Island Lumber Co. et al. v. Savannah Timber Co., C. C. A., 258 Fed. 785.

⁵ Rumford Chemical Works v. Hygienic Chemical Co., 215 U. S. 156, 54 L. ed. 137; Confectioners'

Mach. & Mfg. Co. v. Racine Eng. & Mach. Co., 163 Fed. 914; Taigman v. Desure, C. C. A., 253 Fed. 364.

⁶ S. & C. Merriam Co. v. Saalfeld & Ogilvie, 241 U. S. 22.

⁷ Cramer v. Singer Mfg. Co., 93 Fed. 636; Litchfield v. Goodnow, 123 U. S. 549, 31 L. ed. 199; Hanks Dental Ass'n v. International Tooth Crown Co., C. C. A., 122 Fed. 74; Westinghouse Electric & Mfg. Co. v. Jefferson Electric Light, Heat & Power Co., 135 Fed. 365; Jefferson Electric Light, Heat & Power Co. v. Westinghouse Electric & Mfg. Co., C. C. A., 139 Fed. 385; Rumford Chemical Works v. Hygienic Chemical Co., 148 Fed. 862, *aff'd* 215 U. S. 156, 54 L. ed. 137; Kapiolani Estate v. Atcherley, 238 U. S. 119; Helm v. Zarecor, 213 Fed. 648; Stromberg Motor Devices Co. v. Zenith Carburetor Co., 220 Fed. 154; M'Ilhenny Co. v. Gaidry, C. C. A., 253 Fed. 613; M. B. Fahey Tobacco Co. v. Senior, 247 Fed. 809.

⁸ Goodno v. Hotchkiss, 237 Fed. 687; Elliott Co. v. Roto Co., C. C. A., 242 Fed. 941.

⁹ Stryker v. Goodnow, 123 U. S. 527, 31 L. ed. 194.

¹⁰ Martin v. People's Bank, 115 Fed. 226.

§ 186z. *Res adjudicata in suits on behalf of a class.* A decree in a suit brought by one on behalf of all of a class of bondholders¹ or other creditors² or it seems, of any other class, except holders of certificates of membership in an insurance company or association,³ taxpayers,⁴ and in certain cases stockholders,⁵ does not bind the rest; unless they come in and contribute or prove a claim against the fund in court. A decree in a representative suit brought by some on behalf of all, or against some as representatives of the other members, of a class of holders of certificates of life insurance in an insurance company or association binds them all.⁶ So, it has been held, does a decree in a suit brought by one on behalf of all the stockholders as regards their common rights; or to enjoin or set aside a contract made by the corporation.⁷ It has been said that where the stockholder does not expressly sue on behalf of the others the decree against him does not bind them.⁸ It seems that a judgment in a taxpayer's suit binds all the taxpayers.⁹ A person subjects himself to the estoppel of the final decree by proving his claim.¹⁰ The doctrine of laches and estoppel may be applied to other members of the class who had notice of the suit and an opportunity

§ 186z. ¹ *Wabash R. R. Co. v. Adelbert College*, 208 U. S. 38, 58, 52 L. ed. 379, 388; *Compton v. Jesup*, C. C. A., 68 Fed. 263, 285 (both these cases relate to the same bondholders' suit); *Hart v. Globe Ins. Co.*, 113 Fed. 309 (a creditors' suit); *Jackson Co. v. Gardiner Inv. Co.*, C. C. A., 200 Fed. 113, 117 (a bill filed by stockholders, which was not expressly filed on behalf of the others.) See *supra*, §§ 114-116. In *Helm v. Zarecor*, 213 Fed. 648, 653, it was held that a decree of a state court in an action *quo warranto* to oust a religious body was not *res adjudicata* in a subsequent suit by members of the religious body on behalf of themselves and the rest against certain members of the former body on behalf of them and the others to determine the right to con-

trol property held for religious uses.

² *Hart v. Globe Ins. Co.*, 113 Fed. 109.

³ *Hartford Life Ins. Co. v. Ibs*, 237 U. S. 622, 671.

⁴ *Gamble v. City of San Diego*, 79 Fed. 487.

⁵ *Dana v. Morgan*, C. C. A., 232 Fed. 85.

⁶ *Hartford Life Ins. Co. v. Ibs*, 237 U. S. 662, 671.

⁷ *Dana v. Morgan*, C. C. A., 232 Fed. 85.

⁸ *Jackson Co. v. Gardiner Inv. Co.*, C. C. A., 200 Fed. 113, 117; *Contra*, *Grant v. Greene Consol. Copper Co.*, 169 App. Div. (N. Y.) 206, 215.

⁹ *Gamble v. City of San Diego*, 79 Fed. 487.

¹⁰ *St. Louis-San Francisco Ry. Co. v. McElvain*, 253 Fed. 123.

to intervene.¹¹ The failure to raise the objection of fraud in the first suit does not effect the conclusiveness of the judgment when the latter suit seeks the same relief.¹² Neither does the fact that in the first suit acts were repudiated and a trust *ex maleficio* in consequence thereof sought to be enforced, while the second case is brought to enforce an express trust asserted to have arisen from the same acts which the second plaintiff ratifies, the relief in each being substantially the same.¹³ The plaintiff in the second suit has the burden of proof that he had no contemporary knowledge of the former litigation.¹⁴ It has been held that the doctrine of *res adjudicata* will be applied to a suit by stockholders to enforce a right of their corporation,¹⁵ to a suit by one of those interested in a mortuary insurance fund on behalf of those similarly interested, to establish respective rights of the members thereof.¹⁶

§ 186zz. Res adjudicata between joint parties. Where parties sue or are sued jointly and there are no cross pleadings between them, the judgment in favor of either or both creates no estoppel between them, as to the duty of contribution or the right to share in the proceeds, unless the record shows that a controversy between them upon the subject was actually raised and determined.¹

§ 187. Practice upon the defense of res adjudicata. In pleading a judgment or decree, it is not necessary to set it forth, nor the proceedings upon which it was founded, at length,¹ but so much of the decree and pleadings should be averred as will show that the same point was in issue,² together with the commencement and service of process in the former suit, its general character and object, the relief therein prayed, and sufficient

¹¹ Dana v. Morgan, C. C. A., 232 Fed. 85. See §§ 183, 185, *supra*.

¹² Dana v. Morgan, C. C. A., 232 Fed. 85.

¹³ Grant v. Greene Consol. Copper Co., 169 App. Div. (N. Y.) 206.

¹⁴ *Re* Dashiell, C. C. A., 246 Fed. 366.

¹⁵ Dana v. Morgan, C. C. A., 232 Fed. 85.

¹⁶ Hartford Life Insurance Co. v. Ibs. 237 U. S. 662.

§ 186zz. ¹ Bradford v. Meyers, 231 U. S. 725; In City of Owensboro v. Westinghouse, Church, Kerr & Co., C. C. A., 165 Fed. 385.

§ 187. ¹ McIntosh v. Pittsburg, 112 Fed. 705.

² Ricardo v. Garcias, 12 Cl. & F. 368; Story's Eq. Pl., § 783; Mound City Co. v. Castleman, 171 Fed. 520.

averments of the facts to show that there is an identity of subject-matter.³ In case of such a plea, under the former practice, the court might require that the decree be pleaded at length, or, if the plea set up matter of record in the same court, that the record be shown before the plaintiff is required to take action upon the plea.⁴ It has been held: that proof of the judgment is sufficient.⁵ Where a decree in a former suit is introduced in evidence on stipulation without the objection that it has not been properly pleaded, it will be given full effect as a bar.⁶ A prior decree can usually be put in evidence without having been pleaded where the pleading of the party sets up the facts which were adjudicated by the decree; and the decree is then conclusive evidence of such facts.⁷ When the former judgment was at common law, there is no necessity for a preliminary decree in equity to establish the defense.⁸ It has been held that where a defendant does not raise the objection in the court of first instance, he waives the defense that two separate actions cannot be brought upon a single demand.⁹ It has been said that by pleading a defense against a former decree a party waives his right to claim an estoppel under the same.¹⁰ But offering evidence of such facts while the former decree was merely interlocutory does not waive the right to claim that it is a bar after it has ripened into a final decree.¹¹ It has been held: that a motion to strike out evidence as to the original cause of action, because this was merged in the judgment, did not preclude the defendant from showing that the judgment was invalid.¹² The fact that a decree was interlocutory when the suit was brought does not prevent it from becoming a bar as soon as a final decree

³ *Mound City Co. v. Castleman*, 171 Fed. 520.

⁴ *Emma S. M. Co. v. Emma S. M. Co. of N. Y.*, 1 Fed. 39.

⁵ *F. Straus v. Am. Publishers' Ass'n*, C. C. A., 201 Fed. 306, 309.

⁶ *Emma S. M. Co. v. Emma S. M. Co. of New York*, 1 Fed. 39.

⁷ *David Bradley Mfg. Co. v. Eagle Mfg. Co.*, 58 Fed. 721; *Southern Pac. R. Co. v. U. S.*, 168 U. S. 1, 57, 42 L. ed. 355, 379.

⁸ *Weber v. Hertzell*, C. C. A., 230 Fed. 965.

⁹ *Southern Pac. Ry. Co. v. U. S.*, C. C. A., 186 Fed. 737.

¹⁰ *Mack v. Levy*, 60 Fed. 751.

¹¹ *David Bradley Mfg. Co. v. Eagle Mfg. Co.*, 57 Fed. 980; *Bredin v. National Metal Weatherstrip Co.*, 147 Fed. 741; *David Bradley Mfg. Co. v. Eagle Mfg. Co.*, C. C. A., 57 Fed. 980.

¹² *Wayne County Securities Co. v. Hughitt*, 228 Fed. 816.

to the same effect has been entered.¹³ Where an interlocutory decree did not become final until after an interlocutory decree had been entered in a subsequent suit; it was held: that, if presented before the final decree in the latter, it was conclusive upon the merits of that suit.¹⁴ A person is not chargeable with laches in presenting a prior adjudication as a bar, where it was set up, in a petition filed before the final decree, and within a month after the dismissal by the Supreme Court of the United States of a petition for a writ of certiorari to review the same.¹⁵ Where the adjudication, upon which the defendant relies, is made subsequent to the defendant's answer, he should regularly plead the same by a supplemental answer;¹⁶ but it might be considered when raised by an amended answer,¹⁷ or in a petition.¹⁸ A decree based, in whole or in part, upon a plea of *res adjudicata*, will be reversed upon appeal; where, subsequent to its entry, the judgment held to constitute an estoppel has been reversed; and the appellate court in the second suit will take judicial notice of such reversal;¹⁹ even when it was by a State court;²⁰ but where the judgment, as first rendered, was in accordance with the law of the State, as declared by its highest court, and the reversal overruled former decisions, a Federal court refused, upon a bill to review, to set aside its decree, founded upon *res adjudicata*.²¹ It is no ground for reversal that in subsequent litigation the State court of last resort²² or the Supreme Court of the United States²³ has overruled the doctrine which was the foundation of the decision that

¹³ David Bradley Mfg. Co. v. Eagle Mfg. Co., 57 Fed. 980; Bredin v. National Metal Weatherstrip Co., 147 Fed. 741.

¹⁴ Penfield v. C. & A. Potts & Co., C. C. A., 126 Fed. 475.

¹⁵ Penfield v. C. & A. Potts Co., C. C. A., 126 Fed. 475.

¹⁶ Warren Featherbone Co. v. De Camp, 154 Fed. 198; *infra*, § 195.

¹⁷ See *infra*, §§ 212, 214.

¹⁸ Penfield v. C. & A. Potts & Co., C. C. A., 126 Fed. 475.

¹⁹ Fansom v. St. Pierre, C. C. A., 101 Fed. 665; Empire State-Idaho

Mining & Developing Co. v. Bunker Hill & S. Mining & Concentrating Co., C. C. A., 121 Fed. 973; Hennessey v. Tacoma Smelting & Refining Co., C. C. A., 129 Fed. 40.

²⁰ *Ibid*.

²¹ Board of Councilmen v. Deposit Bank, C. C. A., 124 Fed. 18.

²² Virginia-Carolina Chemical Co. v. Kirven, 215 U. S. 252, 54 L. ed. 179.

²³ Ferguson v. Babcock Lumber & Land Co., C. C. A., 252 Fed. 705, affirming 243 Fed. 623; see *supra*, § 50.

is pleaded. It has been held: that a judgment of the Supreme Court of a State is no bar to a subsequent suit in a Circuit Court of the United States, where it has been taken by writ of error to the Supreme Court of the United States and is there pending undetermined.²⁴ Where a decree for a perpetual injunction and an accounting was affirmed, it was held: that an infringement could not before accounting set up by petition to the Circuit Court of Appeals as *res adjudicata*,²⁵ a judgment of another Circuit Court of Appeals in another action.²⁶ The defense may be raised by a demurrer when the allegations of the bill show that it exists.²⁷

A statement in the judgment or the judgment roll that the defendant appeared by counsel is presumptive evidence that the appearance was authorized.²⁸ In a suit upon a foreign judgment the authority to appear may be contradicted.²⁹ Evidence that the attorney was authorized to appear specially but not generally in the original suit is sufficient to attack the validity of the judgment.³⁰

The recitals in the record of the judgment are not conclusive proof that the defendant was served or duly appeared;³¹ but they are presumptive evidence of the point and in view of the presumption of regularity, a decree which recites that an order or publication had been duly published and executed is not open to collateral attack because no affidavit in support of the order is in the record, when the State statute does not specifically require a written affidavit.³² It has been said that to authorize recovery upon a judgment there should be some evidence, either by the recitals of the judgment or otherwise, to show that the court which rendered it had acquired jurisdiction over the defendant, or the court should have before it the entire record upon which, nothing appearing to the contrary, to predicate a presumption

²⁴ *Eastern B'g & Loan Ass'n v. Welling*, 103 Fed. 352.

²⁵ *National Brake & El. Co. v. Christensen*, C. C. A., 258 Fed. 880.

²⁶ *Hewitt v. Great Western Beet Sugar Co. et. al.*, C. C. A., 230 Fed. 394.

²⁷ *Jarrell v. Cole*, C. C. A., 215 Fed. 315; *Lucas v. Vulcan Iron Works*, 233 Fed. 823.

²⁸ *Lucas v. Vulcan Iron Works*, 233 Fed. 823.

²⁹ *Ibid.*

³⁰ *Blue Goose Mining Co. v. Northern Light Mining Co.*, C. C. A., 245 Fed. 727.

³¹ *Virginia & West Virginia Coal Co. v. Charles*, C. C. A., 251 Fed. 83.

³² *Denny v. Giles*, C. C. A., 250 Fed. 987.

of jurisdiction over the parties.³³ The court may refuse to receive evidence to prove want of jurisdiction until the defendant's case is reached, and before then admit judgment, subject to attack.³⁴ In a suit upon a foreign judgment, certified copies of the record on appeal showing affirmance are admissible.³⁵ The court will take judicial notice of its own records as to proceedings formerly had by a party to a proceeding before the court.³⁶

§ 188. Defenses peculiar to patent cases. The Revised Statutes provide: "In any action for infringement the defendant may plead the general issue, and having given notice in writing to the plaintiff or his attorney, thirty days before, may prove on trial any one or more of the following matters: First, that for the purpose of deceiving the public the description and specification filed by the patentee in the Patent Office was made to contain less than the whole truth relative to his invention or discovery, or more than is necessary to produce the desired effect; or, second, that he had surreptitiously or unjustly obtained the patent for that which was in fact invented by another, who was using reasonable diligence in adapting and perfecting the same; or, third, that it had been patented or described in some printed publication prior to his supposed invention or discovery thereof; or, fourth, that he was not the originator and first inventor or discoverer of any material and substantial part of the thing patented; or, fifth, that it had been in public use or on sale in this country for more than two years before his application for a patent, or had been abandoned to the public. And in notices as to proof of previous invention, knowledge or use of the thing patented, the defendant shall state the names of patentees and the dates of their patents, and when granted, and the names and residences of the persons alleged to have invented, or to have had the prior knowledge of the thing patented, and where and by whom it had been used; and if any one or more of the special matters alleged shall be found for the defendant, judgment shall be rendered for him with costs. And the like defenses may be pleaded in any suit in equity for relief against an alleged in-

³³ *Blue Goose Mining Co. v. Northern Light Mining Co.*, C. C. A., 245 Fed. 727.

³⁴ *Ibid.*

³⁵ *De Bearn v. Safe Deposit & Tr. Co. of Baltimore*, 233 U. S. 24.

³⁶ *Infra*, § 329a.

fringement; and proofs of the same may be given upon like notice, in the answer of the defendant, and with the like effect."¹

Inconsistent defenses may be pleaded.² The defendant may deny complainant's title and allege that he owns the patent and also deny its validity.³ The respondent cannot set up as a defense that if complainant's patent be so construed has to cover the machine made and sold by him, then the machine embraced in said patent was known and used prior to the invention thereof by the patentee.⁴ It has been held that defenses impugning the validity of complainant's patent⁵ and the defense of non-infringement,⁶ are not waived by a further defense of license. It was held at common law that the defendant might plead the general issue, and also a special plea that the combination covered by the patent was not an invention, and a further plea that the invention was not patentable.⁷

A denial in the answer in a suit for infringement of a patent that the patentee was the first inventor of the improvement described in the patent named in the bill, specifying it by number, is sufficient to raise the issue of invention, although the title of the patent as stated in the answer may be technically inaccurate.⁸ Where a bill alleged past and present infringement, and that defendant then had on hand a large number of infringing machines which it was offering for sale, it was held: that an answer which admitted that defendant had previously sold a machine which had been adjudged an infringement, but alleged that it had ceased selling the same "long prior" to the beginning of the suit and returned the parts on hand to the manufacturer, and since "that time" had sold no machines of

§188. ¹ U. S. R. S., § 4920. Cf. *Anderson v. Miller*, 129 U. S. 70, 32 L. ed. 635.

² Eq. Rule 30, *supra*, § 175. Under the former rule it was said that "the respondent cannot set up as a defense that if complainant's patent be so construed as to cover the machine made and sold by him, then the machine embraced in said patent was known and used prior to the invention thereof by the patentee." *Graham v. Mason*, 4 Cliff. 88.

³ *Cleveland Eng. Co. v. Galion Dynamic Motor Truck Co.*, 243 Fed. 405.

⁴ *Graham v. Mason*, 4 Cliff. 88.

⁵ *Nat. Mfg. Co. v. Meyers*, 7 Fed. 355.

⁶ *Niagara Fire Extinguisher Co. v. Hibbard*, C. C. A., 179 Fed. 844.

⁷ *Brickill v. Hartford*, 57 Fed. 216; *Blackedge v. J. M. Shook Absorber Co.*, 213 Fed. 478.

⁸ *Robinson v. American Car & Foundry Co.*, C. C. A., 135 Fed. 693.

that character, was indefinite and evasive and not responsive, and must be treated as admitting the averment that defendant had infringing machines on hand which it was offering for sale.⁹ Where the answer alleged that the patented machine had been used by the defendant before the application for the patent and that he was its inventor, upon his failure to sustain such allegation, it was held that there was such an admission of infringement as entitled the complainant to a decree against him.¹⁰ When defendants avoided answering specific interrogatories concerning a charged infringement, but merely denied the use of any machinery "in violation and infringement of any rights of the plaintiff, or that they are using, or have made, or sold, or used any machines not protected or covered by the proviso in the act of Congress;" it was said that they thereby presumptively admitted the infringement charged.¹¹

The patentee who has assigned his patent¹² or a licensee whose license has not been repudiated¹³ cannot contest its validity in a suit for its infringement.¹⁴ The same rule applies to the licensee of the assignor¹⁵ and to the employer of the assignor who has instructed the latter to design a competing device which will avoid infringement.¹⁶ The estoppel does not prevent the assignor or

⁹ Deere & Webber Co. v. Dowagiac Mfg. Co., C. C. A., 153 Fed. 177.

¹⁰ Reed v. Cropp Concrete Machinery Co., C. C. A., 225 Fed. 764.

¹¹ Agawam Co. v. Jordan, 7 Wall. 583, 609, 19 L. ed. 177, 184. An admission in an answer that the defendant had made locks of the kind described in the patent sued upon, "is satisfied by assuming that the smallest number of locks were made consistent with the use of that word in the plural, and with the use by the defendants of any part of the patent which is valid." See Miller, J., in Jones v. Morehead, 1 Wall. 155, 165, 17 L. ed. 662, 664. But compare Troy I. & N. Factory v. Corning, 6 Blatchf. 328, 366, 337.

¹² Underwood Typewriter Co. v. Manning, 221 Fed. 652; Mergen-

thaler Linotype Co. v. Int. T. Mach. Co., 229 Fed. 168; Leader Plow Co. v. Bridgewater Plow Co., C. C. A., 237 Fed. 376. It has been held that the assignor of a patent cannot sue his assignee for infringement of an older and broader patent subsequently acquired by him covering the same invention when the assignee has acted within the limits of the patent assigned. United Printing Mach. Co. v. Cross Paper Feeder Co., 220 Fed. 322.

¹³ Martin v. New Trinidad Lake Asphalt Co., 255 Fed. 93.

¹⁴ Mergenthaler Linotype Co. v. Int. Typesetting Mach. Co., 229 Fed. 168.

¹⁵ Leader Plow Co. v. Bridgewater Plow Co., C. C. A., 237 Fed. 376.

¹⁶ Babcock & Wilcox Co. v. Toledo Boiler Works Co., C. C. A., 170

licensee from proving the state of the prior art for the purpose of limiting the scope of the patent. Nor from denying the infringement.¹⁷ A complainant is not estopped to attack a patent, introduced by defendant as part of the prior art, which was originally pleaded in the bill but afterwards abandoned.¹⁸ It has been held that the assignor cannot escape the estoppel by alleging that he was induced to part with the patent by unfair representations.¹⁹ But in a later case a defendant was permitted to deny the complainant's title to the patent and in a counterclaim allege equitable ownership in itself and pray for a decree quieting its title.²⁰ An allegation in an answer to a suit for infringement that the Government had begun a suit for the dissolution of the complainant company as an illegal monopoly was held to be irrelevant.²¹ In a suit for the cancellation of an interfering patent the answer may allege any objection to the validity of the patent of the complainant;²² it was held that in such a suit allegations as to the decision of questions in a prior suit between different parties were irrelevant.²³

The notice required by the rule, need not be under oath, and a consent to an order that the answer be considered as amended by the insertion of such defense and notice is a waiver of any further oath.²⁴ Under this statute it has been held that no evidence can be admitted in support of any of these defenses unless it has been properly pleaded and the requisite notice has been given to the complainant;²⁵ the complainant's patent is then *prima facie*

Fed. 81; *Standard Plunger Elevator Co. v. Stokes*, C. C. A., 212 Fed. 941; *Mergenthaler Linotype Co. v. Int. Typesetting Mach. Co.*, 229 Fed. 168, 172; *H. D. Smith & Co. v. Southington Mfg. Co.*, C. C. A., 247 Fed. 342.

¹⁷ *H. D. Smith & Co., v. Southington Mfg. Co.*, C. C. A., 247 Fed. 342; *Moon-Hopkins Billing Mach. Co. v. Dalton Adding Mach. Co.*, C. C. A., 236 Fed. 936.

¹⁸ *Mergenthaler Linotype Co. v. Int. Typesetting Mach. Co.*, 229 Fed. 168, 173.

¹⁹ *Vacuum Eng. Co. v. Dunn*, C. C. A., 209 Fed. 219.

²⁰ *Cleveland Eng. Co. v. Galion D. M. Truck Co.*, 243 Fed. 405.

²¹ *Motion Pict. Patent Co. v. Eclair Film Co.*, 208 Fed. 416.

²² *Nikola Tesla Co. v. Marconi Wireless Tel. Co.*, 227 Fed. 903.

²³ *Nikola Tesla Co. v. Marconi Wireless Tel. Co.*, 227 Fed. 903. See *infra*, § 237.

²⁴ *Campbell v. Mayor of N. Y.*, 45 Fed. 243.

²⁵ *Teese v. Huntington*, 28 How. 2, 16 L. ed. 479; *Agawam Co. v. Jordan*, 7 Wall. 583, 19 L. ed. 177; *Blanchard v. Putnam*, 8 Wall. 420, 19 L. ed. 433; *Bates v. Coe*, 98 U. S. 31, 25 L. ed. 68; *Pitts v. Ed-*

evidence of the priority of his invention;²⁶ but the respondent, after pleading these defenses or some of them, with the names of such of the persons therein referred to as he knows, may also plead a general allegation "that the same had been previously invented and known and used by many other persons whose names are unknown to the respondent, which, when known, the respondent prays leave to insert and set forth in the answer."²⁷ Upon the subsequent discovery of any such persons, testimony concerning them may be taken, and leave obtained from the court to insert their names in the answer by amendment *nunc pro tunc*. An order to this effect may be obtained before or after the testimony has been taken.²⁸

The omission to serve the notice will be waived if the defendant fails to move to strike out the defense as insufficient or to object to the evidence as to the matters which should have been therein included.²⁹ An averment that a patent "was obtained upon false and fraudulent representations by the plaintiffs, or some of them, made to the Commissioner of Patents, and is wholly void at law," is too uncertain to be sufficient to constitute a defense.³⁰ In pleading prior patents, it is sufficient to give their number and date and the name of the patentee.³¹ In pleading prior publications, they must be clearly identified or a copy thereof must be filed.³² Where a prior device which is pleaded as anticipation may be made the subject of an exhibit, the defendant will not be required to set forth the drawings thereof but the complainant may be allowed an inspection before testimony is taken.³³

In pleading prior use, the time and place thereof must be set forth with such directness and certainty as will enable complainant to go upon the ground and determine what acts there done

monds, 2 Fisher, 52, 54; Salamander Co. v. Haven, 3 Dill. 131; Jennings v. Pierce, 15 Blatchf. 42; Williams v. Boston & A. R. Co., 17 Blatchf. 21; Decker v. Grote, 10 Blatchf. 331; Morton v. Llewellyn, C. C. A., 164 Fed. 693; El. Storage Battery Co. v. Phila. Storage Battery Co., 211 Fed. 154.

²⁶ Fay v. Mason, 120 Fed. 506.

²⁷ Roemer v. Simon, 95 U. S. 214,

220, 24 L. ed. 384, 386; Brown v. Hall, 6 Blatchf. 405.

²⁸ Ibid.

²⁹ Monroe v. Bresee, C. C. A., 239 Fed. 727.

³⁰ Clark v. Scott, 5 Fisher, 245.

³¹ Corrugated Metal Co. v. Pattison, 197 Fed. 577.

³² Ibid.

³³ Todd v. Whitaker, 217 Fed. 319.

may be relied on.³⁴ The omission of the place of the use makes the notice fatally defective.³⁵ But a notice is not defective for failure to state the particular place within a specified city at which the defendant proposes to prove the previous use.³⁶ Evidence stated in a notice to be proposed for one purpose cannot be used for another.³⁷ The defenses that complainant was not the original inventor and that the thing patented had been in public use or on sale for more than two years before his application, or had been abandoned, are distinct from each other, and if the defendant relies upon both he must give notice accordingly.³⁸

It seems that when a previous patent has not been referred to in an answer, such patent may still be proved, as evidence of a prior use of the invention, which has been properly pleaded,³⁹ to show the state of the art at the date of the complainant's alleged invention,⁴⁰ and to aid in the proper construction of the patent in suit.⁴¹ The state of the art can always be pleaded without notice.⁴² When two applications are pending in the patent office at the same time neither is prior art as against the other since neither applicant had a right to know of the other's application.⁴³ Where the answer alleges want of invention and novelty in view of the prior art an article shown to have been manufactured and on sale before the patent may be admitted in evidence although not specifically pleaded.⁴⁴

A patent subsequent to that upon which the complainant relies may be offered in evidence upon the issue of infringement

³⁴ Ibid.

³⁵ *Schenck v. Diamond Match Co.*, C. C. A., 77 Fed. 208; s. c., 71 Fed. 521.

³⁶ *Wise v. Allis*, 9 Wall. 737, 19 L. ed. 784.

³⁷ *Pennock v. Dialogue*, 4 Wash. 538; s. c., 2 Pet. 1, 7 L. ed. 327.

³⁸ *Meyers v. Bushby*, 32 Fed. 670.

³⁹ *Atlantic Works v. Brady*, 107 U. S. 192, 27 L. ed. 438. But see *Parks v. Booth*, 102 U. S. 96, 105, 26 L. ed. 54, 57; *Kennedy v. Solar Ref. Co.*, 69 Fed. 715.

⁴⁰ *Am. S. Co. v. Hogg*, 1 Holmes, 133; s. c., 6 Fisher, 67; *Stevenson v. Magowan*, 31 Fed. 824; *Morton*

v. Llewellyn, C. C. A., 164 Fed. 693; *Campbell v. Skinner*, 236 Fed. 359; *Simplex Window Co. v. Hauser Reversible Window Co.*, C. C. A., 248 Fed. 919; *H. D. Smith & Co. v. Southington Mfg. Co.*, 235 Fed. 160.

⁴¹ *Morton v. Llewellyn*, C. C. A., 164 Fed. 693.

⁴² *Vance v. Campbell*, 1 Black, 427, 17 L. ed. 168; *Brown v. Piper*, 91 U. S. 37, 23 L. ed. 200.

⁴³ *Mergenthaler Linotype Co. v. Int. T. Mach. Co.*, 229 Fed. 168, 172.

⁴⁴ *Johnson v. Lambert*, C. C. A., 234 Fed. 886.

when one of the articles alleged to be infringements was made thereunder.⁴⁵ It has been held that a witness may be asked whether the defendant's machine is similar to a model of the plaintiff's patented machine, although no notice of such testimony has been given.⁴⁶ The defenses that the plaintiff's device is not patentable and that it is not workable⁴⁷ need not be pleaded in the answer.⁴⁸ It is unsettled whether the defense of insufficient description can be set up without alleging an intent to deceive the public.⁴⁹

The statute requires notice of the names and residences of the inventors and of those who have the prior knowledge of the thing

⁴⁵ *Reis v. Rosenfeld*, C. C. A., 204 Fed. 282.

⁴⁶ *Evans v. Hettick*, 7 Wheat. 453, 469, 5 L. ed. 496, 500.

⁴⁷ *May v. Juneau County*, 137 U. S. 408, 34 L. ed. 729; *Stevenson v. Magowan*, 31 Fed. 824; *Wills v. Scranton Cold Storage & Warehouse Co.*, C. C. A., 155 Fed. 181. It has been said concerning the defense of want of novelty: "Where the thing patented is an entirety, consisting of a separate device or of a single combination of old elements incapable of division or separate use, the respondent cannot make good the defense in question by proving that a part of the entire invention is found in one prior patent, printed publication, or machine, and another part in another, and so on indefinitely, and from the whole or any given number expect the court to determine the issue of novelty adversely to the complainant."

... "Defense of the kind, if the thing patented is an entirety, incapable of division or separate use, must be addressed to the invention, and not to a part of it, or to one or more claims of the patent, of less than the entire invention. More than one patent may be included in one suit, and more than

one invention may be secured in the same patent; in which cases the several defenses may be made to each patent in the suit, and to each invention, to which the charge of infringement relates." Mr. Justice Clifford, in *Parks v. Booth*, 102 U. S. 96, 104, 26 L. ed. 54, 57; citing *Bates v. Coe*, 98 U. S. 31, 25, L. ed. 68. It has been said that a defense charging that the original patentee "fraudulently and surreptitiously obtained the patent for that which he well knew was invented by another, unaccompanied by the further allegation that the alleged first inventor was at the time using reasonable diligence in adapting and perfecting the invention, is not sufficient to defeat the patent, and constitutes no defense to the charge of infringement." Clifford, J., in *Agawam Co. v. Jordan*, 7 Wall. 583, 597, 19 L. ed. 177, 180.

⁴⁸ *Hildreth v. Mastoras*, 253 Fed. 68.

⁴⁹ *Loom Co. v. Higgins*, 105 U. S. 580, 588, 589, 26 L. ed. 1177, 1180, 1181; *Grant v. Raymond*, 6 Pet. 218, 8 L. ed. 376; *Whittemore v. Cutter*, 1 Gall. 429; *Lowell v. Lewis*, 1 Mason, 182; *Gray v. James*, Pet. C. C. 394.

patented, not the names of the witnesses.⁵⁰ Notice of the time when the person named possessed a knowledge or use of the invention is not required.⁵¹

The notice is not a pleading and should be served upon the plaintiff.⁵² It is the better practice to file the notice with the pleadings after it has been served.⁵³

The pendency of a previous suit for the infringement of certain claims of a patent, specified by number in the bill, is not a bar to a second suit in the same court, between the same parties, for an infringement of different claims of the same patent, also specified in the latter bill, where the two sets of claims cover distinct and separate devices in the same machine.⁵⁴ When, after a bill has been filed to restrain the infringement of a patent and to obtain an account of profits, the defendant continues his infringements, the pendency of the first is no objection to a second bill seeking an injunction and an account, founded upon the subsequent infringements.⁵⁵ Notwithstanding a decree for an injunction in the former suit, a decree for an injunction and account was granted in that for the subsequent infringements, the second injunction being useless except to support the equitable jurisdiction.⁵⁶ The pendency of a suit

⁵⁰ Woodbury P. Mach. Co. v. Keith, 101 U. S. 479, 25 L. ed. 939; Roemer v. Simon, 95 U. S. 214, 24 L. ed. 384.

⁵¹ Phillips v. Page, 24 How. 164, 16 L. ed. 639.

⁵² Cottier v. Stimson, 20 Fed. 906. See, also, 10 Saw. 212; Henry v. U. S., 22 Ct. Cl. 75. The defendant may also plead his defense specially if he so desires. Cottier v. Stimson, 20 Fed. 906, 907; Evans v. Eaton, 3 Wheat. 454; Grant v. Raymond, 6 Pet. 218; Phillips v. Combstock, 4 McLean, 525; Day v. N. E. C. S. Co., 3 Blatchf. 179. In such a case it seems that no notice may be given. Cottier v. Stimson, 20 Fed. 906, 907; Evans v. Eaton, 3 Wheat. 454; Grant v. Raymond, 6 Pet. 218; Phillips v. Combstock, 4 McLean, 525; Day v. N. E. C. S. Co., 3

Blatchf. 179. A plea stricken out by the court is not a sufficient legal notice. Silsy v. Foote, 1 Blatchf. 445; s. c., 14 How. 18. No demurrer lies to a notice. Henry v. U. S., 22 Ct. Cl. 75. A defect in the notice may be remedied by a second notice without leave of the court. Teese v. Huntingdon, 23 How. 2, 10.

⁵³ Teese v. Huntingdon, 23 How. 2, 10, 16 L. ed. 479, 482.

⁵⁴ Bates Mach. Co. v. Wm. A. Force & Co., 139 Fed. 746.

⁵⁵ Wheeler v. McCormick, 8 Blatchf. 267; Roemer v. Newman, 19 Fed. 98; Higby v. Columbia R. Co., 18 Fed. 601. *Contra*, Gold & Stock Tel. Co. v. Pearce, 19 Fed. 419.

⁵⁶ Horton v. N. Y. C. & H. R. R. Co., 63 Fed. 897.

for the infringement of a patent in one district is no bar to a suit against the same defendant for the infringement of the same patent in another district; but, in the latter suit, the court will only consider and adjudicate upon alleged infringements within its district if the defendant resides or has made a general appearance in the former.⁵⁷ Ownership or part-ownership by defendant of the patent which is the foundation of the bill,⁵⁸ a license,⁵⁹ and estoppel,⁶⁰ are affirmative defenses which must be pleaded. But where the defendant has pleaded a patent of prior date to that alleged in the bill and the complainant undertakes to carry the date of his invention further back without having so alleged in his pleading, the defendant may, it has been held, meet such proof by the defense of laches or abandonment without pleading the same.⁶¹ It has been held: that the Federal statute of limitations, six years, to the recovery of profits or damages for the infringement of a patent,⁶² need not be pleaded in the answer, nor need it be negatived in the bill,⁶³ but it is a defense as to which the defendant bears the burden of proof;⁶⁴

The complainant has the burden of proving that the patentee was the original and first inventor of the invention patented.⁶⁵ Ordinarily the patent itself creates a presumption upon this point in his favor.⁶⁶ Where subsequent to its issue another patent for the same invention was granted to an earlier applicant it was held that the mere priority of date did not establish the presumption.⁶⁷ An invention to be patentable must be useful and a patented device must be operated.⁶⁸ It seems that the issue of a patent creates a rebuttable presumption of the utility of the in-

⁵⁷ Warren Bros. Co. v. City of Montgomery, 172 Fed. 414.

⁵⁸ Puetz v. Bransford, 31 Fed. 458.

⁵⁹ Watson v. Smith, 7 Fed. 350; Puetz v. Bransford, 31 Fed. 458.

⁶⁰ Pennsylvania Co. v. Cole, 132 Fed. 668; *supra*, § 185a.

⁶¹ Curtain Supply Co. v. Nat. Lock Washer Co., 174 Fed. 45.

⁶² 29 St. at L. 694; *supra*, § 180.

⁶³ Peters v. Hanger, C. C. A., 134 Fed. 586.

⁶⁴ *Ibid.* The fact that the owner of a patent permitted a suit for

its infringement to be dismissed without a trial on the merits is not such laches as to bar a second suit against the same defendant, *Welsbach Light Co. v. Cohn*, 181 Fed. 122.

⁶⁵ *West Coast Roof & Mfg. Co. v. Elaborated Ready Roof Co.*, C. C. A., 249 Fed. 221, 226.

⁶⁶ *Mygatt v. Schaffer*, C. C. A., 218 Fed. 827.

⁶⁷ *Ibid.*

⁶⁸ *Troy Laundry Mach. Co. v. Columbia Mfg. Co.*, 217 Fed. 787.

vention.⁶⁹ It was held that evidence that the owner of the patent had made but had ceased to make the patented article was not admissible as tending to prove its inutility.⁷⁰ Where there was a dispute as to the usefulness of the invention and it appeared that neither the patentee nor any subsequent owner had used it practically it was held that the owner had failed to produce convincing evidence which was within his possession and that the fullest weight must be given to the defendant's proofs.⁷¹

The plaintiff has the burden of proof as to infringement, even when the defendant pleads a license as well as non-infringement.⁷² Where the answer admitted that defendant, during the time alleged in the bill, had made and used articles conforming to the claims of the patent, no further proof on the issue of infringement was required from complainant.⁷³ Where the defendant in its proposal for a Government contract which had been accepted specified a machine which would have infringed the patent, in the absence of evidence from the defendant showing what machine it furnished under the contract, the Court found an infringement.⁷⁴ Proof that defendant's device was made under a later patent does not create a presumption of non-infringement.⁷⁵

The defendant has the burden of proving the defenses of anticipation and prior use beyond a reasonable doubt.⁷⁶

⁶⁹ Ibid.

⁷⁰ Ibid.

⁷¹ *Troy Laundry Mach. Co. v. Columbia Mfg. Co.*, 217 Fed. 787.

⁷² *Niagara Fire Extinguisher Co. v. Hibbard*, C. C. A., 179 Fed. 844.

⁷³ *Fox v. Knickerbocker Engraving Co.*, C. C. A., 165 Fed. 442. In a suit for infringement against the Hygienic Chemical Company of New York, where it was shown that defendant was a selling company only, while the Hygienic Chemical Company of New Jersey was a manufacturing company only, the testimony of a witness that he purchased an article shown to be an infringement from the "Hygienic Chemical Company" in New York

is sufficient, *prima facie*, to establish infringement by the defendant. *Rumford Chemical Works v. Hygienic Chemical Co.*, C. C. A., 159 Fed. 436.

⁷⁴ *Int. Curtis Marine Turbine Co. v. William Cramp & Sons Ship & Eng. Bldg. Co.*, C. C. A., 202 Fed. 932.

⁷⁵ *Simplex Window Co. v. Hauser Reversible Window Co.*, C. C. A., 248 Fed. 919.

⁷⁶ *Beckwith v. Malleable Iron Range Co.*, 174 Fed. 1001; *Diamond Patent Co. v. S. E. Carr Co.*, C. C. A., 217 Fed. 400; *A. B. Dick Co. v. Underwood Typewriter Co.*, 246 Fed. 309; *Taignian v. Desure*, C. C. A., 253 Fed. 364.

A plea to a bill for an injunction to restrain the infringement of a reissued patent, which set up that the claim had been unlawfully expanded so as to embrace subsequent improvements covered by later patents, was held good.⁷⁷ A plea to a bill filed under section 4918 of the Revised Statutes against the owner of a patent interfering with that of the complainant, which set up that the invention described in the complainant's patent was described in a previous English patent published in the United States, and filed in the Patent Office here before the issue of the complainant's patent, was held bad and overruled.⁷⁸

§ 189. Proceedings to compel answer. By the Equity Rules of 1912, if the defendant fails to file his answer or other defense to the bill in the clerk's office within the time named in the subpoena, "the plaintiff may, at his election, take an order as of course that the bill be taken *pro confesso*; and thereupon the cause shall be proceeded in *ex parte*."¹ "Averments other than of value or amount of damage, if not denied, shall be deemed confessed, except as against an infant, lunatic or other person *non compos* and not under guardianship."² They contain no other provision for proceedings to compel an answer. By the rules of 1842: "The plaintiff, if he requires any discovery or answer to enable him to obtain a proper decree, shall be entitled to process of attachment against the defendant to compel an answer, and the defendant shall not, when arrested upon such process, be discharged therefrom, unless upon filing his answer, or otherwise complying with such order as the court or a judge thereof may direct, as to pleading to or fully answering the bill, within a period to be fixed by the court or judge, and undertaking, to speed the cause."³ The ancient practice upon the subject was substantially the same. If the defendant did not file an answer within due time, he was in contempt and an attachment was issued against him.⁴ If the sheriff was unable to attach the defendant and returned accordingly *non est inventus*, a commis-

⁷⁷ Hubbell v. De Land, 14 Fed. 471.

⁷⁸ Pentlarge v. Pentlarge, 19 Fed. 817; s. c., 22 Fed. 412. But see Foster v. Lindsay, 3 Dill. 126, 131.

§ 189. ¹ Eq. Rule 16.

² Eq. Rule 30.

³ Eq. Rule 18 of 1842.

⁴ Matter of Vanderbilt, 4 J. Ch. (N. Y.) 58. See Daniell's Ch. Pr., (First Am. ed.) 538.

sion of rebellion would issue.⁵ If that proved insufficient, it was followed by a writ of sequestration.⁶

§ 190. Frame of answer. An answer should be entitled in the cause, so as to agree with the names of the parties as they appear in the bill at the time the answer is filed.¹ It seems that the defendant may not correct or alter the names of the parties as they appear in the bill, and that if there is a mistake he must correct it in the part following the title of the cause; thus, "The answer of the defendants, the mayor, aldermen, and commonalty in the bill called the mayor, aldermen, and citizens of the city of New York."² The answer should begin substantially thus: "The answer of John Aber, one of the above-named defendants, to the bill of complaint of the above-named plaintiff;" if the bill has been amended after answer, "to the amended bill of complaint."³ A female defendant who has married since the filing of the bill, usually begins: "The answer of John Aber and Anna, his wife, lately in the bill called 'Anna Brown, spinster,' or widow, as the case may be."⁴ A title, "the several answer of John Peck, Esq., one of the defendants to the bill of complaint of Anna Baines, alias Green, assuming to herself the name of Anna Peck, as pretended wife of John Peck, Esq., deceased, and of Anna Maria Green, assuming to herself the name of Anna Maria Peck, as daughter of the said John Peck, Esq., deceased," was held scandalous.⁵ An answer by a person defending by guardian or next friend should state that fact: "James Fifield by Edward Jennings, his next friend."⁶ If two or more defendants join in the same answer, it usually begins, "The joint and several answer;"⁷ unless they are husband and wife, when it is "The joint answer;"⁸

⁵ *Boudinot v. Symmes*, Wall. C. C. 139; *Smith's Ch. Pr.* (2d ed., 1837), 183, 186.

⁶ *Smith's Ch. Pr.*, (Second ed. 1837) 183-188; *Daniell's Ch. Pr.*, (First Am. ed.) 543; *Davis v. Hammond*, 5 Sim. 9.

⁷ § 190. ¹ *Daniell's Ch. Pr.* (5th Am. ed.) 731.

² *Atty. Gen. v. Worcester Corp.* 1 C. P. Cooper, 18; *Daniell's Ch. Pr.* (5th Am. ed.) 731.

³ *Daniell's Ch. Pr.* (5th Am. ed.) 731; *Rigby v. Rigby*, 9 Beav. 311, 313.

⁴ *Daniell's Ch. Pr.* (5th Am. ed.) 731.

⁵ *Peck v. Peck*, Moseley, 45.

⁶ *Daniell's Ch. Pr.* (5th Am. ed.) 731.

⁷ *Davis v. Davidson*, 4 McLean, 136.

⁸ *Daniell's Ch. Pr.* (5th Am. ed.) 731.

but an answer is not defective if put in by several as a joint answer merely.⁹

When discovery is required, all of the defendants who join in an answer must swear to the same.¹⁰ When the same solicitor is employed for two or more defendants, and separate answers are filed, or other proceedings had by two or more defendants separately, costs, were under the practice in chancery, not allowed for such separate answers or other proceedings, unless a master, upon reference to him, certified that such separate answers and other proceedings were necessary or proper, and ought not to have been joined together.¹¹

Next followed formerly a clause reserving to the defendant any and all advantages that might be taken by exception to the bill.¹² This was always useless¹³ and is forbidden by the Equity Rules of 1912.¹⁴

Then comes the substantive part of the answer, setting up the matters of affirmative defense and giving the discovery required.¹⁵

Next should be inserted any counter-claim or set-off upon which the defendant relies.¹⁶ It is the safer practice to specifically describe the matter thus pleaded as a counter-claim or set-off, as the case may be.¹⁷

The answer usually closes with a general traverse inserted out of abundant caution, denying the unlawful combination charged in the bill, and all other matters therein contained.¹⁸

In the answers of infants and other persons under a disability, the reservation and general traverse have always been deemed properly omitted.¹⁹ The answer in such cases generally is that the infant knows nothing of the matter, and therefore neither admits nor denies the charges, but leaves the plaintiff to prove

⁹ *Davis v. Davidson*, 4 McLean, 126.

¹⁰ *Bailey W. M. Co. v. Young*, 12 Blatchf. 199.

¹¹ Rule 62.

¹² *Mitford's Pl.*, ch. 2, § 2, part 3; *Story's Eq. Pl.*, § 870.

¹³ *Story's Eq. Pl.*, § 870; *Rules* 39, 44.

¹⁴ *Eq. Rule* 30.

¹⁵ *Mitford's Pl.* ch. 2, § 2, part 3.

¹⁶ See *Eq. Rule* 30.

¹⁷ *Bates v. Rosekrans*, 87 N. Y. 409; *Ward v. Conegys*, 2 How. Pr. N. S. (N. Y.) 428; *Burke v. Thorne*, 44 Barb. (N. Y.) 363; *Burrall v. De Groot*, 5 Duer (N. Y.) 379; *Equitable Life Ass'n. v. Cuyler*, 75 N. Y. 511, affirming 12 Hun, 247. But see *Acer v. Hotchkiss*, 97 N. Y. 395.

¹⁸ *Mitford's Pl.*, ch. 2, § 2, part 3, *Story's Eq. Pl.*, § 870.

¹⁹ *Story's Eq. Pl.*, § 871.

them as he shall be advised, and throws himself on the protection of the court.²⁰ But if such a defendant has any substantive defense, he should plead the same.²¹

§ 191. Signature and seal to answer. The answer must be signed individually by one or more solicitors of record.¹ It has been held that under the new rules the defendant need not sign the answer.² If the former practice is followed, an answer must be signed by the defendant, making it; even, it seems, when an answer under oath has been waived,³ unless he answers by guardian, when the latter should sign it,⁴ or unless an order has been obtained dispensing with such signature on account of the defendant's absence, or for some other reason.⁵ A person answering in a dual capacity need sign but once.⁶ An answer by a corporation must be under its corporate seal.⁷ In such a case it is advisable to have the seal attested by one of the corporate officers.⁸ When an answer is made without oath, the signature of the defendant should also be attested.⁹ This is usually done by his solicitor.¹⁰

§ 192. Oath to answer. Under the former practice, unless an answer, under oath, was waived in the bill, a defendant, if a natural person, was obliged to swear;¹ or if conscientiously scrupulous of taking an oath, in lieu thereof to make solemn affirmation to the truth of the facts stated by him.² No oath was necessary to an answer by a corporation.³

²⁰ Chancellor Kent in *Mills v. Dennis*, 3 J. Ch. (N. Y.) 367, 368.

²¹ *Holden v. Hearn*, 1 Beav. 445, 455; *Lane v. Hardwicke*, 9 Beav. 148, 149.

§ 191. ¹ Eq. Rule 24.

² *Kinney v. Rice*, 238 Fed. 441.

³ *Story's Eq. Pl.*, § 875; *Davis v. Davidson*, 4 McLean, 136; *Bayley v. De Walkiers*, 10 Ves. 441; *Fulton Bank v. Beach*, 2 Paige (N. Y.), 307; *Denison v. Bassford*, 7 Paige (N. Y.), 370.

⁴ *Anon.*, 2 J. & W. 553; *Daniell's Ch. Pr.* (5th Am. ed.) 733.

⁵ *Story's Eq. Pl.*, § 875; — v. *Lake*, 6 Ves. 171; — v. *Gwillim*, 6 Ves. 285.

⁶ *Anon.*, 2 J. & W. 553.

⁷ *Haight v. Proprietors Morris Aqueduct*, 4 Wash. 601, 605; *Monarch Vacuum Cleaner Co. v. Vacuum Cleaner Co.*, 194 Fed. 172.

⁸ *Daniell's Ch. Pr.* (5th Am. ed.) 735, note 2.

⁹ *Daniell's Ch. Pr.* (5th Am. ed.) 738.

¹⁰ *Daniell's Ch. Pr.* (5th Am. ed.) 738.

§ 192. ¹ *Fulton Bank v. Beach*, 2 Paige (N. Y.) 307; *Daniell's Ch. Pr.*, (5th Am. ed.) 735.

² Eq. Rule 91 of 1842, which so far as it applies to cases in which an oath is required, re-enacted in Eq. Rule 78 of 1912. See U. S. R. S. § 5013.

³ *Union Bank of Georgetown v.*

The present rules are silent upon the question as to whether an answer must be verified.⁴ They provide: "Every pleading which is required to be sworn to by statute, or these rules, may be verified before any justice or judge of any court of the United States, or of any State or Territory, or of the District of Columbia, or any clerk of any court of the United States, or of any Territory, or of the District of Columbia, or any notary public."⁵ It has been held that under the new rules an answer need not be verified even when discovery is sought, the defendant's discovery being limited to the answers to his interrogatories which are not a part of the pleadings.⁶

An answer can be verified without the United States before commissioners appointed for that purpose;⁷ or probably before any secretary of legation or consular officer at the post, port, place, or within the limits of his legation, consulate, or commercial agency.⁸ The following form of oath or affirmation is given by Daniell in his valuable work on Chancery Practice: "You swear, or solemnly affirm, that what is contained in this your answer (or plea and answer), as far as concerns your own act and deed, is true to your own knowledge, and that what relates to the act or deed of any other person or persons, you believe to be true."⁹ When sworn to in a foreign country, it seems that it must be "administered in the most solemn form

Geary, 5 Pet. 99, 110, 8 L. ed. 60, 64; *Wallace v. Wallace*, Halst. (N. J.) Dig. 173; *Smith v. St. Louis M. Ins. Co.*, 2 Tenn. Ch. 599; *Burpee v. First Nat. Bank*, 5 Biss. 405; *Coca Cola Co. v. Gay-Ola Co.*, C. C. A., 200 Fed. 720, 726. But see *Kittredge v. Claremont Bank*, 3 Story, 590; s. c., 1 W. & M. 245.

⁴ Although the English Judicature Act and orders and rules are silent upon the subject, the English courts do not require an oath to be annexed to the defense in equity, which is the pleading corresponding to our answer. The writer is indebted for this information to the courtesy of Francis A. Stringer, Esq., of the Central Office, Royal Courts of

Justice, one of the editors of "Annual Practice." There, however, in certain cases, upon plaintiff's affidavit that in his belief there is no defense to the action, the defendant is not allowed to defend without permission of the court. Order XIV. For verification of a corporation when required, see § 174, *supra*.

⁵ Eq. Rule 36.

⁶ *Kinney v. Rice*, 238 Fed. 441, 443. See §§ 347, 348, *infra*.

⁷ *Read v. Consequa*, 4 Wash. 335.

⁸ U. S. R. S., § 1750. But see *Read v. Consequa*, 4 Wash. 335.

⁹ Daniell's Ch. Pr., ch. 15, § 2, p. 270; Story's Eq. Pl., § 872, note 4.

observed by the laws and usages" of that country.¹⁰ Every alteration and interlineation in the answer should be authenticated by the initials of the officer who administers "the oath." When the verification of an answer is in the form of an affidavit, the name of the defendant making it must be subscribed at the foot of the affidavit. When in the form of a certificate of the officer administering the oath, the defendant's name should be subscribed at the foot of the answer.¹¹

§ 193. Motions to take answers off the file. When an answer is in any respect irregular,¹ or is filed by a person not named as a defendant in the bill,² or is filed too late, it may upon the plaintiff's motion be taken off the file.³ This may also be done when the paper purporting to be an answer is so evasive that it is in fact no answer.⁴ If it is taken off the file for an error in form, the court may allow the same paper to be corrected, and then filed anew.⁵ By setting the cause down for a hearing upon bill and answer,⁶ or by filing a reply or taking any other step in the cause without raising the objection, such a defect would be waived.⁷ A failure to enter an order taking a bill as confessed, does not authorize the filing of an answer after the prescribed time.⁸

§ 194. Exceptions for insufficiency. "Exceptions for insufficiency of an answer are abolished."¹ The sufficiency of an affirmative defense may be tested by a motion to strike out the same.² It has been held that this rule does not apply to a defense by confession and avoidance.³ In case of insufficiency in admissions or denials, the matters not properly denied are deemed confessed, except as against a person *non compos* and not under

¹⁰ Read v. Consequa, 4 Wash. 335.

178; Smith v. Searle, 14 Ves. 415.

¹¹ Daniell's Ch. Pr., (5th Am. ed.) 743; Hathaway v. Scott, 11 Paige (N. Y.) 173, 176; Pincers v. Robertson, 9 C. E. Green (24 N. J. Eq.) 348.

¹ Bailey W. M. Co. v. Young, 12 Blatchf. 199.

² Besson & Co. v. Goodman, et al., 147 Fed. 887.

§ 193. ¹ Bailey W. M. Co. v. Young, 12 Blatchf. 199.

⁷ Fulton Bank v. Beach, 2 Paige (N. Y.), 307; Glassington v. Thwaites, 2 Russ. 458, 461.

² Putnam v. New Albany, 4 Biss. 365, 367.

³ Allen v. Mayor, 7 Fed. 483.

³ Allen v. Mayor and Board of Ed., 18 Blatchf. 239.

§ 194. ¹ Eq. Rule. 33.

⁴ Tompkins v. Lethbridge, 9 Ves.

² Eq. Rule 33; *infra*, § 237.

³ Churchward Int. Steel Co. v. Bethlehem Steel Co., 233 Fed. 322.

guardianship.⁴ By the former practice, exceptions to the insufficiency of the discovery could be filed within a limited time,⁵ except in the case of an answer by an infant or other person under a disability.⁶ Where such an exception was sustained and a further answer put in, which the plaintiff deemed still insufficient, by the former English practice he had three weeks wherein to refer the same to a master upon the old exceptions; otherwise the further answer was deemed sufficient.⁷ If the further answer was found insufficient, the defendant was required to put in a third answer; and if that too was found insufficient, he was committed to the Fleet, and examined upon interrogatories.⁸ When an order was obtained after answer, allowing the plaintiff to amend his bill, and requiring the defendant to answer the amendments and the exceptions to the answer to the original bill together; upon such answer the plaintiff could only file new exceptions for a failure to fully answer the amendments.⁹ The insufficiency of a defense in an answer could not be thus determined.¹⁰

§ 195. Supplemental answers. A supplemental answer was formerly filed to bring to the attention of the court some fact which was not inserted in the original answer through mistake or ignorance,¹ or which had occurred subsequently to the filing of the same.² They could only be filed by leave of the court, which might impose terms upon the applicant.³

⁴ Eq. Rule 30.

⁵ *Read v. Consequa*, 4 Wash. 335. *Uhlmann v. Arnholt & S. B. Co.*, 41 Fed. 369; *Colgate v. Compagnie Francaise*, 23 Fed. 82. But see *United States v. McLaughlin*, 24 Fed. 823; *McCormick v. Chamberlin*, 11 Paige (N. Y.), 543; *Shepard v. Akers*, 1 Tenn. Ch. 326.

⁶ *Copeland v. Wheeler*, 4 Brown, Ch. C. 256; *Lucas v. Lucas*, 13 Ves. 274; *Micklethwaite v. Atkinson*, 1 Coll. 173; *Daniell's Ch. Pr.* (5th Am ed.) 169.

⁷ *Smith's Ch. Pr.* (2d ed. 1836), 285.

⁸ *Smith's Ch. Pr.* (2d ed. 1836), 285, 286.

⁹ *Partridge v. Haycraft*, 11 Ves. 570, 581; *Smith's Ch. Pr.* (2d ed. 1836), 286.

¹⁰ *Manhattan Tr. Co. v. Chicago El. Traction Co.*, 188 Fed. 1006.

§ 195. ¹ *Smith v. Babcock*, 3 Sumner, 583; *Williams v. Gibbes*, 20 How. 535, 15 L. ed. 1013; *Caster v. Wood*, 1 Baldw. 289; *Suydam v. Truesdale*, 6 McLean, 459.

² *Kelsey v. Hobby*, 16 Pet. 269, 277, 10 L. ed. 961, 963; *Talmadge v. Pell*, 9 Paige (N. Y.), 410, 413.

³ *Smith v. Babcock*, 3 Sumner, 583; *Caster v. Wood*, 1 Baldw. 289.

The Equity Rules now provide: "Upon application of either party the court or judge, may, upon reasonable notice and such terms as are just, permit him to file and serve a supplemental pleading, alleging material facts occurring after his former pleading, or of which he was ignorant when it was made, including the judgment or decree of a competent court rendered after the commencement of the suit determining the matters in controversy or a part thereof."⁴ This provides merely for supplemental answers of the second class.

Such supplemental answers have been little considered in the books. Their functions might also be performed by cross-bills. It was too late after answer and decree to object to the regularity of a proceeding in which facts were set up by petition when cross-bill or supplemental answer would have been the proper practice.⁵

§ 196. Disclaimers. A disclaimer by the defendant is a pleading by which he renounces all claim to property which the plaintiff seeks in his bill to obtain.¹ It is said that it is distinct in its substance from an answer, although sometimes confounded with one.² By the former practice, it must in most cases be accompanied by an answer, for where a defendant had been made a party by mistake, having had an interest with which he has parted, the plaintiff might require an answer sufficient to ascertain what the facts were, and to whom he had transferred his interest.³ Moreover, a defendant, although he may disclaim an interest, cannot disclaim a liability.⁴ Under the present rules it has been so held where the bill charged conspiracy with other defendants to create a cloud on a title which the bill prayed to have removed.⁵ The only cases in which a disclaimer without an

⁴ Eq. Rule 34.

⁵ *Kelsey v. Hobby*, 16 Pet. 269, 277, 10 L. ed. 961, 963; *Coburn v. Cedar V. L. & C. Co.*, 138 U. S. 196, 222, 34 L. ed. 876, 886.

§ 196. ¹ *Mounsey v. Burnham*, 1 Hare, 15.

² Story's Eq. Pl., § 838.

³ Story's Eq. Pl., § 838. See *Ellsworth v. Curtis*, 10 Paige (N. Y.), 105; *Carrington v. Lentz*, 40 Fed. 18.

⁴ *Glassington v. Thwaites*, 2 Russ. 458; *Graham v. Coape*, 9 Sim. 93, 102; s. c., 3 Myl. & Cr. 638.

⁵ *McDonald v. McDonald*, 203 Fed. 724. An averment that the defendant, prior to the beginning of the suit, had ceased selling an alleged infringing machine, and that it had no intention of using or selling any machines embodying the features of the patent, was held not to be such a disclaimer as would deprive the

answer was deemed to be sufficient seem to have been those where the bill simply alleged that the defendant claimed an interest in the property in question without specifying the claim.⁶

Under very special circumstances, a disclaimer may be withdrawn, and an answer filed setting up a claim.⁷

Where a disclaimer is made, and it appears that the defendant was made a party without apparent reason, the bill will be dismissed with costs.⁸ Otherwise, a decree may be entered without costs against the defendant and all claiming under him since the filing of the bill.⁹ If a disclaimer and answer by the same defendant are inconsistent, the matter will be taken most strongly against the defendant upon the disclaimer.¹⁰

The following is a form of a mere disclaimer: "The disclaimer of Richard Flagg, the defendant, to the bill of complaint of Robert Aber, complainant. This defendant, saving and reserving to himself [here follows the usual general reservation in an answer], saith, that he doth not know that he, this defendant, to his knowledge and belief, ever had, nor did he claim or pretend to have, nor doth he now claim, any right, title, or interest of, in, or to the estates and premises, situate [describing them], in the said complainant's bill set forth, or any part thereof; and this defendant doth disclaim all right, title, and interest to the said estate and premises in [naming their situation], in the said complainant's bill mentioned, and every part thereof." A disclaimer concludes in the same way as an answer.¹¹ It has been held that without special authority an attorney has no power to bind his client by a disclaimer or retraxit.¹²

complainant of the right to an injunction. *Deere & Webber Co. v. Dowagiac Mfg. Co.*, C. C. A., 153 Fed. 177.

⁶ Story's Eq. Pl., 838. See *Graham v. Coape*, 9 Sim. 93, 102; s. c., 3 Myl. & Cr. 638.

⁷ Story's Eq. Pl., § 842. See Eq. Rule 30.

⁸ Story's Eq. Pl., § 842.

⁹ Story's Eq. Pl., § 842.

¹⁰ Mitford's Pl., ch. 2, § part 2.

¹¹ Story's Eq. Pl., § 844, note 6.

¹² *Glover v. Bradley*, C. C. A., 233 Fed. 721; *McFarland v. Curtin*, C. C. A., 233 Fed. 728.

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